DRAFT

February, 2002

[Updated 6/18/10]

PATTERN JURY INSTRUCTIONS FOR CASES OF EMPLOYMENT DISCRIMINATION (DISPARATE TREATMENT)

FOR THE DISTRICT COURTS OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

This is a draft of proposed Pattern Jury Instructions for Cases of Employment Discrimination (Disparate Treatment) prepared by Judge Hornby's chambers. We invite feedback and suggestions on any aspect of these instructions. Although we believe that these pattern instructions will be helpful in crafting a jury charge, it bears emphasis that this version is simply a proposal. Neither the Court of Appeals nor any District Court within the circuit has in any way approved the use of these instructions.

PATTERN JURY INSTRUCTIONS
FOR CASES OF
EMPLOYMENT DISCRIMINATION
(DISPARATE TREATMENT)

		Page
	Introductory Notes [Updated: 4/6/10]	5
1.1	General Discrimination: Pretext [Updated: 8/08/08]	8
1.2	General Discrimination: Mixed Motive [Updated: 3/1/10]	14
1.3	Special Verdict Form: General Discrimination—Mixed Motive Case [Updated: 6/14/02]	20
2.1	Sexual Harassment—*Quid Pro Quo* [Updated: 4/6/10]	21
2.2	Sexual Harassment—Hostile Environment Created by Supervisors or Defendant Itself [Updated: 4/6/10]	25
2.3	Sexual Harassment—Hostile Environment Created by Co-workers, Customers, etc. [Updated: 6/26/09]	28
3.1	Disability Discrimination [Updated: 3/1/10]	33
3.2	Reasonable Accommodation [Updated: 9/18/09]	41
4.1	Equal Pay Act [Updated: 8/3/05]	44
5.1	Retaliation [Updated: 4/6/10]	47
6.1	Constructive Discharge [Updated: 9/12/06]	50
7.1	Missing Witness [New: 6/18/10]	51
8.1	Compensatory Damages [Updated: 1/30/09]	52

8.2 ADEA Damages 58
[Updated: 7/24/08]

8.3 Special Verdict Form: ADEA Damages—Pretext Case 65
[Updated: 6/14/02]

8.4 Equal Pay Act Damages 66
[Updated: 7/1/03]

8.5 Special Verdict Form: Equal Pay Act Damages 70
[Updated: 6/14/02]

9.1 Punitive Damages 71
[Updated: 3/1/10/]

10.1 Charge to a Hung Jury 76
[New: 6/26/09]

INTRODUCTORY NOTES

[Updated: 4/6/10]

(1) Statutory Authority. The statutory authority for discrimination claims is as follows: Equal Pay Act, 29 U.S.C. § 206(d) (2001) (prohibiting sex-based pay differentials); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2001) (age); Civil Rights Act of 1866, 42 U.S.C. § 1981 (2001) (prohibiting racial discrimination in the making and enforcement of contracts); Civil Rights Act of 1871, 42 U.S.C. § 1983 (2001) (prohibiting state action in violation of federal civil rights); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2001) (race, color, religion, national origin, or sex discrimination and sexual harassment); Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2001) (pregnancy); Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2006), amended by The ADA Amendments of 2008 ("ADAAA"), Pub. L. No. 110-325, 122 Stat. 3553 (2008) (disability); Rehabilitation Act of 1973, 29 U.S.C. § 794 (2001) (same). The statutory authority for retaliation claims is as follows: 42 U.S.C. § 1981 (as interpreted by the Supreme Court in CBOCS West, Inc., v. Humphries, 128 S. Ct. 1951 (2008)); 29 U.S.C. § 626(d) (2001) (ADEA retaliation provision) (for federal sector employees, 29 U.S.C. § 633a(a), see Gomez-Perez v. Potter, 128 S. Ct. 1931 (2008)); 42 U.S.C. § 2000e-3(a) (2001) (Title VII retaliation provision for private sector employers); Morales-Vallellanes v. Potter, 605 F.3d 27, 35-36 (1st Cir. 2010) (noting the court has assumed that the anti-retaliation provision applicable to private sector employers operates to prohibit retaliation in federal employment)); 42 U.S.C. § 12203(a) (2001) (ADA retaliation provision). See also Fennell v. First Step Designs, Ltd., 83 F.3d 526, 535 n.9 (1st Cir. 1996) (Title VII retaliation) (Title VII and ADEA retaliation analysis is "largely interchangeable"); Champagne v. Servistar Corp., 138 F.3d 7, 13 (1st Cir. 1998) (ADA retaliation claim) ((citing Mesnick v. General Elec. Co., 950 F.2d 816 (1st Cir. 1991) (ADEA retaliation claim)); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 171 (2005) (employee has retaliation claim under Title IX, 20 U.S.C. § 1681, et seq., for action employer took because of his complaints about discrimination in athletics).

(2) Disparate Treatment Cases. We have drafted generic instructions that should generally be usable, with appropriate modifications, for federal employment discrimination claims where the plaintiff claims disparate treatment based on race, color, religion, sex, national origin or age, but we have drafted separate instructions for harassment, retaliation, Equal Pay Act and disability discrimination claims. See, e.g., Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997) (Title VII) ("We regard Title VII, ADEA, ERISA and FLSA as standing in pari pasu and endorse the practice of treating judicial precedents interpreting one such statute as instructive of decisions involving another."); Equal Employment Opportunity Comm'n v. Amego, Inc., 110 F.3d 135, 145 n.7 (1st Cir. 1997) (ADA) ("The ADA is interpreted in a manner similar to Title VII, and courts have frequently invoked the familiar burden-shifting analysis of McDonnell-Douglas in ADA cases." (citations omitted)); Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 428 n.3 (1st Cir. 2000) (ADEA) ("This [Title VII McDonnell Douglas] framework applies to Age Discrimination in Employment Act (ADEA) cases under the law of this Circuit."); Ayala-Gerena v. Bristol Meyers-Squibb Co., 95 F.3d 86, 95 (1st Cir. 1996) (§ 1981) ("In order to prevail under Section 1981, a plaintiff must prove purposeful employment discrimination . . . under the by-now familiar analytical framework used in disparate treatment cases under Title VII."); White v. Vathally, 732 F.2d 1037, 1039 (1st Cir. 1984) (Title VII and § 1983) ("[W]e have recognized that the analytical framework for proving discriminatory treatment

claims set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-805 (1973), is equally applicable to constitutional and to Title VII claims." (parallel citations omitted)); Kvorjak v. Maine, 259 F.3d 48, 50 n.1 (1st Cir. 2001) (ADA) ("the standards applicable to [the Americans with Disabilities Act and the Rehabilitation Act] have been viewed as essentially the same").

(3) Disparate Impact Cases. These instructions are not designed for use in disparate impact cases.

(4) 1991 Civil Rights Act Partial Relief. As a result of Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), the 1991 Civil Rights Act provision allowing for partial relief in mixed motive cases is available in Title VII cases whether the plaintiff's evidence is direct or circumstantial. But it may not be available outside Title VII. See Dominguez-Cruz, 202 F.3d at 429 n.4. In fact, the First Circuit has stated explicitly that partial relief is not available under the ADEA. Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 33 (1st Cir. 2001) (ADEA). As for ADA cases, "[t]his circuit has noted, but not resolved, the question . . . ." Patten v. Wal-Mart Stores East, Inc., 300 F.3d 21, 25 n.2 (1st Cir. 2002). Although not discussed in any of these cases, § 1981 and § 1983 claims might also be excluded from the reach of this aspect of the 1991 amendment for the same reasons.

(5) The First Circuit has held that Title VII does not provide for liability of individual employees/supervisors; only lawsuits against the employer are authorized. Fantini v. Salem Sate College, 557 F.3d 22 (1st Cir. 2009). The question remains open as to certain other federal statutes. See Acevedo Lopez v. Police Dep't of P.R., 247 F.3d 26, 29 (1st Cir. 2001) (ADA) ("We simply note that we have not resolved the question of whether personal capacity suits can be sustained under the ADA. However several other circuit courts and three district courts within this circuit have held that individuals are not subject to suit under the ADA." (internal quotations omitted) (collecting cases)); see also Quiron v. L.N. Violette Co., 897 F. Supp. 18, 19-21 & n.2 (D. Me. 1995) (ADA and ADEA) (collecting cases); see generally Henry P. Ting, Note, Who's the Boss?: Personal Liability Under Title VII and the ADEA, 5 Cornell J.L. & Pub. Pol'y 515 (1996). Sections 1981 and 1983 do not use the same "employer" language and therefore do not share this restriction on individual liability. Injunctive relief in the form of "backpay" is not available against an individual capacity defendant. Negron-Almeda v. Santiago, 528 F.3d 15, 26 (1st Cir. 2008) ("It is settled law in the federal courts that backpay as such cannot be awarded against a defendant in his or her individual capacity."). However, compensatory damages are available against an individual capacity defendant, and "[p]roperly proven, those damages will equal the grand total of the plaintiff's aggregate lost wages and benefits." Id

(6) Respondeat Superior in 42 U.S.C. §§ 1981 and 1983 Cases. Section 1983 does not allow recovery on respondeat superior theories of liability. See Voutour v. Vitale, 761 F.2d 812, 819 (1st Cir. 1985) (§ 1983) ("The Supreme Court has firmly rejected respondeat superior as a basis for section 1983 liability of supervisory officials or municipalities." (citing Monell v. Department of Soc. Servs., 436 U.S. 658, 691, 694 n.58 (1978) (§ 1983))); see also Aponte Matos v. Toledo Davila, 135 F.3d 182, 192 (1st Cir. 1998) (§ 1983) ("Supervisory liability under § 1983 'cannot be predicated on a respondeat superior theory, but only on the basis of the supervisor's own acts or omissions.'").

The availability of respondeat superior liability in § 1981 cases depends on the identity of the defendant. Because the remedial provisions of § 1983 "provide[] the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor," Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 731-32 (1989) (§§ 1981 and 1983), there is no respondeat superior liability in § 1981 cases involving governmental defendants. The Ninth Circuit has held that the 1991 amendments to the Civil Rights Act created an implied cause of action against state actors under 42 U.S.C. § 1981. In reaching this holding, the court concluded that the 1991 amendments statutorily overruled Jett's first holding: that a § 1981 claim for damages against a state actor must be brought under § 1983. Fed'n of African Am. Contractors v. City of Oakland, 96 F.3d 1204, 1205 (9th Cir. 1996). But see Bolden v. City of Topeka, 441 F.3d 1129, 1136-37 (10th Cir. 2006) (disagreeing with the Ninth Circuit's conclusion, holding that Jett is still good law, and collecting cases). But the Ninth Circuit also held that with the 1991 amendments Congress intended to preserve Jett's second holding: that a § 1981 plaintiff who sues a municipality may not rely on the doctrine of respondeat superior. Fed'n of African Am. Contractors. 96 F.3d at 1215. The First Circuit has not addressed whether the 1991 amendments impacted either of Jett's holdings.

Section 1981 cases against non-governmental defendants, on the other hand, are not governed by the § 1983 remedial provisions, and therefore respondeat superior theories of liability are available. See Springer v. Seaman, 821 F.2d 871, 881 (1st Cir. 1987) (§ 1981) ("Unlike § 1983, § 1981 contains no limitation to actions taken under color of state law, and its legislative history evidences no intention to reject the ordinarily applicable respondeat superior liability or to impose the strict causation requirements of § 1983."), abrogated in part by Jett, 491 U.S. at 731-32 (although § 1983 provides the exclusive remedy for § 1981 cases against state actors, § 1981 claims against private actors are not governed by § 1983 rules); see also Fitzgerald v. Mountain States Tel. & Tel. Co., 68 F.3d 1257, 1262-64 (10th Cir. 1995) (§ 1981) (analyzing § 1981 defendant's liability under respondeat superior theory); Cabrera v. Jakabovitz, 24 F.3d 372, 385-88 (2d Cir. 1994) (§ 1981) (same). In Cerqueira v. American Airlines Inc., 520 F.3d 1, 19 (1st Cir. 2008), the First Circuit noted that "the Supreme Court has not addressed the scope of any respondeat superior liability in § 1981 claims generally and we need not do so here." (footnote omitted).

For a discussion of the substantive standards that apply in § 1983 supervisory liability cases, see Excessive Force Instruction 1.1 note 3.

1.1 General Discrimination: Pretext[1]

[Updated:8/08/08]

Pattern Jury Instruction

[Plaintiff] accuses [defendant] of [protected characteristic][2] discrimination in violation of federal law. To succeed on this claim, [plaintiff] must prove by a preponderance of the evidence that [defendant] took adverse employment action against [her/him] because of [protected characteristic].[3]

[4]{An "adverse employment action" is one that, standing alone, actually causes damage, tangible or intangible, to an employee. The fact that an employee is unhappy with something his or her employer did or failed to do is not enough to make that act or omission an adverse employment action.[5] An employer takes adverse action against an employee only if it: (1) takes something of consequence away from the employee, for example by discharging or demoting the employee, reducing his or her salary, or taking away significant responsibilities; or (2) fails to give the employee something that is a customary benefit of the employment relationship, for example, by failing to follow a customary practice of considering the employee for promotion after a particular period of service.[6] An adverse employment action by a supervisor is an action of the employer.[7]}

[Plaintiff] need not show that [protected characteristic] discrimination was the only or predominant factor[8] that motivated[9] [defendant]. In fact, you may decide that other factors were involved as well in [defendant]'s decisionmaking process. In that event, in order for you to find for [plaintiff], you must find that [she/he] has proven that, although there were other factors, [she/he] would not have been [specify adverse action] without the [protected characteristic] discrimination.[10]

An employer is free to [specify adverse action] an employee for any nondiscriminatory reason even if its business judgment seems objectively unwise.[11] But you may consider the believability of an explanation in determining whether it is a cover-up or pretext for discrimination. In order to succeed on the discrimination claim, [plaintiff] must persuade you, by a preponderance of the evidence, that were it not for [protected characteristic] discrimination,[12] [she/he] would not have been [specify adverse action].[13]

[14]{[Plaintiff] is not required to produce direct evidence of unlawful motive.[15] You may infer knowledge and/or motive as a matter of reason and common sense from the existence of other evidence—for example, explanations that you find were really pretextual. "Pretextual" means false or, though true, not the real reason for the action taken.}

---

[1] After Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), there likely will be little demand for this instruction in a Title VII case, because the mixed motive instruction, 1.2, is less demanding of a plaintiff. For cases other than Title VII, however, this instruction may remain viable. If the pretext case reaches the jury, there is no reason to instruct on McDonnell Douglas burden shifting; that procedure for summary judgment and judgment as a matter of law is likely only to confuse jurors. See Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 429-30 (1st Cir. 2000) (ADEA) (expressing skepticism about whether the direct/circumstantial and the McDonnell Douglas

(continued next page)

approaches are really very "helpful" and stating that appellate analysis after trial looks instead at "whether the totality of the evidence permits a finding of discrimination"); White v. N.H. Dep't of Corrections, 221 F.3d 254, 264 (1st Cir. 2000) (Title VII) (finding no error in refusal to give explicit instruction on pretext where the instruction presented to the jury focused on "[t]he central issue, which the court must put directly to the jury, . . . whether or not plaintiff was discharged 'because of [protected conduct]'" (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1017 (1st Cir. 1979) (ADEA))); Zapata-Matos v. Reckitt & Colman, Inc., 277 F.3d 40, 45 (1st Cir. 2002) (Title VII) ("the ultimate question is not whether the explanation was false, but whether discrimination was the cause of the termination"); Sanchez v. P.R. Oil Co., 37 F.3d 712, 720 (1st Cir. 1994) (ADEA) ("[W]hen . . . an employment discrimination action has been submitted to a jury, the burden-shifting framework has fulfilled its function, and backtracking serves no useful purpose. To focus on the existence of a prima facie case after a discrimination case has been fully tried on the merits is to 'unnecessarily evade[] the ultimate question of discrimination vel non.'" (citing U.S. Postal Serv. Bd. of Govs. v. Aikens, 460 U.S. 711, 713-14 (1983) (Title VII))). In Loeb, the First Circuit announced:

> McDonnell Douglas was not written as a prospective jury charge; to read its technical aspects to a jury, . . . will add little to the juror's understanding of the case and, even worse, may lead jurors to abandon their own judgment and to seize upon poorly understood legalisms to decide the ultimate question of discrimination. Since the advantages of trial by jury lie in utilization of the jurors' common sense, we would have serious reservations about using McDonnell Douglas if doing so meant engulfing a lay jury in the legal niceties discussed in this opinion.

600 F.2d at 1016. Moreover, using McDonnell Douglas can result in error unless great care is taken to conform it to the facts of the case. See, e.g., Rodriguez-Torres v. Caribbean Forms Mfr., Inc., 399 F.3d 52, 58-59 (1st Cir. 2005).

[2] This instruction is designed for race, color, national origin, religion, sex, pregnancy or age discrimination cases. The ADEA's prohibition against age discrimination is limited to "individuals who are at least 40 years of age." 29 U.S.C. § 631(a) (2001). The Introductory Notes at the beginning of these instructions outline the statutory basis for each of these claims. For sexual harassment cases, see Instructions 2.1-2.3. For disability discrimination cases, see Instruction 3.1. For Equal Pay Act cases, see Instruction 4.1. For retaliation cases, see Instruction 5.1.

[3] The following language may be used in a pregnancy discrimination case:

> Under federal law, employers must treat women affected by pregnancy the same, for all employment-related purposes, as other persons not affected by pregnancy but similar in their ability or inability to work. Concern for their safety or that of their unborn children is no justification for different treatment. Safety is a justification only when pregnancy actually interferes with an employee's ability to perform her job.

See Int'l Union, United Auto., Aerospace and Agric. Implement Workers v. Johnson Controls, Inc., 499 U.S. 187, 204 (1991) (Title VII) ("Our case law, therefore, makes clear that the safety exception is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job."). In Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 76 (2002), the Supreme Court held that, under the ADA, concern for an employee's own health is a permissible criterion in employee screening. In light of Johnson Controls, any policy seeking the benefit of Chevron would have to be facially neutral, and not single out pregnant women. See also Smith v. F.W. Morse & Co., 76 F.3d 413, 424-25 (1st Cir. 1996) ("At bottom, Title VII requires a causal nexus between the employer's state of mind and the protected trait (here, pregnancy). The mere coincidence between that trait and the employment decision may give rise to an *inference* of discriminatory animus, but it is not enough to establish a per se violation of the statute. . . ." (internal citation omitted)).

[4] This bracketed paragraph may be used in cases where there is a dispute about whether the action that the defendant allegedly took against the plaintiff constituted an adverse employment action. Although this question, if it arises, is one for the jury, see Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 36 (1st Cir. 2001) (ADEA) (jury could find that plaintiff who was given a raise but assigned less challenging, largely menial responsibilities suffered an adverse employment action), in most cases the dispute will be about whether the defendant's challenged conduct was motivated by discriminatory animus, not whether it amounted to an adverse employment action. If there is no dispute about whether the alleged conduct, if proven, would constitute an adverse employment action, the bracketed paragraph may be deleted and the words "took adverse employment action

(continued next page)

against" in the second sentence of the first paragraph may be replaced by a brief description of the adverse employment action the defendant allegedly took.

[5] Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996) (FLSA) ("[T]he inquiry must be cast in objective terms. Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action."). Blackie uses the term "materially adverse employment action," but does not define the term (or, more precisely, the significance of the word "materially") beyond what is included in the text of this instruction. Three other cases also use the modifier "materially" when discussing adverse employment actions, but none of these cases indicates that a materially adverse employment action is different from an adverse employment action. Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7 (1st Cir. 2002) (Title VII sexual harassment retaliation); Simas v. First Citizens' Federal Credit Union, 170 F.3d 37, 49-50 (1st Cir. 1999) (Federal Credit Union Act; whistleblower retaliation) (applying Title VII definition of adverse employment action); Larou v. Ridlon, 98 F.3d 659, 663 n.6 (1st Cir. 1996) (First Amendment political discrimination) (applying, with reservation, Blackie definition of adverse employment action). Furthermore, none of these cases uses the term "materially adverse employment action" exclusively; all the cases describe employment actions as "materially adverse" and "adverse" interchangeably. Other employment discrimination cases decided after Blackie have referred to adverse employment action without the modifier "materially." See, e.g., Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 33 (1st Cir. 2001) (Title VII and § 1981); Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 53-54 (1st Cir. 2000) (ADEA); White v. N.H Dep't of Corrections, 221 F.3d 254, 262 (1st Cir. 2000) (Title VII).

[6] Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996) (FLSA). This definition is generalized because "[d]etermining whether an action is materially adverse necessarily requires a case-by-case inquiry." Id. There is little explicit guidance in the case law about what constitutes an adverse employment action. In Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 62 (2006), a case interpreting Title VII's antiretaliation provision, the Supreme Court distinguished the antiretaliation provision from Title VII's "substantive" antidiscrimination language in part by noting that the words of the substantive provision "explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace." The Court held that Title VII's antiretaliation provision was not so narrow. See infra 5.1 note 8. In the majority of cases, the court does not explicitly analyze whether the challenged conduct constitutes an adverse employment action, presumably because certain actions, such as layoffs, salary reductions, and demotions, are generally recognized as adverse employment actions. See, e.g., Straughn v. Delta Air Lines, Inc., 250 F.3d 23 (1st Cir. 2001) (Title VII and § 1981) (termination); Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15 (1st Cir. 1999) (Title VII) (demotion); Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999) (salary reduction) abrogated in part on other grounds by Smith v. City of Jackson, 544 U.S. 228 (2005); see also Welsh v. Derwinski, 14 F.3d 85, 86 (1st Cir. 1994) (ADEA) ("Most cases involving a retaliation claim are based on an employment action which has an adverse impact on the employee, i.e., discharge, demotion, or failure to promote."). In some cases, the court has defined what actions are insufficient to constitute an adverse employment action by upholding a trial court's conclusion that the defendant's conduct was not, as a matter of law, actionable. See, e.g., Marrero v. Goya of P.R., Inc., 304 F.3d 7, 24 (1st Cir. 2002) ("minor, likely temporary, changes in . . . working conditions," extra supervision and probationary period in new post); Hernandez-Torres v. Intercontinental Trading, Inc., 158 F.3d 43, 47 (1st Cir. 1998) (Title VII) (plaintiff was subjected to increased email messages, disadvantageous assignments and "admonition that [he] complete his work within an eight hour [day]"); Blackie, 75 F.3d at 726 (plaintiffs claimed defendants refused to negotiate a "side agreement" to supplement their employment contract); Connell v. Bank of Boston, 924 F.2d 1169, 1179 (1st Cir. 1991) (ADEA) (plaintiff who had already been fired and whose severance package was already calculated was forced to leave office two weeks early). In another class of cases, the court held that the challenged employment action could constitute an adverse employment action by either upholding a jury verdict for the plaintiff, see, e.g., White v. N.H. Dep't of Corrections, 221 F.3d 254, 262 (1st Cir. 2000) (Title VII) ("ample evidence" of adverse employment action where plaintiff was harassed, transferred without her consent, not reassigned to another position, "and ultimately constructively discharged"), or holding that the defendant was not entitled to summary judgment on this issue, see, e.g., Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 36 (1st Cir. 2001) (ADEA) (plaintiff given standard salary increase but assigned less challenging, largely menial responsibilities); DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997) (Title VII) (plaintiff given five month assignment to job for which he had no experience and deprived of meaningful duties); Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997) (Title VII) (defendant refused to grant plaintiff a hardship transfer); see also Simas v. First Citizens' Federal Credit Union, 170 F.3d 37, 48, 50 (1st Cir. 1999) (Federal Credit Union Act; whistleblower retaliation) (plaintiff given negative

(continued next page)

performance evaluations and deprived of responsibility for major account) (applying Title VII definition of adverse employment action).

[7] In Foley v. Commonwealth Electric Co., 312 F.3d 517, 521 (1st Cir. 2002), the court states that "this instruction optimally should have been included in the charge."

[8] See Carey v. Mt. Desert Island Hosp., 156 F.3d 31, 39 (1st Cir. 1998) (Title VII) (instruction "requiring [a verdict for the defendant] if *any* reason other than gender played, however minimal, a part" in the challenged employment decision places too heavy a burden on plaintiff); see also Hazen Paper Co. v. Biggins, 507 U.S. 604, 617 (1993) (ADEA) ("Once a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the *predominant*, rather than a determinative, factor in the employment decision." (emphasis added)).

[9] Although there is dispute about the propriety of the use of the term "a motivating factor," the First Circuit does not appear to be troubled by the word "motivated" when used by itself. See, e.g., Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 35 (1st Cir. 2001) (Title VII and § 1981) (citing Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 54 (1st Cir. 2000) (Title VII) ("termination was motivated by [protected characteristic] discrimination")).

[10] It may not be necessary that the decisionmaker be biased if someone else was biased and orchestrated the decision. See Cariglia v. Hertz Equip. Rental Corp., 363 F.3d 77, 83-84 (1st Cir. 2004) (applying Massachusetts law, but stating that the orchestration argument "has merit under First Circuit precedent and persuasive case law from other circuits" and quoting Conway v. Electro Switch Corp., 825 F.2d 593, 597 (1st Cir. 1987) ("evidence of corporate state-of-mind or discriminatory atmosphere is not rendered irrelevant by its failure to coincide precisely with the particular actors or time frame involved in the specific events that generated a claim of discriminatory treatment") and Freeman v. Package Machinery Co., 865 F.2d 1331, 1342 (1st Cir. 1988) ("the inquiry into a corporation's motives need not artificially be limited to the particular officer who carried out the action.")). But see Cerqueira v. American Airlines Inc., 520 F.3d 1, 19 n.24 (1st Cir. 2008) ("This circuit has not decided [whether a Cariglia-like theory applies] under Title VII."); Thompson v. Coca-Cola Co., 522 F.3d 168, 178 (1st Cir. 2008) (applying Massachusetts law) ("Harris was a non-decisionmaker, and a comment such as hers 'cannot support an inference of pretext because it was one stray remark, and was made by a non-decision maker.'"); Kouvchinov v. Parametric Technology Corp., No. 07, 2395, 2008 WL 3191283, at *3 (1st Cir. Aug. 8, 2008) (an ERISA case discussing employment discrimination law) ("When assessing a charge of pretext in an employment discrimination case, the focus is on the mindset of the actual decisionmaker. This holds true even when the decisionmaker is relying on information that may later prove to be inaccurate." (internal citations omitted)). Under the Cariglia theory, "the critical legal issue [is] whether corporate liability can attach when neutral decisionmakers rely on information that is manipulated by another employee who harbors illegitimate animus," and a crucial factual finding is whether that employee withheld information from the neutral decisionmakers. Thompson, 522, F.3d at 179 (quoting Cariglia, 363 F.3d at 86).

In Cerqueira, a § 1981 case in which an airline passenger alleged that airline employees discriminated against him because of his race, the First Circuit criticized the district court's application of the respondeat superior doctrine. In particular, the court found error in jury instructions that "permitted liability of the air carrier to turn on the purported bias of non-decisionmakers." Cerqueira, 520 F.3d at 18. It concluded that "[t]he deemed attribution instruction . . . was not justified either by reference to the Restatement (Second) of Agency . . . .or under Cariglia. . . . The district court here interpreted the respondeat superior doctrine to impose liability on an air carrier for the Captain's decision based not on the issue of the Captain's bias, but on the purported discrimination of a lower-level employee who neither had authority to make the allegedly discriminatory decision nor in fact made the decision. Further, the Supreme Court has not addressed the scope of any respondeat superior liability in § 1981 claims generally and we need not do so here." Id. at 19 (footnote omitted). In a footnote, the First Circuit noted that it was also erroneous for the district court to instruct the jury that the "mere providing of information constitutes discrimination if the person providing information was motivated by his or her perception of the plaintiff's race or ethnicity." Id. at 19 n.22.

[11] Webber v. Int'l Paper Co., 417 F.3d 229, 238 (1st Cir. 2005); Thomas v. Eastman Kodak Co., 183 F.3d 38, 64 (1st Cir. 1999) (Title VII) (citing Smith v. Stratus Computer, Inc., 40 F.3d 11, 16 (1st Cir. 1996)) (Title VII) ("Title VII does not grant relief to a plaintiff who has been discharged unfairly, even by the most irrational of managers, unless facts and circumstances indicate that discriminatory animus was the reason for the decision."); see also Feliciano de la Cruz v. El Conquistador Resort and Country Club, 218 F.3d 1, 8 (1st Cir. 2000) (Title VII) (proof that decision is unfair "is not sufficient to state a claim under Title VII"); Rodriguez-Cuervos v. Wal-Mart

(continued next page)

Stores, Inc., 181 F.3d 15, 22 (1st Cir. 1999) (Title VII) ("Title VII does not stop a company from demoting an employee for any reason—fair or unfair—so long as the decision to demote does not stem from a protected characteristic." (citations omitted)); Mesnick v. General Elec. Co., 950 F.2d 816, 825 (1st Cir. 1991) (ADEA) ("Courts may not sit as super personnel departments, assessing the merits—or even the rationality—of employers' nondiscriminatory business decisions." (citations omitted)). Other circuits have said that subjectivity in an evaluation is not itself grounds for challenging the evaluation as discriminatory. E.g., Vaughan v. The Metrahealth Companies, Inc., 145 F.3d 197, 204 (4th Cir. 1998) abrogated in part by Reeves v. Sanderson Plumbing Products Inc., 530 U.S. 133 (2000); Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 780 (8th Cir. 1995); Haskell v. Kaman Corp., 743 F.2d 113, 119 (2d Cir. 1984).

[12] Case law talks about the "true reason," "determining factor," "determinative factor" and "motivating factor," sometimes using the definite article "the" and sometimes using the indefinite article "a." The debate recalls causation analysis in tort law with many of the same ambiguities. What does seem clear, however, is that "but for" causation is the standard in pretext cases. Hidalgo v. Overseas Condado Ins. Agencies, Inc., 120 F.3d 328, 332 (1st Cir. 1997) (ADEA) (citing Mesnick v. General Elec. Co., 950 F.2d 816, 823 (1st Cir. 1991) (ADEA)); see also Thomas v. Eastman Kodak Co., 183 F.3d 38, 58 (1st Cir. 1999) (Title VII) ("The ultimate question is whether the employee has been treated disparately 'because of [the protected characteristic].'"); Price Waterhouse v. Hopkins, 490 U.S. 228, 262 (1989) (Title VII) ("Thus, I disagree with the plurality's dictum that the words 'because of' do not mean 'but-for' causation; manifestly they do."); Ward v. Mass. Health Research Institute, Inc., 209 F.3d 29, 38 (1st Cir. 2000) (ADA) (describing the analysis of whether the plaintiff was fired "because of" his disability as "but/for reasoning"). We have therefore chosen to avoid the listed terms, which seem to provoke endless debate in charge conferences, and use a simple "but for" instruction (the actual words "but for" are not used because they are less familiar to lay jurors than to lawyers and judges). We thereby avoid the debate over those terms as reflected in the following case law: Provencher v. CVS Pharmacy, 145 F.3d 5, 10 (1st Cir. 1998) (Title VII retaliation) ("a motivating factor" and "played a part" are problematic phrases; defendant is liable only if discrimination is "the determinative factor"); Carey v. Mt. Desert Island Hosp., 156 F.3d 31, 38-39 (1st Cir. 1998) (Title VII) (The First Circuit has not yet decided whether "the 'a motivating factor' language in 42 U.S.C. § 2000e-2(m) applies to all discrimination cases" or only to mixed motive cases.); id. at 46 (Stahl, J., dissenting) ("[A] district court errs by giving a jury instruction pursuant to § 2000e-2(m) [e.g., 'a motivating factor' language], unless the court determines that the plaintiff has adduced evidence of discrimination sufficient to take the case outside the McDonnell Douglas paradigm. . . ."); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 542 (1993) (Title VII) (Souter, J., dissenting) ("Congress has taken no action to indicate that we were mistaken in McDonnell Douglas and Burdine.").

[13] The following sentence may be used in age discrimination cases where the defendant argues that the challenged employment decision was based on a factor, other than age, that is often associated with age or is correlated with age, such as seniority or pension status:

> A defendant is entitled to base an employment decision on a factor other than age, such as seniority, even if that factor is often correlated with age, as long as the defendant is not using that other factor as a pretext to hide age discrimination.

See Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993) (ADEA) ("When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is."); see also id. ("Yet an employee's age is analytically distinct from his years of service."); Bramble v. Am. Postal Workers Union, 135 F.3d 21, 26 (1st Cir. 1998) (ADEA) (union that reduced union president's salary based on president's status as a retiree did not discriminate because, although "there is a positive correlation between active pay status and age, . . . one is not an exact proxy for the other"). In Kentucky Retirement Sys. v. EEOC, 128 S. Ct. 2361, 2370 (2008), the Supreme Court held: "Where an employer adopts a pension plan that includes age as a factor, and that employer then treats employees differently based on pension status, a plaintiff, to state a disparate treatment claim under the ADEA, must come forward with sufficient evidence to show that the differential treatment was "actually motivated" by *age*, not pension status." (emphasis in original).

If a defendant requests it and the circumstances justify it, an instruction may be included on the availability of the "same-actor inference." Such an instruction permits a jury to infer a lack of discrimination if the same individual both hired and fired the plaintiff, particularly within a short period of time. See Banks v. Travelers Cos., 180 F.3d 358, 366-67 (2d Cir. 1999) (ADEA); Proud v. Stone, 945 F.2d 796, 797-98 (4th Cir. 1991) (ADEA). The First Circuit stated without discussion that a district court may use the same-actor instruction in appropriate

(continued next page)

circumstances, citing Buhrmaster v. Overnite Transportation Co., 61 F.3d 461, 463 (6th Cir. 1995) (Title VII: sex), but also held that the absence of the instruction did not "confuse[ ] or misle[a]d the jury as to the controlling law." Kelley v. Airborne Freight Corp., 140 F.3d 335, 351 (1st Cir. 1998) (ADEA); accord Banks, 180 F.3d at 367 (declining to adopt a rule requiring a same-actor instruction and affirming the district court's refusal to include the instruction where the court allowed the defendant to urge the jurors to draw the inference); Kim v. Dial Serv. Int'l, Inc., 159 F.3d 1347, No. 97-9142, 1998 WL 514297, at *4 (2d Cir. June 11, 1998) (no prejudice from the district court's refusal to give the instruction) (ADEA, Title VII: race and national origin); Menchaca v. Am. Med. Response of Ill., Inc., No. 98 C 547, 2002 WL 48073, at *2 (N.D. Ill. Jan. 14, 2002) (Title VII: sex) (same).

Courts disagree on the strength of the inference. Compare Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal., 31 F.3d 209, 215 (4th Cir. 1994) (ADA) (calling it "a strong presumption of nondiscrimination") with Waldron v. SL Indus., Inc., 56 F.3d 491, 496 n.6 (3d Cir. 1995) (ADEA) (the fact that the same person hired and fired the plaintiff within a short period of time "is simply evidence like any other and should not be accorded any presumptive value") (internal quotation marks omitted); see also Buhrmaster, 61 F.3d at 464 (noting that "the length of time between the hiring and firing of an employee affects the strength of the inference"). The First Circuit has cited approvingly a statement by the Fourth Circuit calling it a "strong inference." See LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 847 (1st Cir. 1993) (ADEA) (citing and quoting Proud, 945 F.2d at 797).

The First Circuit in Kelley seems to approve only limited use of the same-actor instruction ("in appropriate circumstances," without explaining what that means, 140 F.3d at 351). Other courts and commentators warn that the inference is not always appropriate. See, e.g., Waldron, 56 F.3d at 496 n.6 (in ADEA case, the inference was inappropriate because it was plausible that the plaintiff was hired to work for a few years while the hirer "groomed" a younger person to replace the plaintiff); Susie v. Apple Tree Preschool and Child Care Ctr., Inc., 866 F. Supp. 390, 396-97 (N.D. Iowa 1994) (cautioning that the same-actor inference has little or no force in disability cases because the employer at the time of hiring may not be aware of the extent of the plaintiff's disability and the disability may worsen over time); Anna Laurie Bryant & Richard A. Bales, Using the Same Actor "Inference" in Employment Discrimination Cases, 1999 Utah L. Rev. 255, 272 (inference is not appropriate where the decisionmaker did not know of the plaintiff's protected status at the time of hiring). For a sample same-actor instruction, see Buhrmaster, 61 F.3d at 463.

[14] The pretext language used in this bracketed paragraph is permissible and may help the jury understand the issue, but is not required in the First Circuit. Fite v. Digital Equip. Corp., 232 F.3d 3, 7 (1st Cir. 2000) (ADEA and ADA) ("While permitted, we doubt that such an explanation is compulsory, even if properly requested."); White v. N.H, Dept. of Corrections, 221 F.3d 254 (1st Cir. 2000) (Title VII) (finding no error in refusal to give explicit instruction on pretext).

[15] See DeCaire v. Mukasey, 530 F.3d 1, 20 (1st Cir. 2008) ("To the extent the district court said it *required* DeCaire to present evidence beyond disproving the government's arguments as pretext, that was error." (emphasis in original)).

1.2 General Discrimination: Mixed Motive[1]

[Updated:3/1/10]

Pattern Jury Instruction

[Plaintiff] accuses [defendant] of [protected characteristic][2] discrimination in violation of federal law. Specifically, [he/she] claims that [defendant] took adverse employment action against [him/her] because of [protected characteristic] discrimination.[3] To succeed on this claim, [plaintiff] must prove, by a preponderance of the evidence, that [her/his] [protected characteristic] was a motivating factor[4] in [defendant]'s decision[5] to [specify adverse action].

An employer is free to [specify adverse action] an employee for any nondiscriminatory reason even if its business judgment seems objectively unwise.[6] But you may consider the believability of an explanation in determining whether it is a cover-up or pretext for discrimination. To prove that [protected characteristic] was a "motivating factor," [plaintiff] must show that [defendant] used that consideration[7] in deciding to [specify adverse action].

[Plaintiff] need not show that [protected characteristic] discrimination was the only[8] reason [defendant] [specify adverse action]. But [she/he] must show that [defendant] relied upon [protected characteristic] discrimination in making its decision.[9]

[10]{[Plaintiff] is not required to produce direct evidence of unlawful motive. You may infer knowledge and/or motive as a matter of reason and common sense from the existence of other evidence—for example, explanations that you find were really pretextual. "Pretextual" means false or, though true, not the real reason for the action taken.}

An adverse employment action by a supervisor is an action of the employer.[11]

[12]{An "adverse employment action" is one that, standing alone, actually causes damage, tangible or intangible, to an employee. The fact that an employee is unhappy with something his or her employer did or failed to do is not enough to make that act or omission an adverse employment action.[13] An employer takes adverse action against an employee only if it: (1) takes something of consequence away from the employee, for example by discharging or demoting the employee, reducing his or her salary, or taking away significant responsibilities; or (2) fails to give the employee something that is a customary benefit of the employment relationship, for example, by failing to follow a customary practice of considering the employee for promotion after a particular period of service.[14]}

If you find that [plaintiff] has not proven by a preponderance of the evidence that [defendant] used [plaintiff]'s [protected characteristic] in deciding to [specify adverse action], your verdict must be for the defendant.

But if you find that [plaintiff] has proven by a preponderance of the evidence that [his/her] [protected characteristic] was a motivating factor in [defendant]'s decision to [specify adverse action], then the burden of proof shifts to [defendant] to prove by a preponderance of the

evidence[15] that it would nevertheless have taken the same action even if it had not considered [plaintiff]'s [protected characteristic].[16]

If you find that [defendant] has not met its burden of proof, your verdict will be for the [plaintiff] and you will proceed to consider damages as I will describe them. But if you find that [defendant] has proven that it would have taken the same action regardless of [plaintiff]'s [protected characteristic], you will not consider damages.

I have prepared a special verdict form to assist you in addressing these issues.[17]

---

[1] A mixed motive instruction is appropriate in Title VII cases, but not in ADEA cases. Gross v. FBL Fin. Servs., Inc., ___ U.S. ___, 129 S. Ct. 2343 (2009). Also, the Seventh Circuit held that the mixed motive analysis does not apply to discrimination suits brought under the ADA. Serwatka v. Rockwell Automation, Inc., 591 F.3d 957 (7th Cir. 2010).

The Supreme Court has determined that a mixed motive case can proceed on circumstantial evidence alone, Desert Palace, Inc. v. Costa, 539 U.S. 90, 93-95 (2003), thereby overruling previous appellate pronouncements (including the First Circuit). This instruction does not distinguish between direct and indirect evidence, or give alternative Price Waterhouse / McDonnell Douglas instructions. See Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 429-30 (1st Cir. 2000) ("In fact, one might question whether these bright lines [between direct and indirect evidence] are so helpful in the end. . . . In appeals after trial, this and other courts have recognized the need for flexibility and have sometimes bypassed these approaches and instead looked at whether the totality of the evidence permits a finding of discrimination." (citations omitted)).

If this instruction is used simultaneously with a pretextual instruction, it will need re-working to avoid confusing the jury over the differing standards. It is clear that in the early stages of litigation a plaintiff may proceed simultaneously on both a McDonnell Douglas pretext case and a Price Waterhouse mixed motive case. See, e.g., Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 581 (1st Cir. 1999) (Title VII). What happens at the jury instruction stage, however, is problematic. See id. ("the trial court, at an appropriate stage of the litigation, will channel the case into one format or the other"). Arguably, Desert Palace, 539 U.S. 90 (2003), calls for instructing on both when requested.

[2] This instruction is designed for race, color, national origin, religion, sex or pregnancy discrimination cases. The Introductory Notes at the beginning of these instructions outline the statutory basis for each of these claims.

For sexual harassment cases, see Instructions 2.1-2.3. For disability discrimination cases, see Instruction 3.1. For Equal Pay Act cases, see Instruction 4.1. For retaliation cases, see Instruction 5.1.

[3] The following sentence may be used in a pregnancy discrimination case:

> Under federal law, employers must treat women affected by pregnancy the same, for all employment-related purposes, as other persons not affected by pregnancy but similar in their ability or inability to work. Concern for their safety or that of their unborn children is no justification for different treatment. Safety is a justification only when pregnancy actually interferes with an employee's ability to perform her job.

See Int'l Union, United Auto., Aerospace and Agric. Implement Workers v. Johnson Controls, Inc., 499 U.S. 187, 204 (1991) (Title VII) ("Our case law, therefore, makes clear that the safety exception is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job.").

In Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 76 (2002), the Supreme Court held that, under the ADA, concern for an employee's own health is a permissible criterion in employee screening. In light of Johnson Controls, any policy seeking the benefit of Chevron would have to be facially neutral, and not single out pregnant women. See also Smith v. F.W. Morse & Co., 76 F.3d 413, 424-25 (1st Cir. 1996) ("At bottom, Title VII requires a causal nexus between the employer's state of mind and the protected trait (here, pregnancy). The mere coincidence between that trait and the employment decision may give rise to an *inference* of discriminatory animus, but it is not enough to establish a per se violation of the statute. . . ." (internal citation omitted)).

[4] 42 U.S.C. § 2000e-2(m) (2001) ("an unlawful employment practice is established when the complaining

(continued next page)

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"); DeCaire v. Mukasey, 530 F.3d 1, 18 (1st Cir. 2008) ("DeCaire is correct that to the extent the district court's finding in a mixed motive discrimination case was that there was gender discrimination, such a finding required it to find liability on the part of the government on any timely claim; in such a case, it is plaintiff's remedies, not the employer's liability, that are limited."); Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580 (1st Cir. 1999) (Title VII) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989) (Title VII)) (Price Waterhouse standard applies where the challenged employment decision was "the product of a mixture of legitimate and illegitimate motives").

[5] It may not be necessary that the decisionmaker be biased if someone else was biased and orchestrated the decision. Cariglia v. Hertz Equip. Rental Corp., 363 F.3d 77, 83-85 (1st Cir. 2004) (applying Massachusetts law, but stating that the orchestration argument "has merit under First Circuit precedent and persuasive case law from other circuits" and quoting Conway v. Electro Switch Corp., 825 F.2d 593, 597 (1st Cir. 1987) ("evidence of corporate state-of-mind or discriminatory atmosphere is not rendered irrelevant by its failure to coincide precisely with the particular actors or time frame involved in the specific events that generated a claim of discriminatory treatment") and Freeman v. Package Machinery Co., 865 F.2d 1331, 1342 (1st Cir. 1988) ("the inquiry into a corporation's motives need not artificially be limited to the particular officer who carried out the action.")). But see Cerqueira v. American Airlines Inc., 520 F.3d 1, 19 n.24 (1st Cir. 2008) ("This circuit has not decided [whether a Cariglia-like theory applies] under Title VII."); Thompson v. Coca-Cola Co., 522 F.3d 168, 178 (1st Cir. 2008) (applying Massachusetts law) ("Harris was a non-decisionmaker, and a comment such as hers 'cannot support an inference of pretext because it was one stray remark, and was made by a non-decision maker.'"); Kouvchinov v. Parametric Technology Corp., 537 F.3d 62, 67 (1st Cir. 2008) (an ERISA case discussing employment discrimination law) ("When assessing a charge of pretext in an employment discrimination case, the focus is on the mindset of the actual decisionmaker. This holds true even when the decisionmaker is relying on information that may later prove to be inaccurate." (internal citations omitted)). Under the Cariglia theory, "the critical legal issue [is] whether corporate liability can attach when neutral decisionmakers rely on information that is manipulated by another employee who harbors illegitimate animus," and a crucial factual finding is whether that employee withheld information from the neutral decisionmakers. Thompson, 522 F.3d at 179 (quoting Cariglia, 363 F.3d at 86).

In Cerqueira, a § 1981 case in which an airline passenger alleged that airline employees discriminated against him because of his race, the First Circuit criticized the district court's application of the respondeat superior doctrine. In particular, the court found error in jury instructions that "permitted liability of the air carrier to turn on the purported bias of non-decisionmakers." Cerqueira, 520 F.3d at 18. It concluded that "[t]he deemed attribution instruction . . . was not justified either by reference to the Restatement (Second) of Agency . . . or under Cariglia. . . . The district court here interpreted the respondeat superior doctrine to impose liability on an air carrier for the Captain's decision based not on the issue of the Captain's bias, but on the purported discrimination of a lower-level employee who neither had authority to make the allegedly discriminatory decision nor in fact made the decision. Further, the Supreme Court has not addressed the scope of any respondeat superior liability in § 1981 claims generally and we need not do so here." Id. at 19 (footnote omitted). In a footnote, the First Circuit noted that it was also erroneous for the district court to instruct the jury that the "mere providing of information constitutes discrimination if the person providing information was motivated by his or her perception of the plaintiff's race or ethnicity." Id. at 19 n.22.

[6] Webber v. Int'l Paper Co., 417 F.3d 229, 238 (1st Cir. 2005); Thomas v. Eastman Kodak Co., 183 F.3d 38, 64 (1st Cir. 1999) (Title VII) (citing Smith v. Stratus Computer, Inc., 40 F.3d 11, 16 (1st Cir. 1996)) (Title VII) ("Title VII does not grant relief to a plaintiff who has been discharged unfairly, even by the most irrational of managers, unless facts and circumstances indicate that discriminatory animus was the reason for the decision."); see also Feliciano de la Cruz v. El Conquistador Resort and Country Club, 218 F.3d 1, 8 (1st Cir. 2000) (Title VII) (proof that decision is unfair "is not sufficient to state a claim under Title VII"); Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 22 (1st Cir. 1999) (Title VII) ("Title VII does not stop a company from demoting an employee for any reason—fair or unfair—so long as the decision to demote does not stem from a protected characteristic." (citations omitted)). Other circuits have said that subjectivity in an evaluation is not itself grounds for challenging the evaluation as discriminatory. E.g., Vaughan v. The Metrahealth Companies, Inc., 145 F.3d 197, 204 (4th Cir. 1998) abrogated in part by Reeves v. Sanderson Plumbing Products Inc., 530 U.S. 133 (2000); Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 780 (8th Cir. 1995); Haskell v. Kaman Corp., 743 F.2d 113, 119 (2d Cir. 1984).

(continued next page)

[7] This is the language of Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003). Previously there was debate over whether a plaintiff must show that the protected characteristic played a "substantial" role in the decision. Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580 (1st Cir. 1999) (Title VII) (a plaintiff must show that the illegitimate factor played a "substantial role" or "placed substantial negative reliance on an illegitimate criterion").

[8] 42 U.S.C. § 2000e-2(m) (2001) ("even though other factors also motivated the practice").

[9] Fields v. Clark Univ., 966 F.2d 49, 52 (1st Cir. 1992) (Title VII) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989) (Title VII)) ("We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision.").

Similar to a pretext case, if a defendant requests it and the circumstances justify it, an instruction may be included on the availability of the "same-actor inference." See supra Instr. 1.1 n.13. Such an instruction permits a jury to infer a lack of discrimination if the same individual both hired and fired the plaintiff, particularly within a short period of time. See Banks v. Travelers Cos., 180 F.3d 358, 366-67 (2d Cir. 1999) (ADEA); Proud v. Stone, 945 F.2d 796, 797-98 (4th Cir. 1991) (ADEA). The First Circuit stated without discussion that a district court may use the same-actor instruction in appropriate circumstances, citing Buhrmaster v. Overnite Transportation Co., 61 F.3d 461, 463 (6th Cir. 1995) (Title VII: sex), but also held that the absence of the instruction did not "confuse[] or misle[a]d the jury as to the controlling law." Kelley v. Airborne Freight Corp., 140 F.3d 335, 351 (1st Cir. 1998) (ADEA); accord Banks, 180 F.3d at 367 (declining to adopt a rule requiring a same-actor instruction and affirming the district court's refusal to include the instruction where the court allowed the defendant to urge the jurors to draw the inference); Kim v. Dial Serv. Int'l, Inc., 159 F.3d 1347, No. 97-9142, 1998 WL 514297, at **4 (2d Cir. June 11, 1998) (no prejudice from the district court's refusal to give the instruction) (ADEA, Title VII: race and national origin); Menchaca v. Am. Med. Response of Ill., Inc., No. 98 C 547, 2002 WL 48073, at *2 (N.D. Ill. Jan. 14, 2002) (Title VII: sex) (same).

Courts disagree on the strength of the inference. Compare Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal., 31 F.3d 209, 215 (4th Cir. 1994) (ADA) (calling it "a strong presumption of nondiscrimination") with Waldron v. SL Indus., Inc., 56 F.3d 491, 496 n.6 (3d Cir. 1995) (ADEA) (the fact that the same person hired and fired the plaintiff within a short period of time "is simply evidence like any other and should not be accorded any presumptive value") (internal quotation marks omitted); see also Buhrmaster, 61 F.3d at 464 (noting that "the length of time between the hiring and firing of an employee affects the strength of the inference"). The First Circuit has cited approvingly a statement by the Fourth Circuit calling it a "strong inference." See LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 847 (1st Cir. 1993) (ADEA) (citing and quoting Proud, 945 F.2d at 797).

The First Circuit in Kelley seems to approve only limited use of the same-actor instruction ("in appropriate circumstances," without explaining what that means, 140 F.3d at 351). Other courts and commentators warn that the inference is not always appropriate. See, e.g., Waldron, 56 F.3d at 496 n.6 (in ADEA case, the inference was inappropriate because it was plausible that the plaintiff was hired to work for a few years while the hirer "groomed" a younger person to replace the plaintiff); Susie v. Apple Tree Preschool and Child Care Ctr., Inc., 866 F. Supp. 390, 396-97 (N.D. Iowa 1994) (cautioning that the same-actor inference has little or no force in disability cases because the employer at the time of hiring may not be aware of the extent of the plaintiff's disability and the disability may worsen over time); Anna Laurie Bryant & Richard A. Bales, Using the Same Actor "Inference" in Employment Discrimination Cases, 1999 Utah L. Rev. 255, 272 (inference is not appropriate where the decisionmaker did not know of the plaintiff's protected status at the time of hiring). For a sample same-actor instruction, see Buhrmaster, 61 F.3d at 463.

[10] See DeCaire v. Mukasey, 530 F.3d 1, 20 (1st Cir. 2008) ("To the extent the district court said it *required* DeCaire to present evidence beyond disproving the government's arguments as pretext, that was error." (emphasis in original)). The pretext language used in this bracketed paragraph is permissible and may help the jury understand the issue, but is not required in the First Circuit. Fite v. Digital Equip. Corp., 232 F.3d 3, 7 (1st Cir. 2000) (ADEA and ADA) ("While permitted, we doubt that such an explanation is compulsory, even if properly requested."); White v. N.H. Dept. of Corrections, 221 F.3d 254 (1st Cir. 2000) (Title VII) (finding no error in refusal to give explicit instruction on pretext).

[11] In Foley v. Commonwealth Electric Co., 312 F.3d 517, 521 (1st Cir. 2002), the court stated that "this instruction optimally should have been included in the charge."

[12] This bracketed paragraph may be used in cases where there is a dispute about whether the action that the defendant allegedly took against the plaintiff constituted an adverse employment action. Although this question, if it arises, is one for the jury, see Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 36 (1st Cir. 2001) (ADEA) (jury could find that plaintiff who was given a raise but assigned less challenging, largely menial

(continued next page)

responsibilities suffered an adverse employment action), in most cases the dispute will be about whether the defendant's challenged conduct was motivated by discriminatory animus, not whether it amounted to an adverse employment action. If there is no dispute about whether the alleged conduct, if proven, would constitute an adverse employment action, the bracketed paragraph may be deleted and the words "took adverse employment action against" in the second sentence of the first paragraph may be replaced by a brief description of the adverse employment action defendant allegedly took.

[13] Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996) (FLSA) ("[T]he inquiry must be cast in objective terms. Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.").

Blackie uses the term "materially adverse employment action," but does not define the term (or, more precisely, the significance of the word "materially") beyond what is included in the text of this instruction. Two other cases also use the modifier "materially" when discussing adverse employment actions (both cases take the language from Blackie), but neither of these cases indicates that a materially adverse employment action is different from an adverse employment action. Simas v. First Citizens' Federal Credit Union, 170 F.3d 37, 49-50 (1st Cir. 1999) (Federal Credit Union Act; whistleblower retaliation) (applying Title VII definition of adverse employment action); Larou v. Ridlon, 98 F.3d 659, 663 n.6 (1st Cir. 1996) (First Amendment political discrimination) (applying, with reservation, Blackie definition of adverse employment action). Furthermore, none of these three cases uses the term "materially adverse employment action" exclusively; all three cases describe employment actions as "materially adverse" and "adverse" interchangeably. Other employment discrimination cases decided after Blackie have referred to adverse employment action without the modifier "materially." See, e.g., Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 33 (1st Cir. 2001) (Title VII and § 1981); Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 53-54 (1st Cir. 2000) (ADEA); White v. N.H. Dep't of Corrections, 221 F.3d 254, 262 (1st Cir. 2000) (Title VII).

[14] Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996) (FLSA). As the Blackie court noted, this definition is generalized because "[d]etermining whether an action is materially adverse necessarily requires a case-by-case inquiry." Id. There is little explicit guidance in the case law about what constitutes an adverse employment action. In Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 62 (2006), a case interpreting Title VII's antiretaliation provision, the Supreme Court distinguished the antiretaliation provision from Title VII's "substantive" antidiscrimination language in part by noting that the words of the substantive provision "explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace." The Court held that Title VII's antiretaliation provision was not so narrow. See infra Section 5.1 Restitution note 8.

There are a number of cases that, by their factual holdings, help define the term "adverse employment action." For example, in the majority of cases, the court does not explicitly analyze whether the challenged conduct constitutes an adverse employment action, presumably because certain actions, such as layoffs, salary reductions, and demotions, are generally recognized as adverse employment actions. See, e.g., Straughn v. Delta Air Lines, Inc., 250 F.3d 23 (1st Cir. 2001) (Title VII and § 1981) (termination); Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15 (1st Cir. 1999) (Title VII) (demotion); Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999) (salary reduction) abrogated in part on other grounds by Smith v. City of Jackson, 544 U.S. 228 (2005); see also Welsh v. Derwinski, 14 F.3d 85, 86 (1st Cir. 1994) (ADEA) ("Most cases involving a retaliation claim are based on an employment action which has an adverse impact on the employee, i.e., discharge, demotion, or failure to promote."). More helpful, though, are the cases where the court decided whether a jury could reasonably find that the challenged actions constitute adverse employment actions. In some cases, the court has defined what actions are insufficient to constitute an adverse employment action by upholding a trial court's conclusion that the defendant's conduct was not, as a matter of law, actionable. See, e.g., Hernandez-Torres v. Intercontinental Trading, Inc., 158 F.3d 43, 47 (1st Cir. 1998) (Title VII) (plaintiff was subjected to increased email messages, disadvantageous assignments and "admonition that [he] complete his work within an eight hour [day]"); Blackie, 75 F.3d at 726 (plaintiffs claimed defendants refused to negotiate a "side agreement" to supplement their employment contract); Connell v. Bank of Boston, 924 F.2d 1169, 1179 (1st Cir. 1991) (ADEA) (plaintiff who had already been fired and whose severance package was already calculated was forced to leave office two weeks early). In another useful class of cases, the court held that the challenged employment action could constitute an adverse employment action by either upholding a jury verdict for the plaintiff, see, e.g., White v. N.H. Dep't of Corrections, 221 F.3d 254, 262 (1st Cir. 2000) (Title VII) ("ample evidence" of adverse employment action where plaintiff was harassed, transferred without her consent, not reassigned to another position, "and ultimately constructively discharged"), or holding that the defendant was not entitled to summary judgment on this issue. See, e.g., Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 36 (1st Cir. 2001) (ADEA) (plaintiff given standard salary increase but assigned less

(continued next page)

challenging, largely menial responsibilities); DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997) (Title VII) (plaintiff given five month assignment to job for which he had no experience and deprived of meaningful duties); Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997) (Title VII) (defendant refused to grant plaintiff a hardship transfer); see also Simas v. First Citizens' Federal Credit Union, 170 F.3d 37, 48, 50 (1st Cir. 1999) (Federal Credit Union Act; whistleblower retaliation) (plaintiff given negative performance evaluations and deprived of responsibility for major account) (applying Title VII definition of adverse employment action).

[15] Febres v. Challenger Caribbean Corp., 214 F.3d 57, 60 (1st Cir. 2000) (ADEA) (evidence of discrimination "shifts the burden of persuasion to the employer, who then must establish that he would have reached the same decision regarding the plaintiff even if he had not taken the proscribed factor into account").

[16] Another possible defense in cases of age, disability, sex, pregnancy, national origin or religious discrimination would be for the defendant to argue that the challenged characteristic was a "bona fide occupational qualification" ("BFOQ"). See 29 U.S.C. § 623(f)(1) (2001) (allowing BFOQ defense for employment decisions based on age); 42 U.S.C. § 2000e-2(e) (2001) (same for religion, sex, and national origin); 42 U.S.C. § 12113 (2001) (same for disability); see also Int'l Union, United Auto., Aerospace and Agric. Implement Workers v. Johnson Controls, Inc., 499 U.S. 187, 200-201 (1991) (Title VII); Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 402-403 (1985) (ADEA); Gately v. Massachusetts, 2 F.3d 1221, 1225-26 (1st Cir. 1993) (ADEA). In order to use the BFOQ defense, the defendant must: (1) "show that the qualification at issue is *reasonably necessary* to the essence of [its] business[;]" and (2) "justify [the] use of [the protected characteristic] as a proxy for that qualification." Gately, 2 F.3d at 1225 (internal citations and quotations omitted). The defendant may justify the use of the protected characteristic as a proxy by either: (1) showing that it had "a *factual basis* for believing[ ] that all or substantially all persons [with the protected characteristic] would be unable to perform [] the duties of the job involved[;]" or (2) establishing "that it is impossible or highly impractical to deal with the [employees with the protected characteristic] on an individualized basis." Id. at 1225-26 (internal citations and quotations omitted).

Because of these elements of a BFOQ defense, this instruction is not appropriate for BFOQ cases. More specifically, this instruction is inappropriate for a BFOQ case because it asks the jury to decide what factor or factors motivated the defendant to take the challenged action, whereas the defendant's reliance on the protected characteristic is generally undisputed in a BFOQ case (instead the focus of the dispute is whether the protected characteristic qualifies as a BFOQ).

[17] In Title VII cases, the judge, not the jury, determines the availability of certain remedies when the plaintiff establishes prohibited discrimination and the defendant establishes that it would have taken the same action regardless. See 42 U.S.C. § 2000e-5(g)(2)(B) (2001) ("On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court" may grant declaratory relief, injunctive relief, and attorneys fees, but may not "award damages or issue an order requiring any admission, reinstatement, hiring, [or] promotion."). As discussed in Introductory Note 4, in cases other than Title VII mixed motive cases such a showing by the defendant avoids liability altogether.

1.3 Special Verdict Form: General Discrimination—Mixed Motive Case

[Updated: 6/14/02]

Special Verdict Form

1. Has [plaintiff] proven by a preponderance of the evidence that [protected characteristic] was a motivating factor in [defendant]'s decision to [specify adverse action]?

   Yes____ No____

   If "no," answer no further questions. If "yes," proceed to next question.

2. Has [defendant] proven by a preponderance of the evidence that it would nevertheless have taken the same action even if it had not considered [protected characteristic]?

   Yes____ No____

   If "yes," answer no further questions. If "no," proceed to next question.

3. What damages do you award [plaintiff] against [defendant]?

   $_____

2.1 Sexual Harassment—*Quid Pro Quo*[1]

[Updated: 4/6/10]

Pattern Jury Instruction

[Plaintiff] accuses [defendant] of sexual harassment[2] in violation of federal law. Specifically, [she/he] claims that [specify the *quid pro quo*] and that [defendant] took adverse tangible employment action against [her/him] for refusing.[3] To succeed on this claim, [plaintiff] must prove by a preponderance of the evidence that:

> First, [she/he] was subjected to unwelcome sexual advances that were sexually motivated because of [her/his] sex[4]; and
> Second, [her/his] rejection of the advances affected a tangible aspect of [her/his] employment—in other words, that were it not for [her/his] rejection of the advances,[5] [she/he] would not have been [specify adverse action].

An advance is unwelcome if it is uninvited, and offensive or unwanted.[6]

It is not your role to second guess [defendant's] business judgment. Standing alone, honest errors in business judgment do not establish discrimination. Even if you were to decide that the [specify adverse action] was neither fair nor wise nor professionally handled, that would not be enough.[7] In order to succeed on the sexual harassment claim, [plaintiff] must persuade you, by a preponderance of the evidence, that were it not for [her/his] rejection of the advances,[8] [she/he] would not have been [specify adverse action].

[Plaintiff] need not show that [her/his] rejection of the advances was the only or predominant factor[9] that motivated[10] [defendant]. In fact, you may decide that other factors were involved as well in [defendant]'s decisionmaking process. In that event, in order for you to find for [plaintiff], you must find that [she/he] has proven that, although there were other factors, [she/he] would not have been [specify adverse action] without [her/his] rejection of the advances.[11]

[12]{[Plaintiff] is not required to produce direct evidence of unlawful motive. You may infer knowledge and/or motive as a matter of reason and common sense from the existence of other facts—for example, explanations that were given that you find were really pretextual. "Pretextual" means false or, though true, not the real reason for the action taken.}

An adverse employment action by a supervisor is an action of the employer.[13]

---

[1] Although the Supreme Court has warned against over-emphasizing the *quid pro quo* / hostile environment distinction, the formulation is still useful in determining the type of charge to be given:

> We do not suggest the terms quid pro quo and hostile work environment are irrelevant to Title VII litigation. To the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. When a plaintiff

(continued next page)

> proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII.

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 753-54 (1998) (Title VII).

[2] This instruction should be used in cases where the plaintiff suffered an adverse tangible employment action because he or she refused unwanted sexual advances. If the plaintiff did not suffer an adverse tangible employment action, then Instruction 2.2 or 2.3 should be used.

[3] In Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (Title VII), the Court held that an employer is strictly liable for sexual harassment by an employee in a supervisory position if the plaintiff suffered a tangible employment action as a result of refusal to submit to sexual harassment. Id. at 761-62 ("When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation[ship].").

The Court defined a tangible employment action as "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." Id. at 761. It is not clear whether the term "tangible employment action" (as used by the Court in Ellerth) is synonymous with the term "adverse employment action," the term commonly used in employment discrimination cases. See Fierros v. Tex. Dep't of Health, 274 F.3d 187, 192 n.2 (5th Cir. 2001) (Title VII) (discussing whether Ellerth's definition of "tangible employment action" expanded the definition of "adverse employment action" used in Title VII retaliation claims). The terms serve two different purposes. The Ellerth Court used the term tangible employment action to describe an indicator of employer endorsement of and thus culpability for the actions of an employee, a surrogate for the more complicated agency analysis. Adverse employment action, on the other hand, is used to describe an injury or harm requirement the plaintiff must demonstrate. According to the First Circuit: "Case law in the Third and Eighth Circuits treats constructive discharge as a tangible employment action; cases in the Second and Sixth Circuits lean the other way. Because the conduct differs from case to case, we see no reason to adopt a blanket rule one way or the other." Reed v. MBNA Marketing Sys., Inc., 333 F.3d 27, 33 (1st Cir. 2003) (citations and footnote omitted).

In Agusty v. The Department of Education of the Commonwealth of Puerto Rico, 601 F.3d 45, 54 (1st Cir. 2010), the court noted three theories on which a jury could find tangible employment actions in a tenure delay case:

> The grant or denial of tenure could be viewed as similar to a decision whether to promote, a well-recognized tangible employment action. A failure to grant tenure could also lead to a meaningful change in an employee's benefits in an up-or-out situation at a time when budgetary constraints loomed. Finally, a reasonable jury could certainly find that . . . deliberate delay in evaluating . . . performance and . . . harshly critical assessment, which was directly linked to the tenure decision, adversely impacted . . . employment by delaying . . . receipt of tenure and the job security that would accompany it."

[4] The harasser need not be of the opposite sex to the victim; same-sex harassment is also actionable. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79-80 (1998) (Title VII); see also Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 258-59 (1st Cir. 1999) (Title VII and ADA). The essential issue is whether the victim was harassed "because of" his or her sex.

[5] The causation language in this instruction is drawn from the pretext model because it is the most common model for a *quid pro quo* case. In a case where the mixed motive model is appropriate, the causation language from Instruction 1.2 should be used.

[6] This definition comes from Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 784 (1st Cir. 1990) (Title VII), but Chamberlin has no punctuation in the phrase: "uninvited and offensive or unwanted." The addition of the comma is consistent with the definition favored in at least two other circuits. See Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986) ("In order to constitute harassment, the conduct must be 'unwelcome' in the sense that the employee did not solicit or invite it, and the employee regarded the conduct as undesirable or offensive."); Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982) ("In order to constitute harassment, this conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."). Whether a particular advance was unwelcome is a fact-intensive, context-specific inquiry. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986) (Title VII) ("the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on

(continued next page)

credibility determinations committed to the trier of fact"). The fact that the plaintiff did not explicitly reject the advance is not necessarily dispositive. Chamberlin, 915 F.2d at 784 ("[T]he perspective of the factfinder evaluating the welcomeness of sexual overtures . . . must take account of the fact that the employee may reasonably perceive that her recourse to more emphatic means of communicating the unwelcomeness of the supervisor's sexual advances, as by registering a complaint, though normally advisable, may prompt the termination of her employment, especially when the sexual overtures are made by the owner of the firm.").

There is some uncertainty in the First Circuit about the weight the fact finder should give to the respective perspectives of the person making the advance and the person receiving it. For a discussion of this issue, see Harris v. International Paper Co., 765 F. Supp. 1509, 1513-16 (D. Me.) (Title VII) vacated in part by 765 F. Supp. 1529 (1991) (discussing Chamberlin v. 101 Realty, Inc., 915 F.2d 777 (1st Cir. 1990) (Title VII)); Morgan v. Massachusetts General Hospital, 901 F.2d 186 (1st Cir. 1990) (Title VII); Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) (Title VII)).

[7] Thomas v. Eastman Kodak Co., 183 F.3d 38, 64 (1st Cir. 1999) (Title VII) (citing Smith v. Stratus Computer, Inc., 40 F.3d 11, 16 (1st Cir. 1996)) (Title VII) ("Title VII does not grant relief to a plaintiff who has been discharged unfairly, even by the most irrational of managers, unless facts and circumstances indicate that discriminatory animus was the reason for the decision."); see also Feliciano de la Cruz v. El Conquistador Resort and Country Club, 218 F.3d 1, 8 (1st Cir. 2000) (Title VII) (proof that decision is unfair "is not sufficient to state a claim under Title VII"); Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 22 (1st Cir. 1999) (Title VII) ("Title VII does not stop a company from demoting an employee for any reason—fair or unfair—so long as the decision to demote does not stem from a protected characteristic." (citations omitted)); Mesnick v. General Elec. Co., 950 F.2d 816, 825 (1st Cir. 1991) (ADEA) ("Courts may not sit as super personnel departments, assessing the merits—or even the rationality—of employers' nondiscriminatory business decisions." (citations omitted)). Other circuits have said that subjectivity in an evaluation is not itself grounds for challenging the evaluation as discriminatory. E.g., Vaughan v. The Metrahealth Companies, Inc., 145 F.3d 197, 204 (4th Cir. 1998) abrogated in part by Reeves v. Sanderson Plumbing Products Inc., 530 U.S. 133 (2000); Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 780 (8th Cir. 1995); Haskell v. Kaman Corp., 743 F.2d 113, 119 (2d Cir. 1984).

[8] Case law talks about the "true reason," "determining factor," "determinative factor" and "motivating factor," sometimes using the definite article "the" and sometimes using the indefinite article "a." The debate recalls causation analysis in tort law with many of the same ambiguities. What does seem clear, however, is that "but for" causation is the standard in pretext cases. Hidalgo v. Overseas Condado Ins. Agencies, Inc., 120 F.3d 328, 332 (1st Cir. 1997) (ADEA) (citing Mesnick v. General Elec. Co., 950 F.2d 816, 823 (1st Cir. 1991) (ADEA)); see also Thomas v. Eastman Kodak Co., 183 F.3d 38, 58 (1st Cir. 1999) (Title VII) ("The ultimate question is whether the employee has been treated disparately 'because of [the protected characteristic].'"); Price Waterhouse v. Hopkins, 490 U.S. 228, 262 (1989) (Title VII) ("Thus, I disagree with the plurality's dictum that the words 'because of' do not mean 'but-for' causation; manifestly they do."); Ward v. Mass. Health Research Institute, Inc., 209 F.3d 29, 38 (1st Cir. 2000) (ADA) (describing the analysis of whether the plaintiff was fired "because of" his disability as "but/for reasoning"). We have therefore chosen to avoid the listed terms, which seem to provoke endless debate in charge conferences, and use a simple "but for" instruction (the actual words "but for" are not used because they are far less familiar to lay jurors than to lawyers and judges). We thereby avoid the debate over those terms as reflected in the following case law: Provencher v. CVS Pharmacy, 145 F.3d 5, 10 (1st Cir. 1998) (Title VII retaliation) ("a motivating factor" and "played a part" are problematic phrases; defendant is liable only if discrimination is "the determinative factor"); Carey v. Mt. Desert Island Hosp., 156 F.3d 31, 39 (1st Cir. 1998) (Title VII) (The First Circuit has not yet decided whether "the 'a motivating factor' language in 42 U.S.C. § 2000e-2(m) applies to all discrimination cases" or only to mixed motive cases.); id. at 46 ("[A] district court errs by giving a jury instruction pursuant to § 2000e-2(m) [e.g., 'a motivating factor' language], unless the court determines that the plaintiff has adduced evidence of discrimination sufficient to take the case outside the McDonnell Douglas paradigm. . . ."); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 542 (1993) (Title VII) ("Congress has taken no action to indicate that we were mistaken in McDonnell Douglas and Burdine.").

[9] See Carey v. Mt. Desert Island Hosp., 156 F.3d 31, 39 (1st Cir. 1998) (Title VII) (instruction "requiring [a verdict for the defendant] if *any* reason other than gender played, however minimal, a part" in the challenged employment decision places too heavy a burden on plaintiff); see also Hazen Paper Co. v. Biggins, 507 U.S. 604, 617 (1993) (ADEA) ("Once a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the *predominant*, rather than a determinative, factor in the employment decision." (emphasis added)).

(continued next page)

[10] Although there is dispute about the propriety of the use of the term "a motivating factor," the First Circuit does not appear to be troubled by the word "motivated" when used by itself. See, e.g., Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 35 (1st Cir. 2001) (Title VII and § 1981) (citing Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 54 (1st Cir. 2000) (Title VII) ("termination was motivated by [protected characteristic] discrimination")).

[11] In Cariglia v. Hertz Equip. Rental Corp., 363 F.3d 77 (1st Cir. 2004), an age discrimination case, the First Circuit held that, under Massachusetts law, it is not necessary that the decisionmaker be biased if someone else was biased and orchestrated the decision. Although the court was interpreting Massachusetts law, it relied upon its own precedent and several "persuasive" circuit court cases arising under Title VII and the ADEA. Id. at 83-87. Cariglia may apply in a quid pro quo sexual harassment context where the ultimate decisionmaker did not intend to retaliate, but someone else, who wished to retaliate against the plaintiff for rejecting his or her advances, orchestrated the decision. But see Cerqueira v. American Airlines Inc., 520 F.3d 1, 19 n.24 (1st Cir. 2008) ("This circuit has not decided [whether a Cariglia-like theory applies] under Title VII."); Thompson v. Coca-Cola Co., 522 F.3d 168, 178 (1st Cir. 2008) (applying Massachusetts law) ("Harris was a non-decisionmaker, and a comment such as hers 'cannot support an inference of pretext because it was one stray remark, and was made by a non-decision maker.'"); Kouvchinov v. Parametric Technology Corp., No. 07, 2395, 2008 WL 3191283, at *3 (1st Cir. Aug. 8, 2008) (an ERISA case discussing employment discrimination law) ("When assessing a charge of pretext in an employment discrimination case, the focus is on the mindset of the actual decisionmaker. This holds true even when the decisionmaker is relying on information that may later prove to be inaccurate." (internal citations omitted)). Under the Cariglia theory, "the critical legal issue [is] whether corporate liability can attach when neutral decisionmakers rely on information that is manipulated by another employee who harbors illegitimate animus," and a crucial factual finding is whether that employee withheld information from the neutral decisionmakers. Thompson, 522 F.3d at 179 (quoting Cariglia, 363 F.3d at 86).

In Cerqueira, a § 1981 case in which an airline passenger alleged the airline employees discriminated against him because of his race, the First Circuit criticized the district court's application of the respondeat superior doctrine. In particular, the court found error in jury instructions that "permitted liability of the air carrier to turn on the purported bias of non-decisionmakers." Cerqueira, 520 F.3d at 18. It concluded that "[t]he deemed attribution instruction . . . was not justified either by reference to the Restatement (Second) of Agency . . . or under Cariglia." Id. at 19. In a footnote, the First Circuit noted that it was also erroneous for the district court to instruct the jury that the "mere providing of information constitutes discrimination if the person providing information was motivated by his or her perception of the plaintiff's race or ethnicity." Id. at 19 n.22.

[12] In a hostile environment case, the First Circuit said that "[t]o the extent the district court said it *required* DeCaire to present evidence beyond disproving the government's arguments as pretext, that was error." DeCaire v. Mukasey, 530 F.3d 1, 20 (1st Cir. 2008) (emphasis in original). The pretext language used in this bracketed paragraph is permissible and may help the jury understand the issue, but is not required in the First Circuit. Fite v. Digital Equip. Corp., 232 F.3d 3, 7 (1st Cir. 2000) (ADEA and ADA) ("While permitted, we doubt that such an explanation is compulsory, even if properly requested."); White v. N.H. Dep't of Corrections, 221 F.3d 254 (1st Cir. 2000) (Title VII) (finding no error in refusal to give explicit instruction on pretext).

[13] In Foley v. Commonwealth Electric Co., 312 F.3d 517, 521 (1st Cir. 2002), the court stated that "this instruction optimally should have been included in the charge."

2.2 Sexual Harassment[1]—Hostile Environment Created by Supervisors or Defendant Itself[2]

[Updated: 4/6/10]

Pattern Jury Instruction

[Plaintiff] accuses [defendant] of sexual harassment in violation of federal law. To succeed on this claim, [plaintiff] must prove by a preponderance of the evidence all four of the following factors[3]:

> First, that [she/he] was intentionally subjected to unwelcome harassment by the employer or by [his/her] supervisor[4];
>
> Second, that the harassment was based upon [her/his] sex[5];
>
> Third, that the harassment was both objectively and subjectively offensive, such that a reasonable person[6] would find it hostile or abusive and [plaintiff] in fact did perceive it to be so; and
>
> Fourth, that the harassment was sufficiently severe or pervasive so as to alter the conditions of [his/her] employment and create an abusive working environment.

"Unwelcome harassment" means conduct that is uninvited, and offensive or unwanted.[7]

On whether the conduct was objectively offensive, you may consider, among other things, the frequency of the conduct, its severity, whether it was physically threatening or humiliating or whether it was a mere offensive utterance and whether it unreasonably interfered with an employee's work performance.[8]

Liability on this claim requires more than mere utterance of an offensive remark. It does not, however, require tangible psychological injury. There is no mathematically precise test for determining whether words and gestures meet the standard. Instead, you must consider the evidence as a whole and the totality of the circumstances, such as the nature of the conduct and the context in which it occurred.[9] Discriminatory intimidation, ridicule and insult can be sufficiently severe or pervasive in their accumulated effect to alter the conditions of employment and create an abusive working environment. The conduct or actions do not have to be overtly sexual.[10] But conduct that results from genuine but innocuous differences in the way men and women routinely interact with members of the same sex and of the opposite sex is not illegal. Offhand comments, rudeness, occasional teasing and isolated incidents are not alone sufficient.[11] This is not a general civility code for the workplace.[12]

[13]{If [plaintiff] satisfies you of all the requirements I have listed, then you shall consider the [defendant]'s affirmative defense. To prevail on its affirmative defense, [defendant] must prove by a preponderance of the evidence *both* of the following:

First, that it exercised reasonable care to prevent and correct promptly sexually harassing behavior;[14] and

Second, that [plaintiff] unreasonably failed to take advantage of any preventive or corrective opportunities [defendant] provided.[15]

If you find that [defendant] has proven both of these by a preponderance of the evidence, your verdict must be for [defendant] on this claim. Otherwise, your verdict must be for [plaintiff].}

---

[1] This instruction should be usable, with appropriate modifications, for a claim of racially hostile environment under Title VII or 42 U.S.C. § 1981, see Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8, 13 (1st Cir. 1999) ("[H]ostile work environment claims may now be pursued by employees under both Title VII and section 1981."); Faragher v. City of Boca Raton, 524 U.S. 775, 787 n.1 (1998) (Title VII) ("Courts of Appeals in sexual harassment cases have properly drawn on standards developed in cases involving racial harassment."), or indeed in any hostile environment case. See Rivera- Rodriguez v. Frito Lay Snacks Caribbean, 265 F.3d 15, 24 (1st Cir. 2001) (Title VII, ADA and ADEA) ("Hostile-work-environment claims were first recognized in the sex-discrimination context, but have since been recognized for members of any protected class."). But the First Circuit has not yet decided "whether disability-based hostile work environment claims exist under the ADA." Rocafort v. IBM Corp., 334 F.3d 115, 121 (1st Cir. 2003); accord Arrieta-Colon v. Wal-Mart Puerto Rico, Inc., 434 F.3d 75, 85 n.6 (1st Cir. 2006); Quiles-Quiles v. Henderson, 439 F.3d 1, 5 n.1 (1st Cir. 2006).

[2] This instruction may be used, with appropriate modification, for cases involving harassment by: (1) a defendant, who is either the employer himself or herself or whose high rank in the company is sufficient to "make[] him or her the employer's alter ego," Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 758 (1998) (Title VII); or (2) an employee of defendant who is the plaintiff's supervisor. O'Rourke v. City of Providence, 235 F.3d 713, 736 (1st Cir. 2001) (Title VII). "An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." Ellerth, 524 U.S. at 765. Instruction 2.3 should be used if one of defendant's customers or non-supervisory employees created the hostile work environment. Instruction 2.1 should be used if the plaintiff suffered a tangible employment action as a result of his or her response to the harassment.

[3] The list of factors comes largely from O'Rourke v. City of Providence, 235 F.3d 713, 728 (1st Cir. 2001) (Title VII).

[4] "An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). "The question of whether an employee is a supervisor in the relevant sense is itself factual in nature." Noviello v. City of Boston, 398 F.3d 76, 95 (1st Cir. 2005). It depends on "the degree of authority possessed by the putative supervisor." Id. It requires "some modicum of [] authority" to affect the terms and conditions of employment, such as hiring, firing, transferring, disciplining, etc. Id. at 96.

[5] The harasser need not be of the opposite sex to the victim; same-sex harassment is also actionable. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79-80 (1998) (Title VII); see also Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 258-59 (1st Cir. 1999) (Title VII and ADA). The essential issue is whether the victim was harassed "because of" his or her sex.

[6] In the late eighties and early nineties, some commentators and courts discussed the appropriateness of the "reasonable person" standard, as compared to a "reasonable woman" standard, when the harassment was directed against a woman. See generally Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 Vand. L. Rev. 1183 (1989); Naomi R. Cahn, The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice, 77 Cornell L. Rev. 1398 (1992); Nancy S. Ehrenreich, Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law, 99 Yale L.J. 1177 (1990). See also Harris v. Int'l Paper Co., 765 F. Supp. 1509, 1513-16 (D. Me. 1991) (Title VII) vacated in part by 765 F. Supp. 1529 (1991) (discussing Chamberlin v. 101 Realty, Inc., 915 F.2d 777 (1st Cir. 1990) (Title VII); Morgan v. Mass. Gen. Hosp., 901 F.2d 186 (1st Cir. 1990) (Title VII); Lipsett v. Univ. of P.R., 864 F.2d 881 (1st Cir. 1988) (Title VII)). But in the First Circuit, it remains appropriate to use the term "reasonable person." See O'Rourke v. City of

(continued next page)

Providence, 235 F.3d 713, 728 (1st Cir. 2001) (Title VII) (the "sexually objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so") (citing Faragher v. City of Boca Raton, 524 U.S. 775, 787-89 (1998) (Title VII); Harris v. Forklift Sys., Inc., 510 U.S. 17, 20-23 (1993) (Title VII); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65-73 (1986) (Title VII)). Under this standard, "the objective severity of the harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998) (Title VII) (quoting Harris, 510 U.S. at 23).

[7] This definition comes from Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 784 (1st Cir. 1990) (Title VII), but Chamberlin has no punctuation in the phrase: "uninvited and offensive or unwanted." The addition of the comma is consistent with the definition favored in at least two other circuits. See Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986) ("In order to constitute harassment, the conduct must be 'unwelcome' in the sense that the employee did not solicit or invite it, and the employee regarded the conduct as undesirable or offensive."); Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982) ("In order to constitute harassment, this conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."). Whether particular conduct was unwelcome is a fact-intensive, context-specific inquiry. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986) (Title VII) ("the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact"). The fact that the plaintiff did not explicitly reject the advance is not necessarily dispositive. Chamberlin, 915 F.2d at 784 ("[T]he perspective of the factfinder evaluating the welcomeness of sexual overtures . . . must take account of the fact that the employee may reasonably perceive that her recourse to more emphatic means of communicating the unwelcomeness of the supervisor's sexual advances, as by registering a complaint, though normally advisable, may prompt the termination of her employment, especially when the sexual overtures are made by the owner of the firm.").

[8] This list comes from Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). It has been repeated many times.

[9] See Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-23 (1993) (Title VII), quoted approvingly in Faragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1998) (Title VII).

[10] Harassing conduct need not be explicitly sexual or racial in order to be actionable under Title VII. See O'Rourke v. City of Providence, 235 F.3d 713, 729 (1st Cir. 2001) (sex-based harassment) (quoting Landrau-Romero v. Banco Popular De Puerto Rico, 212 F.3d 607, 614 (1st Cir. 2000) (race-based harassment)).

[11] O'Rourke v. City of Providence, 235 F.3d 713, 729 (1st Cir. 2001).

[12] Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80-82 (1998).

[13] These four bracketed paragraphs should be used only in cases where the harasser was the plaintiff's supervisor, not the defendant himself, herself, or itself. See, e.g., O'Rourke v. City of Providence, 235 F.3d 713, 736 (1st Cir. 2001) (Title VII) (discussing employer liability for harassment by a supervisor).

Furthermore, this affirmative defense is available only if the defendant takes no tangible employment action. Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (Title VII). If the plaintiff suffered a tangible employment action, use Instruction 2.1. For constructive discharge, see Pattern 6.1 and Penn. State Police v. Suders, 542 U.S. 129 (2004).

Finally, because this affirmative defense allows an employer to avoid liability when the harassment occurred outside the scope of the harasser's employment, it is not available if the defendant adopted or ratified the actions of the harasser.

[14] In Agusty v. The Department of Education of the Commonwealth of Puerto Rico, 601 F.3d 45, 55 (1st Cir. 2010), the First Circuit stated that "an employer's failure to show that it had 'established and disseminated an anti-discrimination policy, complete with a known complaint procedure', can prevent it from successfully claiming the Faragher-Ellerth defense." (quoting Marrero v. Goya of P.R., Inc., 304 F.3d 7, 21, (1st Cir. 2002)).

[15] The First Circuit addressed this prong in Monteagudo v. Asociación de Empleados Del Estado Libre Asociado de Puerto Rico, 554 F.3d 164 (1st Cir. 2009). In Monteagudo, the court concluded that a reasonable jury could conclude that the plaintiff's failure to report harassment was based on the relationships between her supervisors and the alleged harasser and was therefore reasonable. Id. at 171-72.

2.3 Sexual Harassment[1]—Hostile Environment Created by Co-workers, Customers, Etc.[2]

[Updated: 6/26/09]

Pattern Jury Instruction

[Plaintiff] accuses [defendant] of permitting sexual harassment in violation of federal law. To succeed on this claim, [plaintiff] must prove by a preponderance of the evidence all six of the following factors:

First, that [she/he] was subjected to unwelcome harassment;

Second, that the harassment was based upon [her/his] sex[3];

Third, that the harassment was both objectively and subjectively offensive, such that a reasonable person[4] would find it hostile or abusive and [plaintiff] in fact did perceive it to be so;

Fourth, that the harassment was sufficiently severe or pervasive so as to alter the conditions of [his/her] employment and create an abusive working environment;

Fifth, [defendant; management level employees of defendant] either knew or should have known of the harassment;[5] and

Sixth, [defendant; management level employees of defendant] failed to take prompt and appropriate remedial action.

Unwelcome harassment means conduct that is uninvited, and offensive or unwanted.[6]

On whether the conduct was objectively offensive, you may consider, among other things, the frequency of the conduct, its severity, whether it was physically threatening or humiliating or whether it was a mere offensive utterance and whether it unreasonably interfered with an employee's work performance.[7]

Liability on this claim requires more than mere utterance of an offensive remark. It does not, however, require tangible psychological injury. There is no mathematically precise test for determining whether words and gestures meet the standard. Instead, you must consider the evidence as a whole and the totality of the circumstances, such as the nature of the conduct and the context in which it occurred.[8] Discriminatory intimidation, ridicule and insult can be sufficiently severe or pervasive in their accumulated effect to alter the conditions of employment and create an abusive working environment. The conduct or actions do not have to be overtly sexual.[9] But conduct that results from genuine but innocuous differences in the way men and women routinely interact with members of the same sex and of the opposite sex is not illegal. Offhand comments, rudeness, occasional teasing and isolated incidents are not alone sufficient.[10] This is not a general civility code for the workplace.[11]

[12] {If [plaintiff] satisfies you of all the requirements I have listed, then you shall consider [defendant]'s affirmative defense. To prevail on its affirmative defense, [defendant] must prove by a preponderance of the evidence *both* of the following:

> First, that it exercised reasonable care to prevent and correct promptly sexually harassing behavior; and
>
> Second, that [plaintiff] unreasonably failed to take advantage of any preventive or corrective opportunities [defendant] provided.

If you find that [defendant] has proven both of these by a preponderance of the evidence, your verdict must be for [defendant] on this claim. Otherwise, your verdict must be for [plaintiff].}

---

[1] This instruction should be usable, with appropriate modifications, for a claim of racially hostile environment under Title VII or 42 U.S.C. § 1981, see Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8, 13 (1st Cir. 1999) ("[H]ostile work environment claims may now be pursued by employees under both Title VII and section 1981."); Faragher v. City of Boca Raton, 524 U.S. 775, 787 n.1 (1998) (Title VII) ("Courts of Appeals in sexual harassment cases have properly drawn on standards developed in cases involving racial harassment."), or indeed in any hostile environment case. See Rivera- Rodriguez v. Frito Lay Snacks Caribbean, 265 F.3d 15, 24 (1st Cir. 2001) (Title VII, ADA and ADEA) ("Hostile-work-environment claims were first recognized in the sex-discrimination context, but have since been recognized for members of any protected class."). But the First Circuit has not yet decided "whether disability-based hostile work environment claims exist under the ADA." Rocafort v. IBM Corp., 334 F.3d 115, 121 (1st Cir. 2003).

[2] This instruction may be used when the hostile work environment was created by either: (1) an employee of defendant who is the plaintiff's co-worker, see O'Rourke v. City of Providence, 235 F.3d 713, 736 (1st Cir. 2001) (Title VII); or (2) a third party such as a customer or contractor. See, e.g., Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 854-55 (1st Cir. 1998) (Title VII) (discussing employer liability for harassment by a customer in case where undifferentiated verdict could have been based on any of a variety of claims involving retaliation, hostile work environment, tort, or other constitutional claims under either federal or Puerto Rican law); see also EEOC Compliance Manual (CCH) § 615, ¶ 3102, at 3207 (2001) (discussing, as examples, cases where a waitress is harassed by customers or an administrative assistant is harassed by a photocopier repair technician); Kim Houghton, Note, Internet Pornography in the Library: Can the Public Library Employer Be Liable for Third-Party Sexual Harassment when a Client Displays Internet Pornography to the Staff?, 65 Brook. L. Rev. 827, 828 n.4 (1999) (collecting cases). Instruction 2.2 should be used if the employer or a supervisory employee created the hostile work environment.

[3] The harasser need not be of the opposite sex to the victim; same-sex harassment is also actionable. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79-80 (1998) (Title VII); see also Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 258-59 (1st Cir. 1999) (Title VII and ADA). The essential issue is whether the victim was harassed "because of" his or her sex.

[4] In the late eighties and early nineties, some commentators and courts discussed the appropriateness of the "reasonable person" standard, as compared to a "reasonable woman" standard, when the harassment was directed against a woman. See generally Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 Vand. L. Rev. 1183 (1989); Naomi R. Cahn, The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice, 77 Cornell L. Rev. 1398 (1992); Nancy S. Ehrenreich, Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law, 99 Yale L.J. 1177 (1990). See also Harris v. Int'l Paper Co., 765 F. Supp. 1509, 1513-16 (D. Me.) (Title VII) vacated in part by 765 F. Supp. 1529 (1991) (discussing Chamberlin v. 101 Realty, Inc., 915 F.2d 777 (1st Cir. 1990) (Title VII); Morgan v. Mass. Gen. Hosp., 901 F.2d 186 (1st Cir. 1990) (Title VII); Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) (Title VII)). But in the First Circuit, it remains appropriate to use the term "reasonable person." See O'Rourke v. City of Providence, 235 F.3d 713, 728 (1st Cir. 2001) (Title VII) (the "sexually objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim

(continued next page)

in fact did perceive it to be so") (citing Faragher v. City of Boca Raton, 524 U.S. 775, 787-89 (1998) (Title VII); Harris v. Forklift Sys., Inc., 510 U.S. 17, 20-23 (1993) (Title VII); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65-73 (1986) (Title VII)). Under this standard, "the objective severity of the harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998) (Title VII) (quoting Harris, 510 U.S. at 23).

[5] In cases where the hostile work environment is created by someone other than the employer or a supervisory employee, the plaintiff has the additional burden of proving that the defendant "knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action." White v. N.H. Dep't of Corrections, 221 F.3d 254, 261 (1st Cir. 2000) (Title VII); accord Forrest v. Brinker Int'l Payroll Co., 511 F.3d 225, 230 (1st Cir. 2007).

[6] This definition comes from Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 784 (1st Cir. 1990) (Title VII), but Chamberlin has no punctuation in the phrase: "uninvited and offensive or unwanted." The addition of the comma is consistent with the definition favored in at least two other circuits. See Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986) ("In order to constitute harassment, the conduct must be 'unwelcome' in the sense that the employee did not solicit or invite it, and the employee regarded the conduct as undesirable or offensive."); Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982) ("In order to constitute harassment, this conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."). Whether particular conduct was unwelcome is a fact-intensive, context-specific inquiry. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986) (Title VII) ("the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact"). The fact that the plaintiff did not explicitly reject the advance is not necessarily dispositive. Chamberlin, 915 F.2d at 784 ("[T]he perspective of the factfinder evaluating the welcomeness of sexual overtures . . . must take account of the fact that the employee may reasonably perceive that her recourse to more emphatic means of communicating the unwelcomeness of the supervisor's sexual advances, as by registering a complaint, though normally advisable, may prompt the termination of her employment, especially when the sexual overtures are made by the owner of the firm.").

[7] This list comes from Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). It has been repeated many times.

[8] See Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-23 (1993) (Title VII), quoted approvingly in Faragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1998) (Title VII).

[9] Harassing conduct need not be explicitly sexual or racial in order to be actionable under Title VII. See O'Rourke v. City of Providence, 235 F.3d 713, 729 (1st Cir. 2001) (sex-based harassment) (quoting Landrau-Romero v. Banco Popular De Puerto Rico, 212 F.3d 607, 614 (1st Cir. 2000) (race-based harassment)).

[10] O'Rourke v. City of Providence, 235 F.3d 713, 729 (1st Cir. 2001).

[11] Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80-82 (1998).

[12] The Supreme Court has not established employer liability standards for a hostile work environment created by co-workers (or customers): "Ellerth and Faragher expressed no view on the employer liability standard for co-worker harassment. Nor do we." Penn. State Police v. Suders, 542 U.S. 129, 143 n.6 (2004). (The First Circuit recognized this gap in Forrest v. Brinker International Payroll Company, LP, 511 F.3d 225, 231 n.7 (2007).) Instead, the Supreme Court's discussion of agency principles by which an employer, corporate or otherwise, is liable for what individuals do, as well as its discussion of the steps an employer can take to avoid such liability, assumes that it is a *supervisor* who has engaged in harassing conduct. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 792 (1998); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986). For such supervisor harassment cases, where no tangible employment action (e.g., firing, demotion, pay cut) has occurred, the Supreme Court recognizes an employer affirmative defense that "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." Ellerth, 524 U.S. at 765.

The First Circuit (like other circuits), however, has adopted its own standards for holding an employer liable for co-worker or customer harassment in the absence of tangible action by the employer: "If the harassment is caused by a co-employee, the employer is liable if it 'knew or should have known of the charged . . . harassment and failed to implement prompt and appropriate corrective action.'" White v. N.H. Dep't of Corr., 221 F.3d 254, 261 (1st Cir. 2000) (quoting Blankenship v. Parke Care Ctrs., Inc., 123 F.3d 868, 872 (6th Cir. 1997)); see also Forrest, 511 F.3d at 230 ("A plaintiff must satisfy different standards for establishing employer liability in a hostile work

(continued next page)

environment case depending on whether the harasser is a supervisor or co-employee of the victim." (quoting Crowley v. L.L. Bean, Inc., 303 F.3d 387, 401 (1st Cir. 2002)); Torres-Negrón v. Merck & Co., Inc., 488 F.3d 34, 40 (1st Cir. 2007) (noting that circuit courts "seem to be in general agreement" that "in the case of harassment by non-employees, *i.e.*, third parties," courts should "us[e] the same standard that is applied in the case of co-employee harassment"). According to the First Circuit, this is a negligence standard, Torres-Negrón, 488 F.3d at 40, and the burden to establish the failure of care lies with the employee. Forrest, 511 F.3d at 230.

The elements of this negligence standard seem to overlap the affirmative defense that Ellerth and Faragher recognize for supervisors, albeit the burdens of proof are reversed. Some circuits have concluded that the affirmative defense therefore should not be available to the employer in cases of co-worker or customer harassment. E.g., Swinton v. Potomac Corp., 270 F.3d 794, 803-04 (9th Cir. 2001); Curry v. Dist. of Columbia, 195 F.3d 654, 660 (D.C. Cir. 1999); Wilson v. Tulsa Junior College, 164 F.3d 534, 541 n.4 (10th Cir. 1998); see also Note, Harassment and Hostility: Determining the Proper Standard of Liability for Discriminatory Peer-to-Peer Harassment of Youth in Schools, 29 Women's Rts. L. Rep. 117, 140 n.272 (2008) (explaining that "[s]ince the [Supreme] Court's discussion [in Faragher] focused solely on the discriminatory conduct of supervisors, some lower courts have taken this to mean that no such affirmative defense is available in cases alleging harassment by co-workers"). Similarly, the ABA comment to its model jury instruction on the affirmative defense states that the defense "is only available where the plaintiff has established that he/she was subjected to sexual harassment by a supervisor that did not culminate in a tangible employment action." Am. Bar Ass'n, Model Jury Instructions: Employment Litigation § 1.04[3](a) cmt. (2d ed. 2005).

Other courts disagree. E.g., Good v. MMR Group, Inc., 2001 WL 1772120, at *5 (W.D. Ky. Dec. 4, 2001) (applying affirmative defense to a claim of co-worker harassment because "allowing an affirmative defense in cases of supervisor harassment, but not coworker harassment, would produce the anomalous result of making liability 'stricter' in coworker cases than supervisor cases"). Eleventh Circuit Judge Barkett has said that the Ellerth/Faragher standard of vicarious liability for supervisory harassment "applies *equally* to cases where the supervisor had adequate notice of a . . . hostile work environment and did nothing to remedy the problem, thus facilitating and prolonging the harassment," because "where a supervisor knows of the . . . harassment of an employee by a co-worker and does nothing to remedy the problem, this inaction is both discriminatory and aided by the agency relation." Coates v. Sundor Brands, Inc., 164 F.3d 1361, 1368 (11th Cir. 1999) (Barkett, J., concurring).

The First Circuit has not applied the affirmative defense to the co-worker/customer context. But neither has it said flatly that it is not available. The Eleventh Circuit Pattern Instruction 1.2.2 allows the affirmative defense, as does the Third Circuit Pattern Instruction 5.1.5. The Fifth, Seventh and Ninth Circuit Pattern Instructions do not include the affirmative defense. 5th Cir. Civ. Pattern Instr. 11.4.3; 7th Cir. Pattern Instr. 3.04; 9th Cir. Pattern Instr. 10.2. The Eighth Circuit Pattern comments that its availability is an open question. 8th Cir. Civ. Pattern Instr. 5.43 n.8.

The need for the affirmative defense instruction may depend on what the negligence standard entails in the first place. The Ninth Circuit says that the employee must "prove that *management* knew or should have known of the harassment" (emphasis added), and defines management as a "supervisor possessing substantial authority and discretion to make decisions concerning the terms of the harasser's or harassee's employment" or a supervisor without that authority but who "has an official or strong de facto duty to act as a conduit to management for complaints about work conditions." Swinton, 270 F.3d at 804-05. The other circuits seem to speak of proving negligence by the employer institutionally. If the employee is required to show *institutional* negligence in the first place, demonstrating what various levels of management knew and what procedures were in place, permitting the jury to determine whether, overall, the employer was institutionally negligent, then arguably there is no need for the affirmative defense. But that approach seems to provide less guidance to the jury and therefore less consistent application of the law; and for some of the elements (the employer's procedures, what various levels of management knew), the burden of proof seems misplaced. Alternatively, if the employee's negligence burden is initially satisfied by showing merely that a low-level supervisor negligently permitted co-worker or customer harassment to continue, despite being aware of it, the rationale of Faragher/Ellerth suggests that there may be a need for the affirmative defense so that a corporate employer can show clear anti-harassment policies, extensive training on the topic, and effective compliance procedures available to a harassed employee to bypass the negligent low-level supervisor, report the conduct elsewhere and obtain effective relief. The ABA Model Instruction 1.04(3)(b) seems to have made Faragher/Ellerth part of the plaintiff's direct case. Am. Bar Ass'n, Model Jury Instructions: Employment Litigation § 1.04[3](b) (explaining that in determining whether the plaintiff proved employer negligence, the jury "should also

(continued next page)

consider whether [the defendant] has instituted an anti-harassment policy with an effective complaint procedure and whether [the plaintiff] availed himself/herself of the procedure").

3.1 Disability Discrimination[1]

[Updated: 3/1/10]

Introductory Note

The following instruction for disability discrimination cases will require modification depending upon whether the case is a McDonnell Douglas pretext or a Price Waterhouse mixed motive case. Note that "[t]his circuit has noted, but not resolved, the question of whether that portion of the 1991 Civil Rights Act which amended Title VII to provide for limited relief against defendants who would have taken the same action even absent their discriminatory motive . . . applies to cases under the ADA." Patten v. Wal-Mart Stores East, Inc., 300 F.3d 21, 25 n.2 (1st Cir. 2002). See Instructions 1.1 – 1.2 for further discussion of the issues associated with the use of pretext and/or mixed motive instructions generally.

***This pattern has been updated to reflect the passage of the ADA Amendments Act of 2008**, Pub. L. No. 110-325, 122 Stat. 3553 (2008).*

The ADA Amendments Act of 2008 ("ADAAA"), Pub. L. No. 110-325, 122 Stat. 3553 (2008), substantially changes how employers and courts are to evaluate ADA claims. For example, Congress has expanded the class of major life activities to specifically include, among others, seeing and working. Id. at § 4(a). In addition, Congress expressly rejected certain holdings of the Supreme Court in Sutton v. United Airlines, 527 U.S. 471, 489 (1999), and Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), which "narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect" and caused "lower courts [to] incorrectly [find] in individual cases that people with a range of substantially limiting impairments are not people with disabilities." ADAAA, Pub. L. No. 110-325, § 2(a)(4)-(6).

*The express language of the ADAAA directs that these amendments take effect January 1, 2009. Id. § 8. Generally, courts must apply the laws and interpretations that were in force when the complained-of acts occurred. See Landgraf v. USI Film Prods., 511 U.S. 244 (1994). A statute is given retroactive effect only if "such construction is required by explicit language or by necessary implication." Fernandez-Vargas v. Gonzales, 548 U.S. 30, 37 (2006). This is not the case here. Moreover, it appears that every court that has addressed this issue has concluded that the ADAAA cannot be applied retroactively to conduct that preceded its effective date. See, e.g. Kiesewetter v. Caterpillar, Inc., 295 F. App'x 850, 851 (7th Cir. 2008); Verhoff v. Time Warner Cable, Inc., 299 F. App'x 488 (6th Cir. 2008); Rudolph v. U.S. Enrichment Corp., Inc., 2009 WL 111737 (W.D. Ky. Jan. 15, 2009); Young v. Precision Metal Prods., Inc., 599 F. Supp. 2d 216 (D. Conn. 2009); Supinski v. United Parcel Serv., Inc., 2009 WL 113796, at *5 n.6 (M.D. Pa. Jan. 16, 2009); Walstrom v. City of Altoona, 2008 WL 5411091, at *5 n.3 (W.D. Pa. Dec. 29, 2008); Hays v. Clark Prods., Inc., 2008 WL 5384300, at *6 n.3 (S.D. Ind. Dec. 18, 2008); Levy ex rel. Levy v. Hustedt Chevrolet, 2008 WL 5273927, at *3 n.2 (E.D.N.Y. Dec. 17, 2008); Knox v. City of Monroe, 2008 WL 5157913, at *5 n.10 (W.D. La. Dec. 9, 2008); Gibbon v. City of New York, 2008 WL 5068966, at *5 n.47 (S.D.N.Y. Nov. 25, 2008); Ragusa v. Malverne Union Free Sch. Dist., 582 F. Supp. 2d 326 (E.D.N.Y. 2008). The Ninth Circuit declined to determine whether the ADAAA applies retroactively. See Rohr v. Salt Riber Project Agric. Imp. & Power Dist., 555 F.3d 850 (9th Cir. 2009).*

When conduct occurring prior to January 1, 2009, is at issue, consult endnotes 4, 11, and 12 below.

Pattern Jury Instruction

[Plaintiff] accuses [defendant] of disability discrimination. Specifically, [she/he] claims that [defendant] took adverse employment action against [her/him] because of disability discrimination. To succeed on this claim, [plaintiff] must prove by a preponderance of the evidence all of the following:

> First, [plaintiff] [had; had a record of having; was regarded as having][2] a physical or mental impairment[3] that substantially limited [was regarded as substantially limiting] [plaintiff]'s ability to [specify major life activity or activities affected][4];
>
> Second, [plaintiff] was a qualified individual, which means [he/she] possessed the necessary skill, experience, education and other job-related requirements for [specify job or position sought] and could have performed the essential functions[5] of [specify job held or position sought] at the time [defendant] [specify adverse action] {if [defendant] had made reasonable accommodations for [plaintiff]'s disability}[6];
>
> Third, [defendant] knew that [plaintiff] had [specify alleged impairment]; and

{Choose one of the following two bracketed sentences, depending on whether the case is a pretext or a mixed motive case[7] (Note: a similar choice/modification must be made at the end of the instruction depending on whether the case is a pretext or a mixed motive case.):

> [8]{Fourth, that were it not for [plaintiff]'s disability, [defendant] would not have taken adverse employment action against [him/her].}
>
> [9]{Fourth, that [plaintiff]'s disability was a motivating factor in [defendant]'s decision[10] to take adverse employment action against [him/her].}}

A person is substantially limited if he or she is [restricted in the ability to][11] [specify major life activity affected].[12]

An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that [he/she] has been subjected to adverse employment action because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

In order to decide what the essential functions of a job are, you may consider the following factors:[13] [(1) The employer's judgment as to which functions of the job are essential; (2) written job descriptions; (3) the amount of time spent on the job performing the function in question; (4) consequences of not requiring the person to perform the function; (5) the terms of a collective bargaining agreement; (6) the work experience of people who have held the job; (7) the current work experience of people in similar jobs; (8) whether the reason the position exists is to perform

the function; (9) whether there are a limited number of employees available among whom the performance of the function can be distributed; (10) whether the function is highly specialized and the individual in the position was hired for his or her expertise or ability to perform the function; and (11) (list any other relevant factors supported by the evidence)]. No one factor is necessarily controlling. You should consider all of the evidence in deciding whether a job function is essential.

[14]{An "adverse employment action" is one that, standing alone, actually causes damage, tangible or intangible, to an employee. A trivial harm is insufficient. The fact that an employee is unhappy with something his or her employer did or failed to do is not enough to make that act or omission an adverse employment action.[15] An employer takes materially adverse action against an employee only if it: (1) takes something of consequence away from the employee, for example by discharging or demoting the employee, reducing his or her salary, or taking away significant responsibilities; or (2) fails to give the employee something that is a customary benefit of the employment relationship, for example, by failing to follow a customary practice of considering the employee for promotion after a particular period of service.[16] Whether action is materially adverse should be judged from the perspective of a reasonable person in [plaintiff]'s position, considering all the circumstances.}

[17]{Reasonable Accommodations}

{For a pretext case, insert the last 3 paragraphs of Instruction 1.1. For a mixed motive case, add the "motivating factor" definition from Instruction 1.2, as well as the last 4 paragraphs of that instruction.}

---

[1] This instruction is designed for disability discrimination cases. Although these notes discuss disability discrimination in terms of Title I of the Americans with Disabilities Act ("ADA") (the First Circuit has not yet decided whether a public employee can sue under Title II, Carmona-Rivera v. Puerto Rico, 464 F.3d 14, 17 (1st Cir. 2006) citing Currie v. Group Ins. Comm'n, 290 F.3d 1, 10-14 (1st Cir. 2002) (ADA)), the same instruction should be usable in a Rehabilitation Act case. See Kvorjak v. Maine, 259 F.3d 48, 50 n.1 (1st Cir. 2001) (ADA) ("the standards applicable to [the Americans with Disabilities Act and the Rehabilitation Act] have been viewed as essentially the same"); Oliveras-Sifre v. P.R. Dep't of Health, 214 F.3d 23, 25 n.2 (1st Cir. 2000) (ADA and Rehabilitation Act) ("An employment discrimination claim under . . . the Rehabilitation Act is analyzed under the same standards applicable to . . . the ADA. We therefore do not separately consider the Rehabilitation Act claim." (internal citation omitted)). The Introductory Notes at the beginning of these instructions outline the statutory basis for disability discrimination claims.

[2] A person has a disability, and therefore qualifies for protection under the ADA, if that person has: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) is regarded as having such an impairment. 42 U.S.C. §§ 12102(2), 12112; ADAAA, Pub. L. No. 110-325 § 4(a). The definition of "regarded as having" comes directly from the ADAAA. Earlier caselaw statements such as the following, therefore, must be read with great care: "A plaintiff claiming that he is 'regarded' as disabled cannot merely show that his employer perceived him as *somehow* disabled; rather, he must prove that the employer regarded him as disabled *within the meaning of the ADA*." Ruiz Rivera v. Pfizer Pharmaceuticals, LLC, 521 F.3d 76, 83 (1st Cir. 2008) (quoting Bailey v. Georgia-Pacific Corp., 306 F.3d 1162, 1169 (1st Cir. 2002) (emphasis in original)); id. at 86 (The plaintiff "may not rely exclusively on her employer's recognition or implementation of the restrictions imposed by her own physician to establish a regarded

(continued next page)

as claim."); Sutton v. United Air Lines, Inc., 527 U.S. 471, 489-90 (1999) (pre-ADAAA) (discussing the "regarded as having" standard); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521-25 (1999) (ADA) (same); Sheehan v. City of Gloucester, 321 F.3d 21, 25-26 (1st Cir. 2003) (although city/employer regarded plaintiff as capable of work as police officer, to meet "regarded as" standard, plaintiff "would have to show that the City regarded his hypertension as rendering him unable to perform a broad range of jobs."); Bailey v. Georgia-Pacific Corp., 306 F.3d 1162, 1166-67 (1st Cir. 2002) (same); Santiago Clemente v. Executive Airlines, Inc., 213 F.3d 25, 33-34 (1st Cir. 2000) (ADA) (discussing and rejecting plaintiff's arguments that she had a record of impairment and that she was regarded as having an impairment). The ADAAA explains that its "regarded as" definition "shall not apply to impairments that are transitory and minor," where "[a] transitory impairment is an impairment with an actual or expected duration of 6 months or less." ADAAA, Pub. L. No. 110-325 § 4(a).

The ADAAA explicitly notes that the EEOC has "authority to issue regulations implementing the definitions of disability," ADAAA, Pub. L. No. 110-325 § 6(a)(2), and the EEOC has proposed new regulations implementing the ADAAA, see EEOC, Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 74 Fed. Reg. 48431, et seq. (Sept. 23, 2009). Once these regulations become effective, earlier caselaw statements like the following must be read with great caution: "[T]he EEOC has authority to issue regulations to carry out the employment provisions in Title I of the ADA, §§ 12111-12117, pursuant to § 12116" but it has not "been given authority to issue regulations implementing the generally applicable provisions of the ADA, see §§ 12101-12102, which fall outside Titles I-V." Sutton, 527 U.S. at 479; Toyota Motor Mfg. Ky., Inc. v. Williams, 534 U.S. 184, 194 (2002) (ADA) (citing Sutton and observing: "The persuasive authority of the EEOC regulations [defining the term 'disability'] is less clear. . . . [N]o agency has been given authority to issue regulations interpreting the term 'disability' in the ADA. Nonetheless, the EEOC has done so.").

[3] The term "physical or mental impairment" is not defined in the statute, but the ADAAA requires that "[t]he definition of disability . . . shall be construed in favor of broad coverage of individuals." ADAAA, Pub. L. No. 110-325 § 4(a). The proposed new regulations amplify the terms. 74 Fed. Reg. 48440. The First Circuit has said: "There is no question that alcoholism is an impairment for purposes of the first prong of analysis under the ADA," Bailey v. Georgia-Pacific Corp., 306 F.3d 1162, 1167 (1st Cir. 2002), but also said that it was not "a *per se* disability," id. at 1168. "The ADA explicitly allows an employer to 'hold an employee who . . . is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the . . . alcoholism of such employee.' 42 U.S.C. § 12114(c). This statutory provision means that an employee who tries to use deficiencies in his job performance as evidence that alcoholism substantially impairs his ability to work is likely to establish the unhelpful proposition, for ADA coverage, that he cannot meet the legitimate requirements of the job." Sullivan v. Neiman Marcus Group, Inc., 358 F.3d 110, 115-16 (1st Cir. 2004).

[4] For cases involving conduct prior to January 1, 2009, the Supreme Court defined "major life activity" to include "those activities that are of central importance to daily life." Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002) (ADA). The Court cautioned, however, "[t]hat these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled." Id. The then-applicable EEOC regulations defined a "major life activity" as a "function[ ] such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).

Toyota's restrictive definition has been replaced by the ADAAA. For cases involving conduct on and after January 1, 2009, the ADAAA provides a definition of "major life activity":

> [M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
>
> . . . [A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

ADAAA, Pub. L. No. 110-325 § 4(a). Furthermore the ADAAA expressly rejects Toyota's requirement that the terms "substantially" and "major" need to be strictly interpreted to create a demanding standard under the ADA. Id. § 2(b). The ADAAA makes clear that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." Id.

(continued next page)

The ADAAA provides expressly that working is a major life activity. Prior to the ADAAA, the Supreme Court had declined to rule on whether working was a major life activity. Toyota, 534 U.S. at 200; Sutton v. United Air Lines, Inc., 527 U.S. 471, 492 (1999) (ADA). The First Circuit stated:

> Awaiting a definitive ruling from the Supreme Court otherwise, we have assumed that "working" is a major life activity and applied the EEOC's framework in dismissing plaintiffs' ADA claims . . . . So doing, we have required claimants to show that they were precluded from more than the performance of a particular job.

Guzmán-Rosario v. United Parcel Serv., Inc., 397 F.3d 6, 11 (1st Cir. 2005) (citation omitted).

For pre-ADAAA cases, a plaintiff must "show an inability to work in a 'broad range of jobs,' rather than a specific job." Toyota, 534 U.S. at 200 (citing Sutton, 527 U.S. at 492); see also 29 C.F.R. § 1630.2(j)(3)(i) ("With respect to the major life activity of working . . . [t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes. . . . The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." (applying the pre-ADAAA standard of "significantly" restricted)); Sheehan v. City of Gloucester, 321 F.3d 21, 25-26 (1st Cir. 2003) (summary judgment for City where the plaintiff could no longer work as a police officer but could work as a private security guard 24-32 hours per week); Carroll v. Xerox Corp., 294 F.3d 231, 239 (1st Cir. 2002) ("Furthermore, to determine whether a substantial limitation exists when work is at issue, we have looked to whether plaintiff can show that he or she is significantly restricted in his or her ability to perform 'a class of jobs' or 'a broad range of jobs in various classes.'"); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 524-25 (1999) (ADA) (upholding summary judgment for defendant where plaintiff's hypertension prevented him from working as one type of mechanic but did not affect his ability to work as a mechanic generally); Tardie v. Rehabilitation Hosp. of R.I., 168 F.3d 538, 541-42 (1st Cir. 1999) (ADA) (holding that plaintiff's inability to work more than 40 hours a week did not substantially limit her in the major life activity of working). In Gelabert-Ladenheim, 252 F.3d at 58-59, the First Circuit observed that:

> [W]hen the question of whether someone is disabled turns on the plaintiff's ability to work, the very existence of the disability turns on factors beyond simply the physical characteristics of the plaintiff. So, arguably, different results could be reached with respect to plaintiffs who suffer from identical physical impairments but who, due to a variety of factors like the economic health or geographic location of an area, face dissimilar employment prospects.

Furthermore, "[a]n otherwise valid job requirement, such as a height requirement, does not become invalid simply because it would limit a person's employment opportunities in a substantial way if it were adopted by a substantial number of employers." Sutton, 527 U.S. at 493-94. For a listing of some criteria see Bailey v. Georgia-Pacific Corp., 306 F.3d 1162, 1168 (1st Cir. 2002) ("accessible geographic area, the numbers and types of jobs in the area foreclosed due to the impairment, and the types of training, skills, and abilities required by the jobs").

The following cases discuss whether specific activities constitute major life activities pre-ADAAA: Toyota, 534 U.S. at 197 ("manual tasks"); Guzman-Rosario, 397 F.3d at 11 (caring for oneself); Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11, 21-24 (1st Cir. 2002) (ADA) (lifting); Whitney v. Greenberg, Rosenblatt, Kull & Bitsoli, P.C., 258 F.3d 30, 34 (1st Cir. 2001) (ADA) (learning); Criado v. I.B.M. Corp, 145 F.3d 437, 442-43 (1st Cir. 1998) (ADA) (sleeping); Bercovitch v. Baldwin School, Inc., 133 F.3d 141, 155 (1st Cir. 1998) (ADA) (learning); Soileau v. Guilford of Me., Inc., 105 F.3d 12, 15 (1st Cir. 1997) (ADA) ("ability to get along with others").

[5] Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 646 (1st Cir. 2000). For elaboration of the "essential functions" requirement, see Gillen v. Fallon Ambulance Service, Inc., 283 F.3d 11, 24-25 (1st Cir. 2002).

[6] The bracketed language may be used in cases where reasonable accommodations are a disputed issue.

[7] The Seventh Circuit held that the mixed motive analysis does not apply to discrimination suits brought under the ADA. Serwatka v. Rockwell Automation, Inc., 591 F.3d 957 (7th Cir. 2010).

[8] This bracketed sentence should be used in a pretext case. See Instruction 1.1.

[9] This bracketed sentence should be used in a mixed motive case. See Instruction 1.2.

[10] It may not be necessary that the decisionmaker be biased if someone else was biased and orchestrated the decision. Cariglia v. Hertz Equip. Rental Corp., 363 F.3d 77, 83-85 (1st Cir. 2004) (applying Massachusetts law, but stating that the orchestration argument "has merit under First Circuit precedent and persuasive case law from other circuits" and quoting Conway v. Electro Switch Corp., 825 F.2d 593, 597 (1st Cir. 1987) ("evidence of

(continued next page)

corporate state-of-mind or discriminatory atmosphere is not rendered irrelevant by its failure to coincide precisely with the particular actors or time frame involved in the specific events that generated a claim of discriminatory treatment") and Freeman v. Package Machinery Co., 865 F.2d 1331, 1342 (1st Cir. 1988) ("the inquiry into a corporation's motives need not artificially be limited to the particular officer who carried out the action.")). But cf. Cerqueira v. American Airlines Inc., 520 F.3d 1, 19 n.24 (1st Cir. 2008) ("This circuit has not decided [whether a Cariglia-like theory applies] under Title VII."); Thompson v. Coca-Cola Co., 522 F.3d 168, 178 (1st Cir. 2008) (applying Massachusetts law) ("Harris was a non-decisionmaker, and a comment such as hers 'cannot support an inference of pretext because it was one stray remark, and was made by a non-decision maker.'"); Kouvchinov v. Parametric Technology Corp., 537 F.3d 62, 67 (1st Cir. 2008) (an ERISA case discussing employment discrimination law) ("When assessing a charge of pretext in an employment discrimination case, the focus is on the mindset of the actual decisionmaker. This holds true even when the decisionmaker is relying on information that may later prove to be inaccurate." (internal citations omitted)). Under the Cariglia theory, "the critical legal issue [is] whether corporate liability can attach when neutral decisionmakers rely on information that is manipulated by another employee who harbors illegitimate animus," and a crucial factual finding is whether that employee withheld information from the neutral decisionmakers. Thompson, 522 F.3d at 179 (quoting Cariglia, 363 F.3d at 86).

In Cerqueira, a section 1981 case in which an airline passenger alleged that airline employees discriminated against him because of his race, the First Circuit criticized the district court's application of the respondeat superior doctrine. In particular, the court found error in jury instructions that "permitted liability of the air carrier to turn on the purported bias of non-decisionmakers." Cerqueira, 520 F.3d at 18. It concluded that "[t]he deemed attribution instruction . . . was not justified either by reference to the Restatement (Second) of Agency . . . or under Cariglia." Id. at 19. In a footnote, the First Circuit noted that it was also erroneous for the district court to instruct the jury that the "mere providing of information constitutes discrimination if the person providing information was motivated by his or her perception of the plaintiff's race or ethnicity." Id. at 19 n.22.

[11] For conduct occurring prior to January 1, 2009, the instruction should reflect the pre-ADAAA standard under Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184, 198 (2002), that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." Also taking into account the pre-ADAAA guidelines by the EEOC, 29 C.F.R. § 1630.2(j), the pattern should read: "A person is substantially limited if he or she is [unable to; significantly restricted in the ability to] [specify major life activity affected]."

Under the ADAAA, "substantially limits" must "be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008." ADAAA, Pub. L. No. 110-325 § 4(a). These findings and purposes include "provid[ing] broad coverage" for individuals with disabilities. Id. § 2(a). The ADAAA expressly rejects the standard announced in Toyota, 534 U.S.at 198, that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." ADAAA, Pub. L. No. 110-325 § 2(b)(4). The ADAAA further denounces the EEOC definition of "substantially limits" as "significantly restricted." Id. § 2(b)(6). However, the ADAAA fails to suggest a new standard in the place of the rejected Toyota and EEOC standards. The ADAAA explicitly notes that the EEOC has "authority to issue regulations implementing the definitions" of the terms used in 28 U.S.C. § 12102, ADAAA, Pub. L. No. 110-325 § 6(a)(2), and the EEOC has proposed regulations defining "substantially limits." 74 Fed. Reg. 48440. Pursuant to the ADAAA, "[a]n impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability." ADAAA, Pub. L. No. 110-325 § 4(a).

For conduct occurring prior to the effective date of the ADAAA, the assessment of the severity of any condition must include the effect of any corrective measures. Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) (ADA) ("[I]f a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act."); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521 (1999) (ADA) (same).

After the ADAAA, however, "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures." ADAAA, Pub. L. No. 110-325 § 4(a). These measures expressly include:

> (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics

(continued next page)

including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
(II) use of assistive technology;
(III) reasonable accommodations or auxiliary aids or services; or
(IV) learned behavioral or adaptive neurological modifications.

Id. "The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses," however, "shall be considered in determining whether an impairment substantially limits a major life activity." Id. (emphasis added). An employer is barred from using "qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria . . . is shown to be job-related for the position in question and consistent with business necessity." Id. § 5(b).

[12] The ADAAA amends the ADA to provide that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." ADAAA, Pub. L. No. 110-325 § 4(a). Prior to the ADAAA, the Supreme Court held that an impairment's impact must be permanent or long-term, Toyota, 534 U.S. at 198, and the First Circuit had noted that the pre-ADAAA version of the statute:

> [Said] nothing about duration and nothing in the term "disability" or its definition [gave] a judge, and still less a jury, much guidance. The problem is primarily a policy choice to which Congress did not speak clearly; and the Supreme Court has done no more than extrapolate, from some estimated numbers of those to be covered, that severe restrictions of very important activities were what Congress had in mind. Until the Supreme Court fine-tunes its interpretation, it will be unclear how lower courts should deal with periods between, say, 6 and 24 months.

Guzmán-Rosario v. United Parcel Serv., Inc., 397 F.3d 6, 10 (1st Cir. 2005) (citation omitted). But post-ADAAA, a plaintiff with a "transitory impairment . . . with an actual or expected duration of 6 months or less," cannot succeed under the "regarded as" prong of the definition of disability. ADAAA, Pub. L. No. 110-325 § 4(a).

[13] See 29 C.F.R. § 1630(n); Eighth Circuit Model Instruction 5.52B (2001); see also Ward v. Mass. Health Research Institute, 209 F.3d 29, 34 (1st Cir. 2000) (ADA) (an employer's description of a job's essential functions is given substantial weight, but other factors to consider include "written job descriptions, consequences of not requiring the function, work experience of past incumbents, and work experience of current incumbents"). Although attendance, generally, is an essential job function, see Leary v. Dalton, 58 F.3d 748, 753 (1st Cir. 1995) (Rehabilitation Act), adherence to a fixed schedule may not be essential for some jobs. See Ward, 209 F.3d at 34. The jury charge should select only the relevant factors from this list.

[14] This bracketed paragraph may be used in cases where there is a dispute about whether the action that the defendant allegedly took against the plaintiff constituted an adverse employment action. Although this question, if it arises, is one for the jury, see Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 36 (1st Cir. 2001) (ADEA) (jury could find that plaintiff who was given a raise but assigned less challenging, largely menial responsibilities suffered an adverse employment action), in most cases the dispute will be about whether the defendant's challenged conduct was motivated by discriminatory animus, not whether it amounted to an adverse employment action. If there is no dispute about whether the alleged conduct, if proven, would constitute an adverse employment action, the bracketed paragraph may be deleted and the generic references to "adverse employment action" may be replaced by a brief description of the adverse employment action defendant allegedly took.

[15] Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996) (FLSA) ("[T]he inquiry must be cast in objective terms. Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action."). In a retaliation case, the Supreme Court said: "We speak of *material* adversity because we believe it is important to separate significant from trivial harms." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006). The Court there used the objective plaintiff standard from Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 80 (1998).

[16] Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996) (FLSA). This definition is generalized because "[d]etermining whether an action is materially adverse necessarily requires a case-by-case inquiry." Id. There is little explicit guidance in the case law about what constitutes an adverse employment action. In the majority of cases, the court does not explicitly analyze whether the challenged conduct constitutes an adverse employment action, presumably because certain actions, such as layoffs, salary reductions, and demotions, are generally

(continued next page)

recognized as adverse employment actions. See, e.g., Straughn v. Delta Air Lines, Inc., 250 F.3d 23 (1st Cir. 2001) (Title VII and section 1981) (termination); Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15 (1st Cir. 1999) (Title VII) (demotion); Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999) (ADEA) (demotion and salary reduction), abrogated on other grounds by Smith v. City of Jackson, 544 U.S. 228 (2005). In some cases, the court has defined what actions are insufficient to constitute an adverse employment action by upholding a trial court's conclusion that the defendant's conduct was not, as a matter of law, actionable. See, e.g., Marrero v. Goya of P.R., Inc., 304 F.3d 7, 24 (1st Cir. 2002) ("minor, likely temporary, changes in . . . working conditions," extra supervision and probationary period in new post); Hernandez-Torres v. Intercontinental Trading, Inc., 158 F.3d 43, 47 (1st Cir. 1998) (Title VII) (plaintiff was subjected to increased email messages, disadvantageous assignments and "admonition that [he] complete his work within an eight hour [day]"); Blackie, 75 F.3d at 726 (plaintiffs claimed defendants refused to negotiate a "side agreement" to supplement their employment contract); Connell v. Bank of Boston, 924 F.2d 1169, 1179 (1st Cir. 1991) (ADEA) (plaintiff who had already been fired and whose severance package was already calculated was forced to leave office two weeks early). In another class of cases, the court held that the challenged employment action could constitute an adverse employment action by either upholding a jury verdict for the plaintiff, see, e.g., White v. N.H. Dep't of Corrections, 221 F.3d 254, 262 (1st Cir. 2000) (Title VII) ("ample evidence" of adverse employment action where plaintiff was harassed, transferred without her consent, not reassigned to another position, "and ultimately constructively discharged"), or holding that the defendant was not entitled to summary judgment on this issue. See, e.g., Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 36 (1st Cir. 2001) (ADEA) (plaintiff given standard salary increase but assigned less challenging, largely menial responsibilities); DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997) (Title VII) (plaintiff given five month assignment to job for which he had no experience and deprived of meaningful duties); Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997) (Title VII) (defendant refused to grant plaintiff a hardship transfer); see also Simas v. First Citizens' Federal Credit Union, 170 F.3d 37, 48, 50 (1st Cir. 1999) (Federal Credit Union Act; whistleblower retaliation) (plaintiff given negative performance evaluations and deprived of responsibility for major account) (applying Title VII definition of adverse employment action).

[17] Insert the appropriate language from Instruction 3.2 when reasonable accommodations are a disputed issue.

3.2 Reasonable Accommodation[1]

[Updated: 9/18/09]

Pattern Jury Instruction

Federal law requires employers to provide reasonable accommodation to employees who are disabled[2] unless the accommodation would impose an undue hardship on the employer or pose a direct threat to the employee or others.[3]

To succeed on a claim that the employer has failed to provide a reasonable accommodation, the employee must prove:[4]

> First, that the proposed accommodation would enable [him/her] to perform the essential functions of the job and that the accommodation is feasible for the employer under the circumstances; and
>
> Second, that the employee made a request for the accommodation that was sufficiently direct and specific so as to put the employer on notice of the need for an accommodation.

If the employee meets this burden, then the employer bears the burden of proving that the accommodation [plaintiff] proposed would have been an undue burden or direct threat.[5] The employee need not show that the employer had discriminatory intent.[6]

A reasonable accommodation is a modification or adjustment to the work environment or to the manner in which a job is performed.[7] A reasonable accommodation may include:[8] [modifying or adjusting a job application process to enable a qualified applicant with a disability to be considered for the position; making existing facilities used by employees readily accessible to and usable by individuals with disabilities; job restructuring; part-time or modified work schedule; reassignment to a vacant position; acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies; provision of qualified readers and interpreters; other similar accommodations for individuals with plaintiff's disabilities].[9]

A reasonable accommodation does not include changing or eliminating any essential function of a job, shifting any of the essential functions of the job to others, or creating a new position for the disabled employee.[10] If [plaintiff] rejects a reasonable accommodation that is necessary to enable [plaintiff] to perform the essential functions of the position, and, as a result, cannot perform the essential functions of the position, [plaintiff] cannot be considered a qualified individual.

"Direct threat" means a significant risk of substantial harm to the health or safety of the employee or others that cannot be eliminated or reduced by reasonable accommodation.

An "undue hardship" is an action that would create significant difficulty or expense for [employer], considering the nature and cost of the accommodation, the overall financial resources of [employer], the effect of the accommodation on expenses and resources, and the

impact of the accommodation on the operations of [employer], including the impact on the ability of other employees to perform their duties and the impact on [employer]'s ability to conduct business.

---

[1] A reasonable accommodation instruction may be appropriate in either disability or religious discrimination cases. See 42 U.S.C. § 2000e(j) (2001) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."); 42 U.S.C. § 12111 (2001) ("The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."); ADA Amendments Act of 2008, Pub. L. No. 110-325 § 6(a)(1) ("Nothing in this Act alters the provision . . . specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved."). Although this instruction is focused on disability discrimination, it should be usable, with appropriate modification, for religious discrimination cases as well. See generally Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) (Title VII religious discrimination).

The Equal Employment Opportunity Commission guidelines concerning reasonable accommodation are at 29 C.F.R. §§ 1605 (religious discrimination) and 1630 (disability discrimination).

[2] Also, "[t]he duty to provide reasonable accommodation is a continuing one, . . . [that is] not exhausted by one effort." Ralph v. Lucent Tech., Inc., 135 F.3d 166, 172 (1st Cir. 1998) (ADA). But a plaintiff may not base an ADA claim on the defendant's denial of a request for accommodations where the plaintiff's disability did not exist at the time of the request, but rather was allegedly caused by the defendant's failure to honor the request. Santiago Clemente v. Executive Airlines, Inc., 213 F.3d 25, 31 (1st Cir. 2000) (ADA). Under the ADAAA, reasonable accommodation is *not* required for individuals who meet the definition of disability solely under the "regarded as" test. Pub. L. No. 110-325 § 6(a)(1).

[3] Although the language of the ADA includes only a direct threat to "other individuals in the workplace," 42 U.S.C. § 12113(b), the EEOC's implementing regulations include direct threats to "*the individual or* others in the workplace." 29 C.F.R. § 1630.15(b)(2) (emphasis added). The Supreme Court upheld the validity of the EEOC's more expansive definition in Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002).

[4] Enica v. Principi, 544 F.3d 328, 338 (1st Cir. 2008).

[5] U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 402 (2002) (ADA). The plaintiff "bears the burden of proposing an accommodation that would enable him [or her] to perform [the] job effectively and is, at least on the face of things, reasonable." Kvorjak v. Maine, 259 F.3d 48, 55 (1st Cir. 2001) (ADA); Reed v. LePage Bakeries, Inc., 244 F.3d 254, 258-60 (1st Cir. 2001) (ADA) (once plaintiff has met his or her burden, defendant bears burden of proving that the proposed accommodation would be an undue hardship); see also id. (discussing the "well recognized tension" between the plaintiff's and the defendant's burdens).

Beyond this division of the responsibility for proposing and proving the availability of a reasonable accommodation after the fact (at trial), the Equal Employment Opportunity Commission's implementing regulations provide that "it may be necessary for the [employer] to initiate an informal, interactive process" with the employee in order to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(2) cited in Kvorjak, 259 F.3d at 52. An employer may be liable for a failure to engage in this interactive process if the plaintiff can demonstrate that "had a good faith interactive process occurred, the parties could have found a reasonable accommodation that would enable the disabled person to perform the job's essential functions." Kvorjak, 259 F.3d at 52; Jacques v. Clean-Up Group, Inc., 96 F.3d 506, 515 (1st Cir. 1996) (ADA) (upholding judgment for defendant but noting that "[t]here may well be situations in which the employer's failure to engage in an informal interactive process would constitute a failure to provide reasonable accommodation that amounts to a violation of the ADA"). However, a plaintiff who refused to participate in the interactive process may not base an ADA claim on the failure of that process. Phelps v. Optima Health, Inc., 251 F.3d 21, 27-28 (1st Cir. 2001) (ADA).

(continued next page)

Most recently the First Circuit has said:

> In some cases, an employee's request for an accommodation may trigger a duty on the part of the employer to engage in an interactive process. As part of this process, the employer is "expected to engage in a meaningful dialogue with the employee to find the best means of accommodating that disability." Although the degree of interaction required varies in accordance to the circumstances of each case, the process requires open communication by both parties, and an employer will not be held liable if it makes "reasonable efforts both to communicate with the employee and provide accommodations based on the information it possessed . . . ." Where a breakdown in the process has been identified, "courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary." For instance, "[a] party that obstructs or delays the interactive process is not acting in good faith."
>
> Though the issue of good faith is relevant in examining the interactive process, a showing of discriminatory intent or animus is not required in cases alleging a failure to accommodate. Instead, "an employer who knows of a disability yet fails to make reasonable accommodations violates the statute, no matter what its intent, unless it can show that the propose accommodation would create undue hardship for its business." Furthermore, the "duty to provide a reasonable accommodation is a continuing one, however, and not exhausted by one effort."

Enica v. Principi, 544 F.3d 328, 338-39 (1st Cir. 2008) (citations and footnote omitted).

[6] Id.; Tobin v. Liberty Mutual Ins. Co., 553 F.3d 121, 149 (1st Cir. 2009) ("[U]nlike some acts of discrimination—such as retaliation for an employee's exercise of protected rights—rejection of a requested accommodation does not by itself suggest that the employer knew its conduct may be in violation of the law.")

[7] The assessment of whether an accommodation is reasonable must be individualized and situation specific; a court may not use per se rules. Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 647 (1st Cir. 2000) (ADA). However, the Supreme Court has said that "ordinarily" an accommodation that would run afoul of a seniority system is not reasonable, U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 403 (2002) (ADA), and that a plaintiff must "show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested 'accommodation' is 'reasonable' on the particular facts." Id. at 405.

[8] This list should be modified in accordance with the facts of the case.

[9] For examples of cases involving specific types of accommodation, see: Kvorjak v. Maine, 259 F.3d 48, 57 (1st Cir. 2001) (ADA) (work at home); Phelps v. Optima Health, Inc., 251 F.3d 21, 26-27 (1st Cir. 2001) (ADA) (job sharing and job creation); Reed v. LePage Bakeries, Inc., 244 F.3d 254, 260 (1st Cir. 2001) (ADA) ("permission to walk away from any stressful conflict"); Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 646 (1st Cir. 2000) (ADA) (additional leave beyond that allowed by the employer's leave policy); Ward v. Massachusetts Health Research Institute, 209 F.3d 29, 37 (1st Cir. 2000) (ADA) (flexible work schedule); Soto-Ocasio v. Federal Express Corp., 150 F.3d 14, 20 (1st Cir. 1998) (ADA) (reallocation of job duties); Criado v. IBM Corp., 145 F.3d 437, 443 (1st Cir. 1998) (ADA) (leave of absence and leave extension); Equal Employment Opportunity Commission v. Amego, Inc., 110 F.3d 135, 147-48 (1st Cir. 1997) (ADA) (reallocation of job duties).

[10] Phelps v. Optima Health, Inc., 251 F.3d 21, 26-27 (1st Cir. 2001) (ADA). Furthermore, the fact that an employer voluntarily offered an accommodation at one time does not mean that it must offer the same accommodation in a subsequent situation. Id. at 26 ("to find otherwise would discourage employers from granting employees any accommodations beyond those required by the ADA").

4.1 Equal Pay Act[1]

[Updated: 8/3/05]

Pattern Jury Instruction

[Plaintiff] accuses [defendant] of pay discrimination in violation of federal law. It is unlawful for an employer to discriminate between employees on the basis of sex by paying different wages to employees of different sexes working in jobs that require substantially equal skill, effort and responsibility, and that are performed under similar working conditions.

To succeed on this claim, [plaintiff] must prove each of the following elements by a preponderance of the evidence:

> First, that [plaintiff] and [male/female] workers have been employed by [defendant][2] in jobs requiring substantially equal skill, effort and responsibility;[3]
>
> Second, that the jobs are performed under similar working conditions; and
>
> Third, that [plaintiff] was paid a lower wage than the [male/female] workers in jobs that require substantially equal skill, effort and responsibility as [plaintiff]'s job and that are performed under similar working conditions.

In deciding whether jobs require substantially equal skill, effort and responsibility, your task is to compare the jobs, not the individual employees holding those jobs. It is not necessary that the jobs be identical; the law requires proof that the performance of the jobs demands "substantially equal" skill, effort and responsibility. Insignificant and insubstantial or trivial differences do not matter and may be disregarded. Job classifications, descriptions or titles are not controlling.[4] The important thing is the actual work or performance requirements of the jobs.

In deciding whether the jobs require substantially equal "skill," you should consider such factors as the level of education, experience, training and ability necessary to meet the performance requirements of the respective jobs.

In deciding whether the jobs require substantially equal "effort," you should consider the amount of physical and mental exertion needed for the performance of the respective jobs. Duties that result in mental or physical fatigue and emotional stress, or factors that alleviate fatigue and stress, should be weighed together in assessing the relative effort involved. It may be that jobs require equal effort in their performance even though the effort is exerted in different ways on the jobs; but jobs do not entail equal effort, even though they involve most of the same routine duties, if one job requires other additional tasks that consume a significant amount of extra time and attention or extra exertion.

In deciding whether the jobs involve substantially equal "responsibility," you should consider the degree of accountability involved in the performance of the work. You should take into consideration such things as the level of authority delegated to the respective employees to direct or supervise the work of others or to represent the employer in dealing with customers or

suppliers; the consequences of inadequate or improper performance of the work in terms of possible damage to valuable equipment or possible loss of business or productivity; and the possibility of incurring legal liability to third parties.

In deciding whether jobs are performed under similar working conditions, the test is whether the working conditions are "similar"; they need not be substantially equal. In deciding whether relative working conditions are similar, you should consider the physical surroundings or the environment in which the work is performed, including the elements to which employees may be exposed. You should also consider any hazards of the work including the frequency and severity of any risks of injury.

[5]{If you find that [plaintiff] has proven [his/her] claim, you will then consider [defendant]'s defense. [Defendant] contends that the differential in pay between the jobs was the result of a bona fide [seniority system; merit system; system which measures earnings by quantity or quality of production; or describe factor other than sex[6] upon which the defendant relies]. On this defense, [defendant] has the burden of proof by a preponderance of the evidence. If you find that [defendant] has met this burden, then your verdict will be for [defendant].}

---

[1] This instruction is designed for Equal Pay Act cases. The Introductory Notes at the beginning of these instructions outline the statutory basis for an Equal Pay Act claim.

There is currently a split among the circuits (and the First Circuit has steadfastly avoided taking a position) about the relationship between an EPA claim and a Title VII wage discrimination claim. See Rodriguez v. Smithkline Beecham Pharm., P.R., Inc., 62 F. Supp. 2d 374, 381-82 (D.P.R. 1999) (Title VII and EPA) (outlining the issue and the circuit split) aff'd, Rodriguez v. Smithkline Beecham, 224 F.3d 1, 8 (1st Cir. 2000) (noting the issue but declining to take a position); see also Dragon v. R.I. Dep't of Mental Health, Retardation and Hosps., 936 F.2d 32, 37 (1st Cir. 1991) (Title VII and EPA) (same); Marcoux v. Maine, 797 F.2d 1100, 1105-06 (1st Cir. 1986) (Title VII) (same). The issue centers on the defendant's burden of proof after the plaintiff establishes his or her prima facie case. See Rodriguez, 62 F. Supp. 2d at 382. Under the EPA, the defendant bears both the burden of production and the burden of persuasion with respect to the statutory defenses. See Ingram v. Brink's, Inc., 414 F.3d 222, 232 (1st Cir. 2005); see also Corning Glass Works v. Brennan, 417 U.S. 188, 196 (1974). In a Title VII case, on the other hand, once the defendant meets its burden of articulating (producing) non-discriminatory reasons for the challenged employment action, the plaintiff bears the burden of proving that those reasons are merely pretextual. However, Title VII explicitly incorporates any defenses authorized by the EPA. See 42 U.S.C. § 2000e-2(h) (2001) ("It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the EPA]."). The question, then, is whether this statutory incorporation of the EPA defenses should affect only the substantive defenses, or whether it should also affect the allocation of burdens of proof.

There is also at least one limitation on an EPA claim that does not apply to a Title VII sex-based wage discrimination claim. See Marcoux, 797 F.2d at 1104 (EPA requirement that plaintiff work in same establishment as opposite-sex employee who is paid more does not apply to Title VII case).

[2] At this point in the instruction, it might be necessary to address the issue of whether the defendant is the plaintiff's employer within the meaning of the EPA. See 29 U.S.C. § 203(d) (2001) (An "employer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency."); see also 29 U.S.C. § 213. In most cases this will not be necessary because whether a defendant is an employer is a legal rather than factual question. If, however, there are factual issues that must be resolved before that legal determination can be made, this instruction should be modified accordingly. See, e.g., Baystate Alternative Staffing, Inc. v. Herman, 163 F.3d 668, 678 (1st Cir. 1998) (FLSA) ("[W]e must determine whether the Board's factual findings, which are not disputed on appeal, support its legal conclusion that Harold and Marlene are 'employers,' *(continued next page)*

within the meaning of the Act.").

[3] See, e.g., Marcoux v. Maine, 797 F.2d 1100, 1107-08 (1st Cir. 1986) (Title VII) (analyzing the comparability of work by female guards at one prison and male guards at another). "[T]he plaintiff must first establish a prima facie case by showing that the employer paid different wages to specific employees of different sexes for jobs performed under similar working conditions and requiring equal skill, effort and responsibility. Such a showing is harder to make than the *prima facie* showing under the McDonnell framework because it requires the plaintiff to identify specific employees of the opposite sex holding positions requiring equal skill, effort and responsibility under similar working positions who were more generously compensated." Ingram v. Brink's, Inc., 414 F.3d at 232 (citations omitted).

[4] Rodriguez v. Smithkline Beecham, 224 F.3d 1, 7 (1st Cir. 2000) (Title VII and EPA) ("Although job titles may be given some weight in determining whether two employees hold substantially equal positions, the EPA's emphasis is on the responsibilities and functions of the position.").

[5] Appropriate portions of this bracketed paragraph may be used if the defendant argues that any of the four statutory defenses is applicable.

[6] See, e.g., Rodriguez v. Smithkline Beecham, 224 F.3d 1, 6 (1st Cir. 2000) (Title VII and EPA) ("[S]tanding company policies designed . . . to protect employees' salary and grade levels during developmental placements [or] to allow the company to utilize employees at lower level positions without detriment to the employee's compensation . . . are 'factors other than sex' . . . and therefore constitute a legitimate basis for wage differentials."); Byrd v. Ronayne, 61 F.3d 1026, 1034 (1st Cir. 1995) (Title VII and EPA) (fact that one employee generated substantially greater revenues than another constituted "factor other than sex" justifying pay differential); Winkes v. Brown, 747 F.2d 792, 795-96 (1st Cir. 1984) (EPA) (defendant that is subject to a consent decree requiring it to hire more women cannot be penalized under the EPA for taking steps to retain female employee where those steps were consistent with established policy of matching offers made to employees by competitors).

5.1 Retaliation[1]

[Updated: 4/6/10]

Pattern Jury Instruction

[Plaintiff] accuses [defendant] of violating federal law by retaliating against [her/him] for engaging in protected activities, namely, for [specify protected activity]. [Specify protected activity, *e.g.*, filing a discrimination complaint] is a "protected activity."[2] To succeed on this claim, [plaintiff] must prove[3] by a preponderance of the evidence that

First, [defendant] took adverse action against [her/him]; and

Second, {Choose one of the following two bracketed phrases, depending on whether the case is a pretext or a mixed motive case (Note: a similar choice/modification must be made at the end of the instruction depending on whether the case is a pretext or a mixed motive case.):

[4]{were it not for [her/his] protected activity, [defendant] would not have taken adverse employment action against [her/him].}

[5]{[her/his] protected activity was a motivating factor in [defendant]'s decision[6] to take adverse employment action against [her/him].}}

[Plaintiff] is not required to prove that [her/his] [protected activity] claim had merit in order to prove the retaliation claim.[7]

[8]{An "adverse action" is one that would be materially adverse to a reasonable employee or job applicant, an action that could well dissuade a reasonable worker from making or supporting a charge of discrimination. This is an objective standard.[9] "Material" means significant, as opposed to trivial. An adverse action by a supervisor is an action of the employer.[10]}

{For a claim of retaliatory harassment by co-workers/third parties, insert the following: Alternatively, if you find that [defendant / defendant management] knew or should have known that co-workers and/or third parties were retaliating against [plaintiff] because of his/her protected activity in a way that would amount to material adverse action as I have defined it, and that [defendant / defendant management] failed to take prompt action to stop it, then you may find [defendant] liable for that retaliation.}[11]

{For a pretext case, insert the last 3 paragraphs of Instruction 1.1. For a mixed motive case, add the "motivating factor" definition from Instruction 1.2, as well as the last 4 paragraphs of that instruction.}

[1] This instruction is designed for retaliation cases. The Introductory Notes at the beginning of these instructions outline the statutory basis for a retaliation claim. Some of the statutes actually use the terminology "discrimina[tion]" on account of protected activities. See, e.g., 42 U.S.C. §§ 2000e-3(a) (Title VII), 12203 (ADA).

[2] "[R]equesting an [ADA] accommodation is protected activity . . . ." Wright v. CompUSA, 352 F.3d 472, 477 (1st Cir. 2003).

[3] Evidence of retaliation can be direct or circumstantial. DeCaire v. Mukasey, 530 F.3d 1, 20 (1st Cir. 2008).

[4] This bracketed language should be used in a pretext case. See Instruction 1.1.

[5] This bracketed language should be used in a mixed motive case. See Instruction 1.2. In a retaliation case characterized by the First Circuit as "mixed motive," the court seemed to use both standards ("not enough to trigger an inference of causation" and "plaintiff failed to show that, but for the defendants' animus towards him, the recommendation would have been rejected." Kearney v. Town of Wareham, 316 F.3d 18, 23 (1st Cir. 2002)). However, it does not appear to be an intentional change in the mixed motive standards. Note that in a mixed motive retaliation case in the First Circuit, Price-Waterhouse controls without any alteration by the 1991 amendments to Title VII and there is, therefore, no relief for a plaintiff if a defendant proves it would have taken the same action regardless. Tanca v. Nordberg, 98 F.3d 680, 684 (1st Cir. 1996) (Title VII retaliation).

[6] In Cariglia v. Hertz Equipment Rental Corp., 363 F.3d 77 (1st Cir. 2004), an age discrimination case, the First Circuit held that, under Massachusetts law, it is not necessary that the decisionmaker be biased if someone else was biased and orchestrated the decision. Although the court was interpreting Massachusetts law, it relied upon its own precedent and several "persuasive" circuit court cases arising under Title VII and the ADEA. Id. at 83-87. Cariglia may apply in a retaliation case where the ultimate decisionmaker had no retaliatory intent, but someone else, who wished to retaliate against the plaintiff for engaging in a protected activity, orchestrated the decision. But cf. Cerqueira v. American Airlines Inc., 520 F.3d 1, 19 n.24 (1st Cir. 2008) ("This circuit has not decided [whether a Cariglia-like theory applies] under Title VII."); Kouvchinov v. Parametric Technology Corp., 537 F.3d 62, 67 (1st Cir. 2008) (an ERISA case discussing employment discrimination law) ("When assessing a charge of pretext in an employment discrimination case, the focus is on the mindset of the actual decisionmaker. This holds true even when the decisionmaker is relying on information that may later prove to be inaccurate." (internal citations omitted)). Under the Cariglia theory, "the critical legal issue [is] whether corporate liability can attach when neutral decisionmakers rely on information that is manipulated by another employee who harbors illegitimate animus," and a crucial factual finding is whether that employee withheld information from the neutral decisionmakers. Thompson v. Coca-Cola Co., 522 F.3d 168, 179 (1st Cir. 2008) (applying Massachusetts law) (quoting Cariglia, 363 F.3d at 86).

In Cerqueira, a § 1981 case in which an airline passenger alleged that airline employees discriminated against him because of his race, the First Circuit criticized the district court's application of the respondeat superior doctrine. In particular, the court found error in jury instructions that "permitted liability of the air carrier to turn on the purported bias of non-decisionmakers." Cerqueira, 520 F.3d at 18. It concluded that "[t]he deemed attribution instruction . . . was not justified either by reference to the Restatement (Second) of Agency . . . or under Cariglia." Id. at 19. In a footnote, the First Circuit noted that it was also erroneous for the district court to instruct the jury that the "mere providing of information constitutes discrimination if the person providing information was motivated by his or her perception of the plaintiff's race or ethnicity." Id. at 19 n.22.

[7] Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261-62 (1st Cir. 1999) (Title VII and ADA); Mesnick v. General Elec. Co., 950 F.2d 816, 827 (1st Cir. 1991) (ADEA retaliation). It used to be considered appropriate to add language explaining that the plaintiff need only establish that he or she had a reasonable belief that the claim had merit when the complaint that prompted the retaliation was filed. See Higgins, 194 F.3d at 261-62 (citing Mesnick, 950 F.2d at 827; Petitti v. New England Tel. & Tel. Co., 909 F.2d 28, 33 (1st Cir. 1990) (Title VII)); see also Monteiro v. Poole Silver Co., 615 F.2d 4, 8 (1st Cir. 1980) (Title VII) (holding that retaliation claim was properly rejected where plaintiff "had not shown that his accusations of discrimination were voiced in good-faith 'opposition' to perceived employer misconduct" as opposed to being "a smokescreen in challenge to the supervisor's legitimate criticism"). The First Circuit recently reaffirmed that standard in Fantini v. Salem State College, 557 F.3d 22, 32 (1st Cir. 2009) (Appellant "must demonstrate only that [she] had a 'good faith, reasonable belief that the underlying challenged actions of the employer violated the law.'"). There is, however, some confusion in the case law on this point. The Supreme Court in Burlington Northern stated that its standard "does *not* require a reviewing court or jury to consider 'the nature of the discrimination that led to the filing of the charge.' Rather, the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the

(continued next page)

Title VII complaint." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 69 (2006) (internal citation omitted) (emphasis original). See also Crawford v. Metropolitan Gov't of Nashville & Davidson County, Tenn., 129 S. Ct. 846 (2008) (finding that the protection of the "opposition clause" of the anti-retaliation provision of Title VII extended to employee who spoke out about sexual harassment allegedly directed at her, not on her own initiative, but in answering questions during employer's investigation of employee's co-worker's complaints of sexual harassment).

[8] This bracketed paragraph may be used in cases where there is a dispute about whether the action that the defendant allegedly took against the plaintiff constituted an adverse action. The definitional language comes from Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006), where the Court announced that "Title VII's substantive provision and its anti-retaliation provision are not coterminous." Id. at 67. Although this question, if it arises, is one for the jury, see Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 36 (1st Cir. 2001) (ADEA), in most cases the dispute will be about whether the defendant's challenged conduct was motivated by a retaliatory purpose, not whether it amounted to an adverse action. In Burlington Northern, the Supreme Court held that Title VII's antiretaliation provision is in fact broader than Title VII's substantive provision, for it "is not limited to discriminatory actions that affect the terms and conditions of employment." Burlington N., 548 U.S. at 64. "An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace." Id. at 63 (emphasis in original); see also Dixon v. Int'l Bhd. of Police Officers, 504 F.3d 73, 82 (1st Cir. 2007) ("Title VII . . . cover[s] retaliation claims against unions which cause harm in the workplace and outside of it."). If there is no dispute about whether the alleged conduct, if proven, would constitute an adverse action, the bracketed paragraph may be deleted and the generic references to "adverse action" may be replaced by a brief description of the adverse action defendant allegedly took. Former employees are also protected against retaliation. Robinson v. Shell Oil Co., 519 U.S. 337 (1997).

[9] In Morales-Vallellanes v. Potter, 605 F.3d 27, 37-38 (1st Cir. 2010), the court held that a "temporary rotation of [plaintiff's] preferred distribution duties to a female [co-worker] fails to qualify as an adverse employment action."

[10] In Foley v. Commonwealth Electric Co., 312 F.3d 517, 521 (1st Cir. 2002), the court states that "this instruction optimally should have been included in the charge."

[11] Rather than include a separate retaliatory hostile environment charge, this retaliation charge may be amplified to make it clear that a retaliatory hostile environment can qualify as an "adverse action" in some circumstances. See Burlington No. & Santa Fe Rwy. Co. v. White, 548 U.S. 53 (2006). For discussion of retaliatory hostile work environment liability, see Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 345-47 (6th Cir. 2008).

6.1 Constructive Discharge[1]

[Updated: 9/12/06]

Pattern Jury Instruction

[Plaintiff] claims that [specify incident(s)] caused [her/his] constructive discharge. A "constructive discharge" occurs when an employer, such as [defendant], through illegal employment practices, imposes working conditions so intolerable[2] that a reasonable person would feel compelled to leave[3] [her/his] job rather than submit to them.[4]

---

[1] In 2004, the Supreme Court resolved a Circuit split over whether affirmative defenses are available in a constructive discharge case:

> [A]n employer does not have recourse to the Ellerth/Faragher affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a "tangible employment action," however, the defense is available to the employer whose supervisors are charged with harassment.

Pa. State Police v. Suders, 542 U.S. 129 (2004). The decision thereby approved the approach taken in Reed v. MBNA Marketing Sys., Inc., 333 F.3d 27, 33 (1st Cir. 2003). See also Arrieta-Colon v. Wal-Mart Puerto Rico, Inc., 434 F.3d 75, 87 (1st Cir. 2006) (no "hard and fast per se rules").

[2] To prove that he or she was constructively discharged, a plaintiff "must establish that his [or her] work environment was hostile." Hernandez-Torres v. Intercontinental Trading, Inc., 158 F.3d 43, 48 (1st Cir. 1998) (Title VII) (citing Landgraf v. USI Film Prods., 968 F.2d 427, 430 (5th Cir. 1992) (Title VII) ("To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment.")). "[A] reduction in responsibility or a change in the way that business is done, unaccompanied by diminution of salary or some other marked lessening of the quality of working conditions, does not constitute a constructive discharge." Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 55 (1st Cir. 2000) (ADEA); see also id. at 54 ("The workplace is not a cocoon, and those who labor in it are expected to have reasonably thick skins—thick enough, at least, to survive the ordinary slings and arrows that workers routinely encounter in a hard, cold world. Thus, the constructive discharge standard, properly applied, does not guarantee a workplace free from the usual ebb and flow of power relations and inter-office politics." (citations omitted)).

[3] "If a plaintiff does not resign within a reasonable time period after the alleged harassment, he was not constructively discharged." Landrau-Romero v. Banco Popular de P.R., 212 F.3d 607, 613 (1st Cir. 2000) (Title VII). "The standard is an objective one." Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7, 28 (1st Cir. 2002) (Title VII).

[4] Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 36 (1st Cir. 2001) ("'[C]onstructive discharge' is a label for treatment so hostile or degrading that no reasonable employee would tolerate continuing in the position . . . . Not every minor advantage or status symbol is protected by the statute—'adverse action' is a rule of reason concept. . . ."); Greenberg v. Union Camp Corp., 48 F.3d 22, 27 (1st Cir. 1995) (ADEA) (citations omitted) ("It is well settled in this Circuit that, to establish a claim of constructive discharge, the evidence must support a finding that 'the new working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.' The legal standard to be applied is 'objective,' with the inquiry focused on 'the reasonable state of mind of the putative discriminatee.'"); see also Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 54 (1st Cir. 2000) (ADEA) ("This standard cannot be triggered solely by an employee's subjective beliefs, no matter how sincerely held. The ultimate test is one of objective reasonableness." (citation omitted)).

7.1 Missing Witness[1]

[New: 6/18/10]

Pattern Jury Instruction

If you find that [party] had a witness available to it whom it did not call, and that [party] did not have that witness available to it, you may infer that the witness's testimony would have been unfavorable to [party who failed to call the witness]. You may draw such an inference, but you are not required to.

---

[1] In Latin American Music Co. v. ASCAP, 593 F.3d 95, 101 (1st Cir. 2010), the court said: "Although far more common in criminal cases, a missing witness instruction may be given in a civil case as well." "The instruction, however, should only be given where 'the witness is either actually unavailable to the party seeking the instruction or so obviously partial to the other side that the witness (though technically available) is deemed to be legally unavailable.'" Id. at 101-02 (citing United States v. Perez, 299 F.3d 1, 3 (1st Cir. 2002)). In an earlier civil case, the court said that the instruction is permissible "when a party fails to call a witness who is either (1) 'favorably disposed' to testify for that party, by virtue of status or relationship with the party or (2) 'peculiarly available' to that party, such as being with the party's 'exclusive control.'" Grajales-Romero v. American Airlines, Inc., 194 F.3d 288, 298 (1st Cir. 1999) (quoting United States v. DeLuca, 137 F.3d 24, 38 (1st Cir. 1998)). "When deciding whether to issue a missing witness instruction the 'court must consider the explanation (if any) for the witness's absence and whether the witness, if called, would be likely to provide relevant, non-cumulative testimony.'" Latin American Music Co., 593 F.3d at 102 (citing Perez, 299 F.3d at 3). Although all this language addresses the court's role in deciding whether to give the instruction, it seems appropriate, if the instruction is given, to allow the jury also to make the underlying determinations as to whether the conditions for the adverse inference are present. Whether to give the instruction is within the trial court's discretion. See Grajales-Romero, 194 F.3d at 298.

8.1 Compensatory Damages[1]

[Updated: 1/30/09]

Pattern Jury Instruction

The fact that I instruct you on damages does not represent any view by me that you should or should not find [defendant] liable.

[Plaintiff] seeks to recover damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other noneconomic losses.[2]

You must not consider any lost wages or fringe benefits. Federal law requires that I as the judge determine the amount of any lost wages and fringe benefits that [plaintiff] shall recover if you find [defendant] liable. [3] Distress arising from this lawsuit, or legal expenses incurred in this lawsuit must also not be included in these damages.[4] You must determine instead what other loss, if any, [plaintiff] has suffered or will suffer in the future caused by any [protected characteristic] discrimination that you find [defendant] has committed under the instructions I have given you. We call these compensatory damages. You may award compensatory damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other noneconomic losses if you determine that [plaintiff] has proven by a preponderance of the evidence that [she/he] has experienced any of these consequences as a result of [protected characteristic] discrimination. No evidence of the monetary value of intangible things like emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other noneconomic losses is available and there is no standard I can give you for fixing any compensation to be awarded for these injuries. Even though it is obviously difficult to establish a standard of measurement for these damages, that difficulty is not grounds for denying a recovery on this element of damages. You must, therefore, make the best and most reasonable estimate you can, not from a personal point of view, but from a fair and impartial point of view, of the amount of emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other noneconomic losses you find that [plaintiff] has undergone and can probably be expected to suffer in the future as a result of [defendant]'s conduct. And you must place a money value on this, attempting to come to a conclusion that will be fair and just to both of the parties. This will be difficult for you to measure in terms of dollars and cents, but there is no other rule I can give you for assessing this element of damages.

[5]{You may also award [plaintiff] prejudgment interest in an amount that you determine is appropriate to make [her/him] whole and to compensate [her/him] for the time between when [she/he] was injured and the day of your verdict. It is entirely up to you to determine the appropriate rate and amount of any prejudgment interest you decide to award.}

[6]{If you find that [plaintiff] is entitled to damages for losses that will occur in the future, you will have to reduce this amount, whatever it may be, to its present worth. The reason for this is that a sum of money that is received today is worth more than the same money paid out in installments over a period of time, since a lump sum today, such as any amount you might award in your verdict, can be invested and earn interest in the years ahead.

You have heard testimony concerning the likelihood of future inflation and what rate of interest any lump sum could return. In determining the present lump sum value of any future earnings you conclude [plaintiff] has lost or future damages [plaintiff] will suffer, you should consider only a rate of interest based on the best and safest investments, not the general stock market, and you may set off against it a reasonable rate of inflation.[7]}

[8]{[Plaintiff] has the duty to mitigate [her/his] damages—that is, to take reasonable steps that would reduce the damages. If [she/he] fails to do so, then [she/he] is not entitled to recover any damages that [she/he] could reasonably have avoided incurring. [Defendant] has the burden of proving by a preponderance of the evidence that [plaintiff] failed to take such reasonable steps.}

[9]{[Defendant] contends that it would have made the same decision to [specify adverse action] because [describe the after-discovered misconduct]. If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [specify adverse action] because of [describe the after-discovered misconduct],[10] you should limit any award of damages to the date [defendant] would have made the decision to [specify adverse action] as a result of [the after-discovered misconduct].[11]}

[12]{Causation}

{[13]If you have found [defendant] liable to [plaintiff], but find that [her/his] damages have no monetary value, you may award [her/him] nominal or token damages such as One Dollar ($1.00) or some other minimal amount.}

[14]{Tax Consequences}

---

[1] This instruction is for Title VII, Pregnancy Discrimination Act, ADA, Rehabilitation Act, § 1981, and § 1983 cases. Use Instruction 7.2 for ADEA cases and Instruction 7.5 for Equal Pay Act cases.

[2] Although the language of § 1981a includes "future pecuniary losses" in the list of compensatory damages available, it has not been included in this instruction because of the possibility that its inclusion might confuse the jury. Moreover, because, as the Supreme Court ruled in Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 852 (2001) (Title VII), front pay is not a "future pecuniary loss," it is not clear what damages might fit within the definition of "future pecuniary losses" in an employment discrimination case. See also Pollard, 532 U.S. at 852 (noting "[t]he term 'compensatory damages . . . for future pecuniary losses' is not defined in the statute. . . .").

Therefore, unless a plaintiff provides evidence of a type of harm that might reasonably be classified as a "future pecuniary loss," this instruction avoids the problem of asking the jury to distinguish between front pay and a "future pecuniary loss."

[3] Back pay and benefits are not jury issues in Title VII or ADA cases. Two statutory sections, §§ 1981a and 2000e-5(g) of Title 42, govern the damages available in a Title VII or ADA action. 42 U.S.C. §§ 1981a(b)(2), 2000e-5(g) (2001). Section 2000e-5(g) authorizes recovery of lost benefits, front pay, back pay, and interest on back pay. 42 U.S.C. § 2000e-5(g) (2001); see also Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 847-48 (2001) (Title VII) (outlining the damages available under §§ 1981a and 2000e-5(g)). Section 1981a(b) complements § 2000e-5(g) by authorizing both compensatory and punitive damages in situations where § 2000e-5(g) authorized only equitable remedies. 42 U.S.C. § 1981a (2001); see also Pollard, 532 U.S. at 847-48.

Section 1981a(a) authorizes a plaintiff to recover both: (1) the "compensatory and punitive damages" provided in § 1981a(b); and (2) "any relief authorized by" § 2000e-5(g). 42 U.S.C. § 1981a(a) (2001). However, § 1981a(b)(2) specifically excludes the relief authorized by § 2000e-5(g) from its definition of "compensatory

(continued next page)

damages." 42 U.S.C. § 1981a(b)(2) (2001). This distinction between the damages available under §§ 1981a and 2000e-5(g) is important because § 1981a(c) provides the right to a jury trial, whereas § 2000e-5(g) does not. 42 U.S.C. § 1981a(c) (2001) ("If a complaining party seeks compensatory or punitive damages under this section . . . any party may demand a trial by jury."); 42 U.S.C. § 2000e-5(g) (2001) ("If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."); see also Ramos v. Roche Prods., Inc., 936 F.2d 43, 49-50 (1st Cir. 1991) (Title VII) ("The First Circuit still adheres to its long-held rule precluding jury trials for equitable remedies under Title VII.").

There is some discussion of whether the enactment of § 1981a changed this rule. See Pollard, 532 U.S. at 847-48; see also Landgraf v. USI Film Prods., 511 U.S. 244, 252 n.4 (1994) (Title VII) ("We have not decided whether a plaintiff seeking backpay under Title VII is entitled to a jury trial."); Braverman v. Penobscot Shoe Co., 859 F. Supp. 596, 606 (D. Me. 1994) (ADA and ADEA) ("Whether a plaintiff who seeks backpay under either the ADA or Title VII is entitled to a jury trial is an open question." (citing Landgraf, 511 U.S. at 252 n.4)). However it is clear that the enactment of § 1981a did not change the remedies available under § 2000e-5(g), but rather provided additional remedies. Pollard, 532 U.S. at 852 ("Congress therefore made clear through the plain language of the statute that the remedies newly authorized under § 1981a were in addition to the relief authorized by [§ 2000e-5(g)].") More specifically, the Pollard Court held that even after the enactment of § 1981a, front pay was still an equitable rather than compensatory remedy. See id. at 852-53. Therefore, the well-established rule that the calculation of equitable remedies is within the discretion of the court, rather than subject to jury determination, continues to apply. See Lussier v. Runyon, 50 F.3d 1103, 1107-08 (1st Cir. 1995) (Rehabilitation Act of 1973, 29 U.S.C. § 794a (2001)) (Selya, J.) ("it follows *a fortiori* from the equitable nature of the remedy that the decision to award or withhold front pay is, at the outset, within the equitable discretion of the trial court"); Braverman, 859 F. Supp. at 606 (deciding that "[t]he Court will determine whether [the plaintiff] is entitled to backpay").

The total compensatory and punitive damages available under § 1981a (but not the benefits, front pay, back pay, or interest on back pay available under 42 U.S.C. § 2000e-5(g)) are limited according to the number of employees employed by the defendant. 42 U.S.C. § 1981a(b)(3); Pollard, 532 U.S. at 852 (holding that front pay, like back pay, is excluded from the damages cap in § 1981(b)(3)). However, the section also provides that "the court shall not inform the jury of [these] limitations." 42 U.S.C. § 1981a(c)(2).

But, in § 1983 cases, back pay is an issue for the jury as long as the plaintiff seeks some measure of compensatory damages in addition to back pay; if the plaintiff seeks only back pay, or back pay and reinstatement, then the calculation of the back pay award is an issue for the court rather than the jury. Saldana Sanchez v. Vega Sosa, 175 F.3d 35, 36 (1st Cir. 1999) (§ 1983) (citing Santiago-Negron v. Castro-Davila, 865 F.2d 431, 441 (1st Cir. 1989) (§ 1983)). Although not discussed explicitly in the case law, this same principle would presumably apply to § 1981 cases, and to an award of front pay under either section. See Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975) (Title VII and § 1981) ("An individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages."); Sinai v. New England Tel. & Tel. Co., 3 F.3d 471, 476 (1st Cir. 1993) (Title VII and § 1981) ("The jury was presented in the § 1981 claim with evidence concerning back pay, front pay, and emotional distress, and instructed to determine the appropriate level of damages for them."); T & S Serv. Assoc., Inc. v. Crenson, 666 F.2d 722, 728 n.7 (1st Cir. 1981) (§ 1981) ("Without deciding the issue, we note that the proper inquiry under § 1983 would likely focus on compensation, as under § 1981."); Hiraldo-Cancel v. Aponte, 925 F.2d 10, 13 (1st Cir. 1991) (§ 1983) (holding that an award of reinstatement is an equitable remedy, and thus within the discretion of the court). Therefore, it might be necessary to add a back pay component to this instruction in some §§ 1981 or 1983 cases. Backpay is not available against individual-capacity defendants, but "[p]roperly proven, [compensatory] damages will equal the grand total of the plaintiff's aggregate lost wages and benefits." Negron-Almeda v. Santiago, 528 F.3d 15, 26 (1st Cir. 2008).

Despite the foregoing analytical complexity, the First Circuit appears to be endorsing a practical solution. It has stated:

> In this circuit, juries are generally entrusted with decisions on back pay when the jurors are already resolving issues of liability and compensatory damages. . . . However, "[w]here only reinstatement and back pay are requested or if they are the only issues, in addition to liability, remaining in the case then both

(continued next page)

> reinstatement and back pay shall be for the court." . . . Awards of front pay, by contrast, are generally entrusted to the district judge's discretion . . . .

Johnson v. Spencer Press of Maine, Inc., 364 F.3d 368, 379-80 & n.7 (1st Cir. 2004) (citation omitted). In a case in which the jury determined liability and awarded backpay damages but there was a significant delay (a few months) between the verdict, the court's entry of judgment, and the plaintiff's ultimate reinstatement to his employment position, the district court awarded damages for wages lost during the period between the jury verdict and reinstatement. Harding v. Cianbro Corp., 498 F. Supp. 2d 337 (D. Me. 2007). Acknowledging that the First Circuit had "not specifically addressed the issue," id. at 340, the court determined that it had the authority to order recovery for the post-verdict period the jury could not anticipate. "If the award is technically back pay, since it precedes the entry of judgment, the Court has authority to grant relief under the logic of [Banks v. Travelers Companies, 180 F.3d 358, 364 (2d Cir. 1999)]. If the award is technically front pay, the Court has the authority to grant relief under [Johnson v. Spencer Press of Me., Inc., 364 F.3d 368, 379-80 (1st Cir. 2004)]." Id. at 342.

[4] See, e.g., Zimmerman v. Direct Fed. Credit Union, 262 F.3d 70, 79 (1st Cir. 2001) (a case under Massachusetts discrimination law, but recognizing that "the heavy weight of authority holds that litigation-induced stress is not ordinarily recoverable as an element of damages") (citing Picogna v. Bd. of Educ. of Cherry Hill, 671 A.2d 1035, 1038 (N.J. 1996); Stoleson v. United States, 708 F.2d 1217, 1223 (7th Cir. 1983)).

[5] There is some conflict in the caselaw about whether this is a question for the jury or for the court. In a § 1983 case, "it is the jury that must decide whether prejudgment interest is warranted." Foley v. City of Lowell, Mass., 948 F.2d 10, 17 (1st Cir. 1991) (§ 1983); accord Cordero v. De Jesus-Mendez, 922 F.2d 11, 13 (1st Cir. 1990) (§ 1983) ("There can be no doubt that in this circuit the decision to award prejudgment interest in a federal question case lies within the sole province and discretion of the jury."); id. ("[I]n an action brought under 42 U.S.C. § 1983, the issue of prejudgment interest is so closely allied with the issue of damages that federal law dictates that the jury should decide whether to assess it.") (citing Furtado v. Bishop, 604 F.2d 80, 97-98 (1st Cir. 1979) (§ 1983)). In other types of cases, the First Circuit has generally held that "[t]he decision to award prejudgment interest is within the discretion of the trial court." Criado v. IBM Corp., 145 F.3d 437, 446 (1st Cir. 1998) (ADA); accord Troy v. Bay State Computer Group, Inc., 141 F.3d 378, 383 (1st Cir. 1998) (Title VII); Hogan v. Bangor & Aroostook R.R. Co., 61 F.3d 1034, 1038 (1st Cir. 1995) (ADA); Powers v. Grinnell Corp., 915 F.2d 34, 41 (1st Cir. 1990) (ADEA); Conway v. Electro Switch Corp., 825 F.2d 593, 602 (1st Cir. 1987) (Title VII); cf. Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist., 648 F.2d 761, 763 (1st Cir.) (§§ 1981 and 1983) ("we agree" that "prejudgment interest is required to make injured parties whole when the injuries they suffer are not 'intangible'"), rev'd and vacated on other grounds by 454 U.S. 807 (1981), remanded to 670 F.2d 1 (1st Cir. 1982) (reaffirming unaffected conclusions). However, in at least one case, the court made this statement even though the trial court submitted the question of prejudgment interest to the jury. Scarfo v. Cabletron Sys., Inc., 54 F.3d 931, 960-61 (1st Cir. 1995) (Title VII and EPA). In still another case, the court implied that prejudgment interest is a jury question, citing the rule that governs prejudgment interest in § 1983 cases: "[P]laintiff did not request prejudgment interest from the jury. He was therefore barred from subsequently seeking it from the judge." Kolb v. Goldring, Inc., 694 F.2d 869, 875 (1st Cir. 1982) (ADEA).

This confusion likely flows from the language of the court's holding in Earnhardt v. Puerto Rico, 744 F.2d 1 (1st Cir. 1984) (Title VII), language that has been cited in most of the subsequent cases to discuss the issue. In Earnhardt, a bench trial where the plaintiff did not request prejudgment interest until he filed a motion to amend the judgment, the First Circuit held (without citation to any other authority):

> The determination of the amount of damages is, absent legal error, a matter for the finder of fact. It cannot be said that either prejudgment interest or an award for lost fringe benefits must, as a matter of law, be part of the damages awarded in a Title VII case. The question of whether they are necessary to make a plaintiff whole is within the discretion of the district court.

Id. at 3.

Considering all of these cases, it appears that the rule in the First Circuit is that prejudgment interest is a jury question in § 1983 cases. (If a § 1983 plaintiff fails to ask the jury for prejudgment interest, he or she may not later ask the judge to award it. Foley, 948 F.2d at 17; Cordero, 922 F.2d at 13.) For employment discrimination cases other than § 1983 cases, an award of prejudgment interest is within the court's discretion, but the court may also exercise that discretion by submitting the question to the jury. This bracketed paragraph may be used in cases where the question of prejudgment interest is submitted to the jury.

[6] These bracketed paragraphs may be used in cases where the plaintiff's claimed damages include future

(continued next page)

losses, such as retirement benefits, that must be reduced to net present value. See Loeb v. Textron, Inc., 600 F.2d 1003, 1021 (1st Cir. 1979) (ADEA) ("any pension benefits due a prevailing plaintiff normally should be liquidated as of the date damages are settled, and should approximate the present discounted value of plaintiff's interest" (internal citation omitted)).

[7] "The discount rate should be based on the rate of interest that would be earned on the 'best and safest investments.'" Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 537 (1983) (longshoreman's workers' compensation) (quoting Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 491 (1916) (Federal Employers' Liability Act)). The "best and safest investments" are those which provide a "risk-free stream of future income," not those made by "investors who are willing to accept some risk of default." Pfeifer, 462 U.S. at 537; Kelly, 241 U.S. at 490-91.

[8] This bracketed paragraph may be used in cases where the plaintiff's duty to mitigate damages is an issue. See Hazel v. U.S. Postmaster Gen., 7 F.3d 1, 5 (1st Cir. 1993) (ADEA and Title VII) (holding that plaintiff could not recover, even if he proved discrimination, because he failed to mitigate his damages). In cases where a back pay instruction is called for, see supra note 122, an additional instruction regarding the plaintiff's duty to seek comparable employment and the "mitigation-defense exception" may also be appropriate. See infra ADEA Damages, section 7.2, and note 142.

[9] This bracketed paragraph may be used in cases where the defendant argues that it was entitled to take the challenged employment action because of after-acquired information about misconduct by the plaintiff. Although information acquired after the challenged employment action may not be considered when assessing the defendant's liability, it may be relevant to the amount of the plaintiff's damages. See McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361-63 (1995) (ADEA), cited in Equal Employment Opportunity Comm'n v. Amego, Inc., 110 F.3d 135, 146 n.9 (1st Cir. 1997) (ADA); Serafino v. Hasbro, Inc., 82 F.3d 515, 519 (1st Cir. 1996) (Title VII); see also Sabree v. United Bhd. of Carpenters and Joiners Local No. 33, 921 F.2d 396, 404-05 (1st Cir. 1990) (Title VII). This bracketed paragraph is not appropriate when the defendant knew of the misconduct in question before it took the challenged employment action. See Perkins v. Brigham & Women's Hosp., 78 F.3d 747, 751 (1st Cir. 1996) (Title VII).

[10] McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 362-63 (1995) (ADEA) ("[A]n employer seek[ing] to rely upon after-acquired evidence of wrongdoing . . . must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.").

[11] The effect of after-acquired evidence of misconduct on the calculation of damages is not precisely defined. In McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361-62 (1995) (ADEA), the Court noted that, "as a general rule . . . neither reinstatement nor front pay is an appropriate remedy," and that "[t]he beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered." The Court added that: "In determining the appropriate order for relief, the court can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party." Id. at 362. We have not resolved how to account for such "extraordinary equitable circumstances" in this jury charge.

[12] This instruction does not include language for use in cases where there is a question as to whether the defendant's conduct caused the plaintiff's injury. In a case where the causal link between the challenged conduct and the claimed damages is disputed (e.g., when the plaintiff claims emotional injury and the defendant claims that other factors in the plaintiff's environment caused the emotional distress), it will be necessary to add appropriate causation language.

[13] A nominal damages instruction need not be given to the jury. If a liability verdict is returned without damages, the plaintiff may make a timely nominal damages request to the judge. See Nazario v. Rodriguez, 554 F.3d 196 (1st Cir. 2009); Azimi v. Jordan's Meats, Inc., 456 F.3d 228, 240 (1st Cir. 2006). Title VII and § 1981 do not "provide statutory authority for automatic or presumptive damages." Azimi, 456 F.3d at 234. In Kerr-Selgas v. American Airlines, Inc., 69 F.3d 1205, 1214-15 (1st Cir. 1995) (Title VII), the court held that: "Although nominal damages are recoverable in intentional discrimination cases under 42 U.S.C. § 1981a(a)(1), . . . a liability verdict [does not] *compel[]* such an award absent a timely request." See also Provencher v. CVS Pharmacy, 145 F.3d 5, 11 n.4 (1st Cir. 1998) (Title VII). According to Romano v. U-Haul Int'l, 233 F.3d 655, 671 (1st Cir. 2000) (Title VII), nominal damages are not limited to $1, but $500 is too high. See also Magnett v. Pelletier, 488 F.2d 33, 35 (1st Cir. 1973) (§ 1983).

(continued next page)

[14] Whether the damages a plaintiff recovers are taxable depends on both the statutory source of the recovery and the type of injury the plaintiff sustained, because the federal tax code excludes from taxable income "any damages . . . received . . . on account of personal physical injuries or physical sickness." 26 U.S.C. § 104; see also, e.g., O'Gilvie v. United States, 519 U.S. 79 (1996) (tax case; medical malpractice) (punitive damages awards are taxable); Commissioner v. Schleier, 515 U.S. 323 (1995) (tax case; ADEA) (back pay and liquidated damages awards in ADEA case are both taxable); United States v. Burke, 504 U.S. 229 (1992) (tax case; Title VII) (before 1991 amendment, Title VII damages were not "tort-like" and thus were taxable); Dotson v. United States, 87 F.3d 682, 685-86 (5th Cir. 1996) (tax case; ERISA) (applying Schleier and Burke in ERISA case); Wulf v. City of Wichita, 883 F.2d 842, 871-75 (10th Cir. 1989) (§ 1983) (examining decisions by the Third, Fourth and Ninth circuits); Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1579-80 (5th Cir. 1989) (Title VII and § 1983) ("The distinction between the § 1983 award and the Title VII award is important for federal income tax purposes."); Thompson v. Commissioner, 866 F.2d 709, 712 (4th Cir. 1989) (tax case: Title VII and Equal Pay Act). As a general rule, tort-type damages are non-taxable, even if they include damages based on the plaintiff's lost wages, but an award that more closely resembles contract damages, such as an award of back pay, is taxable.

Even after the tax status of each element of a plaintiff's claimed damages is properly established, it is not clear how the tax status of any particular element should affect the final calculation of damages. For example, consider a case involving lost wages. If those wages had been paid properly, they would have been taxed when earned. Therefore, an argument could be made that any award should be reduced to reflect the after-tax value based on the tax rate the plaintiff was subject to in the year in question. On the other hand, an amount the plaintiff receives for those lost wages may be taxable when the plaintiff receives them; thus an argument could be made that the plaintiff's damages should be enhanced so that the he or she actually receives, after taxes, the amount the jury awarded. As a practical matter, these two factors may offset each other, in which case there is no reason to include a jury instruction about the tax consequences of an award. For an example of the difficulty of resolving this issue, see Wulf, 883 F.2d at 873. See also Johnston, 869 F.2d at 1580 ("We decline to require district courts to act as tax consultants every time they grant back pay awards, speculating as to what deductions and shelters the plaintiff will find, and then calculating the plaintiff's potential tax liability.")

This instruction does not attempt to resolve these issue. In a case where the tax consequences of all or part of a damages award are at issue, it will be necessary to supplement the language of this instruction to reflect the particular circumstances of that case.

8.2 ADEA Damages[1]

[Updated: 7/24/08]

Pattern Jury Instruction

The fact that I instruct you on damages does not represent any view by me that you should or should not find [defendant] liable.

If you find that [defendant] unlawfully discriminated against [plaintiff] on the basis of [her/his] age, then you must determine the amount of damages, if any, that [plaintiff] has sustained up to the date of this trial. You may award [plaintiff] an amount equal to the pay and benefits that [she/he] would have received from [defendant] if the age discrimination had not occurred.[2] You should deduct from this sum whatever wages [plaintiff] has obtained from other employment during this same period, from the date of the discrimination to the date of this trial.

[3]{You may also award [plaintiff] prejudgment interest in an amount that you determine is appropriate to make [her/him] whole and to compensate [her/him] for the time between when [she/he] was injured and the day of your verdict. It is entirely up to you to determine the appropriate rate and amount of any prejudgment interest you decide to award.}

[4]{If you find that [plaintiff] is entitled to damages for losses that will occur in the future, you will have to reduce this amount, whatever it may be, to its present worth. The reason for this is that a sum of money that is received today is worth more than the same money paid out in installments over a period of time, since a lump sum today, such as any amount you might award in your verdict, can be invested and earn interest in the years ahead.

You have heard testimony concerning the likelihood of future inflation and what rate of interest any lump sum could return. In determining the present lump sum value of any future earnings you conclude [plaintiff] has lost or future damages [plaintiff] will suffer, you should consider only a rate of interest based on the best and safest investments, not the general stock market, and you may set off against it a reasonable rate of inflation.[5]}

[6]{[Plaintiff] has the duty to mitigate [her/his] damages—that is, to take reasonable steps that would reduce the damages. If [she/he] fails to do so, then [she/he] is not entitled to recover any damages that [she/he] could reasonably have avoided incurring. [Defendant] has the burden of proving by a preponderance of the evidence that [plaintiff] failed to take such reasonable steps.}

[7]{The duty to mitigate damages includes the duty to seek other comparable employment. If you find that [plaintiff] made no effort to find comparable employment, then you shall award [him/her] no lost pay. However, if [plaintiff] persuades you by a preponderance of the evidence that [he/she] made some effort to find comparable employment, then [defendant] has the burden of persuading you by a preponderance of the evidence that substantially equivalent jobs were nevertheless available in the relevant geographic area and that [plaintiff] failed to use reasonable diligence to obtain such employment. If [defendant] does so persuade you, then you shall deduct from any lost pay award those amounts that you find [plaintiff] could have earned by exercising reasonable diligence in a search for suitable employment.}

[8]{[Defendant] contends that it would have made the same decision to [specify adverse action] because [describe the after-discovered misconduct]. If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [specify adverse action] because of [describe the after-discovered misconduct],[9] you should limit any award of damages to the date [defendant] would have made the decision to [specify adverse action] as a result of [the after-discovered misconduct].[10]}

[11]{If you find that [defendant] [specify adverse action] [plaintiff] because of [her/his] age, you must then determine whether [defendant]'s conduct was "willful."[12] "Willful" means that [defendant] either knew that its conduct was prohibited by federal law or showed reckless disregard for the matter. Under this standard, [plaintiff] need not show that [defendant]'s conduct was outrageous and [she/he] need not show direct evidence of [defendant]'s motivation. As I have said for motive, you may (but do not have to) infer willfulness from the existence of those facts that you find have been proven by a preponderance of the evidence.} If [defendant] believed, in good faith, that its conduct was legal, then [defendant]'s conduct was not "willful."[13]

[14]{The age discrimination here was on the part of [identify individual(s)]. You may find that [defendant]'s conduct was "willful" only if you find that [defendant] ratified or authorized [identify individual(s) who discriminated]'s actions or that they committed the wrongful conduct while they were serving in a managerial capacity and were acting within the scope of their employment. Conduct is within the scope of employment if the conduct is the kind of activity the employee was hired to perform and was actuated at least in part by the purpose to serve [defendant].}

[15]{However, if you determine that [defendant] made reasonable, good faith efforts to comply with the federal law forbidding age discrimination, then [defendant]'s conduct was not "willful."[16] In determining the good faith of [defendant], you may consider whether [defendant] instituted policies prohibiting age discrimination, and trained its personnel to ensure equal treatment of its employees, regardless of age. On this issue of good faith, the defendant bears the burden of proof.}

[17]{Causation}

[18]{Nominal Damages}

[19]{Tax Consequences}

[20]{Set-off of Pension or Social Security benefits}

I have prepared a special verdict form to assist you in addressing these issues.

---

[1] The Supreme Court described the interrelation of the ADEA and other employment discrimination laws in McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995) (ADEA):

The ADEA incorporates some features of both Title VII and the Fair Labor Standards Act of 1938,

(continued next page)

> which has led us to describe it as something of a hybrid. The substantive, antidiscrimination provisions of the ADEA are modeled upon the prohibitions of Title VII. Its remedial provisions incorporate by reference the provisions of the Fair Labor Standards Act of 1938. When confronted with a violation of the ADEA, a district court is authorized to afford relief by means of reinstatement, backpay, injunctive relief, declaratory judgment, and attorney's fees. In the case of a willful violation of the Act, the ADEA authorizes an award of liquidated damages equal to the backpay award. The Act also gives federal courts the discretion to grant such legal or equitable relief as may be appropriate to effectuate the purposes of the Act.

Id. at 357-58 (citations omitted).

The statute provides the right to a jury trial on the issue of liability and back pay (or other related elements of damages). See 29 U.S.C. 626(c)(2) (2001) ("[A] person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action."); see also Kolb v. Goldring, Inc., 694 F.2d 869, 871 (1st Cir. 1982) (ADEA) ("Jury trials of age discrimination claims fall under the contract rubric. The action is for 'amounts owing.'"); Sanchez v. Puerto Rico Oil Co., 37 F.3d 712 (1st Cir. 1994) (ADEA) (reviewing jury's award of back pay in ADEA case).

[2] The damages available in an ADEA case include "items of pecuniary or economic loss such as wages, fringe, and other job-related benefits." Kolb v. Goldring, Inc., 694 F.2d 869, 872 (1st Cir. 1982) (ADEA) (citations omitted).

An award of either reinstatement or front pay in lieu of reinstatement is an equitable remedy, and thus within the discretion of the trial court. Kelley v. Airborne Freight Corp., 140 F.3d 335, 354 (1st Cir. 1998) (ADEA) ("Within federal employment discrimination law, front pay is generally an equitable remedy awarded by the court. . . ."); Wildman v. Lerner Stores Corp., 771 F.2d 605, 616 (1st Cir. 1985) (ADEA), abrogated on other grounds by Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air, 483 U.S. 711, 717-18 (1987), cited by Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 851 n.1 (2001) (Title VII) ("Future damages should not be awarded unless reinstatement is impracticable or impossible; the district court, then, has discretion to award front pay. Because future damages are often speculative, the district court, in exercising its discretion, should consider the circumstances of the case, including the availability of liquidated damages."). Future economic damages, such as front pay, are only available as a substitute for reinstatement. Kolb, 694 F.2d. at 875 n.4 (Unless a plaintiff seeks reinstatement he or she "cannot . . . recover damages for future economic loss, or 'front pay,' even though the injury continues."); see also Kelley, 140 F.3d at 353 ("Under the ADEA, though the district court has equitable power to award front pay when plaintiff has 'no reasonable prospect of obtaining comparable alternative employment,' future damages should not be awarded unless reinstatement is impracticable or impossible." (citations omitted)).

Non-pecuniary, non-contractual damages such as pain and suffering and punitive damages are not available. Commissioner of Internal Revenue v. Schleier, 515 U.S. 323, 326 & n.2 (1995) (tax case involving ADEA award) (citing Vazquez v. Eastern Air Lines, Inc., 579 F.2d 107, 112 (1st Cir. 1978) (ADEA)) ("[T]he ADEA does not permit a separate recovery of compensatory damages for pain and suffering or emotional distress."); Collazo v. Nicholson, 535 F.3d 41, 44 (1st Cir. 2008) ("[I]t is well-established that the statute does not allow compensatory damages for pain and suffering."); Loeb v. Textron, Inc., 600 F.2d 1003, 1022 (1st Cir. 1979) (ADEA) ("While [the language of the ADEA] is expansive, we have noted previously that it is limited for the most part by the remedies available under the [Fair Labor Standards Act, 29 U.S.C. §§ 216, 217 (2001)], and thus have held that damages for pain and suffering are not available under the FLSA, except to the extent that they are encompassed by liquidated damages." (citations omitted)).

[3] There is some conflict in the caselaw about whether this is a question for the jury or for the court. The First Circuit has generally held that "[t]he decision to award prejudgment interest is within the discretion of the trial court." Criado v. IBM Corp., 145 F.3d 437, 446 (1st Cir. 1998) (ADA); accord Troy v. Bay State Computer Group, Inc., 141 F.3d 378, 383 (1st Cir. 1998) (Title VII); Hogan v. Bangor & Aroostook R.R. Co., 61 F.3d 1034, 1038 (1st Cir. 1995) (ADA); Powers v. Grinnell Corp., 915 F.2d 34, 41 (1st Cir. 1990) (ADEA); Conway v. Electro Switch Corp., 825 F.2d 593, 602 (1st Cir. 1987) (Title VII); cf. Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist., 648 F.2d 761, 763 (1st Cir.) (§§ 1981 and 1983) ("we agree" that "prejudgment interest is required to make injured parties whole when the injuries they suffer are not 'intangible'"), rev'd and vacated on other grounds by 454 U.S. 807 (1981), remanded to 670 F.2d 1 (1st Cir. 1982) (reaffirming unaffected conclusions). However, in at least one case, the court made this statement even though the trial court submitted the question of prejudgment interest to the jury. Scarfo v. Cabletron Sys., Inc., 54 F.3d 931, 960-61 (1st Cir. 1995) (Title VII and EPA). In another case, the

(continued next page)

court implied that prejudgment interest is a jury question, citing the rule that governs prejudgment interest in 1983 cases, see discussion of the rule governing prejudgment interest in § 1983 cases supra note 124: "[P]laintiff did not request prejudgment interest from the jury. He was therefore barred from subsequently seeking it from the judge." Kolb v. Goldring, Inc., 694 F.2d 869, 875 (1st Cir. 1982) (ADEA).

This confusion likely flows from the language of the court's holding in Earnhardt v. Puerto Rico, 744 F.2d 1 (1st Cir. 1984) (Title VII), language that has been cited in most of the subsequent cases to discuss the issue. In Earnhardt, a bench trial where the plaintiff did not request prejudgment interest until he filed a motion to amend the judgment, the First Circuit held (without citation to any other authority):

> The determination of the amount of damages is, absent legal error, a matter for the finder of fact. It cannot be said that either prejudgment interest or an award for lost fringe benefits must, as a matter of law, be part of the damages awarded in a Title VII case. The question of whether they are necessary to make a plaintiff whole is within the discretion of the district court.

Id. at 3.

Considering all of these cases, it appears that an award of prejudgment interest in an ADEA case is within the court's discretion, but the court may exercise that discretion by submitting the question to the jury. This bracketed paragraph may be used in cases where the question of prejudgment interest is submitted to the jury.

Prejudgment interest is not available if the plaintiff is awarded liquidated damages. Powers v. Grinnell Corp., 915 F.2d 34, 41 (1st Cir. 1990) (ADEA).

[4] These bracketed paragraphs may be used in cases where the plaintiff's claimed damages include future losses, such as retirement benefits, that must be reduced to net present value. See Loeb v. Textron, Inc., 600 F.2d 1003, 1021 (1st Cir. 1979) (ADEA) ("any pension benefits due a prevailing plaintiff normally should be liquidated as of the date damages are settled, and should approximate the present discounted value of plaintiff's interest" (internal citation omitted)).

[5] "The discount rate should be based on the rate of interest that would be earned on the 'best and safest investments.'" Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 537 (1983) (longshoreman's workers' compensation) (quoting Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 491 (1916) (Federal Employers' Liability Act)). The "best and safest investments" are those which provide a "risk-free stream of future income," not those made by "investors who are willing to accept some risk of default." Pfeifer, 462 U.S. at 537; Kelly, 241 U.S. at 490-91.

[6] This bracketed paragraph may be used in cases where the plaintiff's duty to mitigate damages is an issue. See Hazel v. U.S. Postmaster Gen., 7 F.3d 1, 5 (1st Cir. 1993) (ADEA and Title VII) (holding that plaintiff could not recover, even if he proved discrimination, because he failed to mitigate his damages).

[7] This bracketed paragraph may be used in cases where there is a question whether the plaintiff has attempted to mitigate damages by seeking other employment. The instruction is based on Quint v. E.A. Staley Manuf. Co., 172 F.3d 1, 16 (1st Cir. 1999), an ADA case. In Quint, First Circuit described the general rule:

> "As long as the claimant has made some effort to secure other employment, the burden to prove failure to mitigate normally resides with the defendant-employer, which then must show that (i) though substantially equivalent jobs were available in the relevant geographic area, (ii) the claimant failed to use reasonable diligence to sure suitable employment."

Id. (citations omitted). The court then adopted the "mitigation-defense exception," holding that a defendant-employer is relieved of "the burden to prove the availability of substantially equivalent jobs in the relevant geographic area once it has been shown that the former employee made no effort to secure suitable employment." Id. Although Quint arose under the ADA, the court's reasoning suggests that the "mitigation-defense exception" is available in any employment discrimination case where the plaintiff's failure to seek comparable employment is an issue.

Although the First Circuit has not addressed a plaintiff's retirement or complete withdrawal from the workforce, several other circuits have held that plaintiffs are not entitled to back pay to the extent that they fail to remain in the labor market. E.g., Kirsch v. Fleet Street, Ltd., 148 F.3d 149, 168 (2d Cir. 1998) (ADEA) ("The backpay period ends prior to judgment . . . if the plaintiff has theretofore retired . . . ."); Hansard v. Pepsi-Cola Metropolitan Bottling Co., 865 F.2d 1461, 1468 (5th Cir. 1989) (ADEA) ("A plaintiff may not simply abandon his job search and continue to recover back pay."); Thorne v. City of El Segundo, 802 F.2d 1131, 1136 (9th Cir. 1986) (Title VII) ("[T]he backpay period may terminate [prior to judgment] if the plaintiff has voluntarily removed herself from the job market."). That the back pay period ends once a plaintiff has chosen to retire or withdraw from the

(continued next page)

labor market is a logical corollary of the duty to mitigate. In a case where the plaintiff's retirement or withdrawal is an issue, the following instruction may be warranted:

> "If you find that [plaintiff] at any point withdrew completely from the labor force, you shall not award [him/her] any lost wages for the period after that withdrawal. [Defendant] has the burden of proving by a preponderance of the evidence that [plaintiff] withdrew completely from the labor force. But if you find that despite any withdrawal, [plaintiff] continued actively to search for comparable work and would have re-entered the labor force if [he/she] had found comparable work, then you may continue to award damages for as long as [he/she] continued actively to search."

[8] This bracketed paragraph may be used in cases where the defendant argues that it was entitled to take the challenged employment action because of after-acquired information about misconduct by the plaintiff. Although information acquired after the challenged employment action may not be considered when assessing the defendant's liability, it may be relevant to the amount of the plaintiff's damages. See McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361-63 (1995) (ADEA), cited in Equal Employment Opportunity Comm'n v. Amego, Inc., 110 F.3d 135, 146 n.9 (1st Cir. 1997) (ADA); Serafino v. Hasbro, Inc., 82 F.3d 515, 519 (1st Cir. 1996) (Title VII) (Coffin, J.); see also Sabree v. United Bhd. of Carpenters and Joiners Local No. 33, 921 F.2d 396, 404-05 (1st Cir. 1990) (Title VII). This bracketed paragraph is not appropriate when the defendant knew of the misconduct in question before it took the challenged employment action. See Perkins v. Brigham & Women's Hosp., 78 F.3d 747, 751 (1st Cir. 1996) (Title VII) (holding affidavits properly admitted where information described in affidavits was known at the time of plaintiff's firing but affidavits were not created until after plaintiff filed suit).

[9] McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 362-63 (1995) (ADEA) ("[A]n employer seek[ing] to rely upon after-acquired evidence of wrongdoing . . . must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.").

[10] The effect of after-acquired evidence of misconduct on the calculation of damages is not precisely defined. In McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361-62 (1995) (ADEA), the Court noted that, "as a general rule . . . neither reinstatement nor front pay is an appropriate remedy," and that "[t]he beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered." The Court added that: "In determining the appropriate order for relief, the court can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party." Id. at 362. We have not resolved how to account for such "extraordinary equitable circumstances" in this jury charge.

[11] The next three bracketed paragraphs may be used in cases where the plaintiff seeks liquidated damages. The plaintiff is entitled to liquidated damages equal to the actual damages if the jury finds that the defendant's conduct was "willful." 29 U.S.C. §§ 216(b), 626(b) (2001). Because the size of the liquidated damages award is non-discretionary, this instruction does not explain why the jury is asked to decide the question of willfulness. See, e.g., Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 716 (1st Cir. 1994) (ADEA) (reviewing case where trial court calculated liquidated damages by doubling the jury's back pay award).

[12] "[A] violation is considered willful if 'the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 721 (1st Cir. 1994) (ADEA) (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 126 (1985) (ADEA)). A plaintiff who receives liquidated damages is not eligible for pre-judgment interest on his or her back pay award. Powers v. Grinnell Corp., 915 F.2d 34, 39-42 (1st Cir. 1990) (ADEA) ("[A]n award of liquidated damages under the ADEA precludes a recovery of prejudgment interest on the back pay award.").

[13] Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 129 (1985) (ADEA).

[14] The next two bracketed paragraphs should be used only in vicarious liability cases. For a discussion of vicarious liability and punitive damages in a Title VII, ADA or civil rights case, see notes 175-178.

[15] This bracketed paragraph should only be used in cases where the employee who committed the wrongful conduct was serving in a managerial capacity. In cases where the employer ratified or authorized the discriminatory actions, this defense is not available. See Kolstad v. American Dental Ass'n, 527 U.S. 526, 542-45 (1999) (Title VII).

[16] Reasonable good faith efforts to conform policies or conduct to the requirements of the ADEA are a defense. Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 721-22 (1st Cir. 1994) (ADEA).

(continued next page)

[17] This instruction does not include language for use in cases where there is a question as to whether the defendant's conduct caused the plaintiff's injury. In a case where the causal link between the challenged conduct and the claimed damages is disputed, it will be necessary to add appropriate causation language.

[18] This instruction does not include a nominal damages charge, because it is not clear in the case law or from the statute whether nominal damages are either authorized or necessary in an ADEA case. No First Circuit case has yet addressed this issue. The language of the statute is broad, and thus could be read to authorize nominal damages, but, because of the nature of the remedies available under the ADEA, it is unlikely that an award of nominal damages would "effectuate the purposes" of the Act. 29 U.S.C. § 626(b) (2001). In other contexts a nominal damages award is given in order to support a corresponding award of punitive damages. But in an ADEA case the only punitive damages available are liquidated damages, which are automatically calculated by doubling the back pay award. A second reason why a plaintiff might seek nominal damages is to justify an award of attorney's fees. However, this proposition is undermined by the Supreme Court's holding in Farrar v. Hobby, 506 U.S. 103 (1992) (§ 1983), that: "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all." Id. at 115 (citations omitted); see also Coutin v. Young & Rubicam P.R., Inc., 124 F.3d 331, 339 (1st Cir. 1997) (Title VII) ("Farrar, then, signifies that fees need not be bestowed if the plaintiff's apparent victory is 'purely technical or de minimis.'" (citing Farrar, 506 U.S. at 117); Diver v. Goddard Mem'l Hosp., 783 F.2d 6, 8 (1st Cir. 1986) (Fair Labor Standards Act, 29 U.S.C. 216(b)) (holding plaintiff entitled to minimal attorney's fees where plaintiff's degree of success could be "fairly characterized . . . as minimal"). Finally, because these instructions anticipate the use of a jury form with specific questions about culpability and damages, there is no need for a separate nominal damages award to establish a defendant's culpability in cases where the plaintiff has suffered no measurable damages. Therefore, there is no need for a nominal damages provision in this instruction.

[19] Whether the damages a plaintiff recovers are taxable depends on both the statutory source of the recovery and the type of injury the plaintiff sustained, because the federal tax code excludes from taxable income "any damages . . . received . . . on account of personal physical injuries or physical sickness." 26 U.S.C. § 104(a); see also, *e.g.*, O'Gilvie v. United States, 519 U.S. 79 (1996) (tax case; medical malpractice) (punitive damages awards are taxable); Commissioner v. Schleier, 515 U.S. 323 (1995) (tax case; ADEA) (back pay and liquidated damages awards in ADEA case are both taxable); United States v. Burke, 504 U.S. 229 (1992) (tax case; Title VII) (before 1991 amendment, Title VII damages were not "tort-like" and thus were taxable); Dotson v. United States, 87 F.3d 682, 685-86 (5th Cir. 1996) (tax case; ERISA) (applying Schleier and Burke in ERISA case); Wulf v. City of Wichita, 883 F.2d 842, 871-75 (10th Cir. 1989) (§ 1983) (examining decisions by the Third, Fourth and Ninth circuits); Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1579-80 (5th Cir. 1989) (Title VII and § 1983) ("The distinction between the § 1983 award and the Title VII award is important for federal income tax purposes."); Thompson v. Commissioner, 866 F.2d 709, 712 (4th Cir. 1989) (tax case: Title VII and Equal Pay Act). As a general rule, tort-type damages are non-taxable, even if they include damages based on the plaintiff's lost wages, but an award that more closely resembles contract damages, such as an award of back pay, is taxable.

Even after the tax status of each element of a plaintiff's claimed damages is properly established, it is not clear how the tax status of any particular element should affect the final calculation of damages. For example, consider a case involving lost wages. If those wages had been paid properly, they would have been taxed when earned. Therefore, an argument could be made that any award should be reduced to reflect the after-tax value based on the tax rate the plaintiff was subject to in the year in question. On the other hand, an amount the plaintiff receives for those lost wages may be taxable when the plaintiff receives them; thus an argument could be made that the plaintiff's damages should be enhanced so that the he or she actually receives, after taxes, the amount the jury awarded. As a practical matter, these two factors may offset each other, in which case there is no reason to include a jury instruction about the tax consequences of an award. For an example of the difficulty of resolving this issue, see Wulf, 883 F.2d at 873. See also Johnston, 869 F.2d at 1580 ("We decline to require district courts to act as tax consultants every time they grant back pay awards, speculating as to what deductions and shelters the plaintiff will find, and then calculating the plaintiff's potential tax liability.")

This instruction does not attempt to resolve these issues. In a case where the tax consequences of all or part of a damages award are at issue, it will be necessary to supplement the language of this instruction to reflect the particular circumstances of that case.

[20] Although the First Circuit has not addressed the issue, the prevailing view is that social security benefits are collateral and so should not be set-off against a back pay award. E.g., Maxwell v. Sinclair Int'l, 766 F.2d 788, 793-94 (3d Cir. 1985); Rasimas v. Michigan Dept. of Mental Health, 714 F.2d 614, 627 (6th Cir. 1983). There is
(continued next page)

conflicting authority regarding whether pension benefits are subject to set-off. Compare Fariss v. Lynchburg Foundry, 769 F.2d 958 (4th Cir. 1985) (set-off) with McDowell v. Avtex Fibers, Inc., 740 F.2d 214, 217-18 (3d Cir. 1984), vacated and remanded on other grounds, 469 U.S. 1202 (1985); Doyne v. Union Elec. Co., 953 F.2d 447, 451 (8th Cir. 1992); Guthrie v. J.C. Penney Co., Inc., 803 F.2d 202, 209 (5th Cir. 1986). Pensions paid from retirement plans that are separate entities from the employer may be considered collateral. Doyne, 953 F.2d at 451. Ultimately, the propriety of a set-off will depend on the nature and character of the benefit. Cf. Allen v. Exxon Shipping Co., 639 F. Supp. 1545 (D. Me. 1986) (set-off of disability payments appropriate because payments were made pursuant to a plan of the employer to provide for its own indemnification and were not in the nature of deferred compensation or fringe benefit). This instruction does not attempt to address these issues.

8.3 Special Verdict Form: ADEA Damages—Pretext Case

[Updated: 6/14/02]

Special Verdict Form

1. Has [plaintiff] proven by a preponderance of the evidence that were it not for age discrimination, [she/he] would not have been [specify adverse action]?

   Yes____ No____

   If "no," answer no further questions. If "yes," proceed to next question.

2. What damages do you award [plaintiff] to compensate [him/her] for lost pay and/or benefits that [she/he] would have received from [defendant] if the age discrimination had not occurred?

   $_____

   Proceed to next question.

3. Has [plaintiff] proven [defendant] willfully violated federal law by discriminating against [him/her] on the basis of [her/his] age?

   Yes____ No____

8.4 Equal Pay Act[1] Damages[2]

[Updated: 7/1/03]

Pattern Jury Instruction

The fact that I instruct you on damages does not represent any view by me that you should or should not find [defendant] liable.

If you find that [defendant] unlawfully discriminated against [plaintiff] on the basis of [her/his] sex by paying [her/him] different wages than it paid to [male/female] workers in jobs that required substantially equal skill, effort and responsibility as [plaintiff]'s job and that were performed under similar working conditions, you must then also determine whether [defendant]'s conduct was "willful."[3] "Willful" means that [defendant] either knew that its conduct was prohibited by federal law or showed reckless disregard for the matter.[4] Under this standard, [plaintiff] need not show that [defendant]'s conduct was outrageous and [she/he] need not show direct evidence of [defendant]'s motivation. As I have said for motive, you may (but do not have to) infer willfulness from the existence of those facts that you find have been proven by a preponderance of the evidence.

Once you have determined whether [defendant]'s conduct was willful, you must then determine the amount of damages, if any, that [plaintiff] has sustained.

If you find that [defendant] acted willfully, then [plaintiff] is entitled to damages for the period from [date three years before complaint was filed] until today. You may award [plaintiff] an amount equal to the difference between the amount of pay and benefits[5] that [plaintiff] received and the average amount that [male/female] employees with similar jobs, as I defined similarity earlier, received.[6]

If you find that [defendant] did not willfully discriminate, then you must consider only the time from [date two years before complaint was filed] to today. The amount of your award should be equal to the difference between the amount of pay and benefits that [plaintiff] received and the average amount that [male/female] employees with similar jobs, as I defined similarity earlier, received.

[7]{You may also award [plaintiff] prejudgment interest in an amount that you determine is appropriate to make [her/him] whole and to compensate [her/him] for the time between when [she/he] was injured and the day of your verdict. It is entirely up to you to determine the appropriate rate and amount of any prejudgment interest you decide to award.}

[8]{If you find that [plaintiff] is entitled to damages for losses that will occur in the future, you will have to reduce this amount, whatever it may be, to its present worth. The reason for this is that a sum of money that is received today is worth more than the same money paid out in installments over a period of time, since a lump sum today, such as any amount you might award in your verdict, can be invested and earn interest in the years ahead.

You have heard testimony concerning the likelihood of future inflation and what rate of interest any lump sum could return. In determining the present lump sum value of any future earnings you conclude [plaintiff] has lost or future damages [plaintiff] will suffer, you should consider only a rate of interest based on the best and safest investments, not the general stock market, and you may set off against it a reasonable rate of inflation.[9]}

[10]{Tax Consequences}

---

[1] Because the Equal Pay Act is substantively part of the Fair Labor Standards Act (FLSA), this instruction often relies upon FLSA case law to interpret the Equal Pay Act.

[2] This instruction does not ask the jury to assess liquidated damages because the amount of liquidated damages is calculated automatically, by doubling the actual damages award. See 29 U.S.C. § 216(b) (2001). The only variability in an award of liquidated damages is the defense provided by 29 U.S.C. § 260 for cases of good faith errors. 29 U.S.C. § 260 (2001) ("[I]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938 . . . the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title."). However the good faith question, unlike the question of willfulness, is explicitly committed to the discretion of the court rather than the jury. See Fowler v. Land Mgmt. Groupe, Inc., 978 F.2d 158, 162-63 (4th Cir. 1992) (Title VII and Equal Pay Act) (discussing distinction between determinations of "willfulness" and "good faith"). The First Circuit has suggested that a finding of willfulness may rule out a finding of good faith. Loeb v. Textron, Inc., 600 F.2d 1003, 1020 (1st Cir. 1979) (ADEA) (discussing the applicability of the FLSA's "good faith" requirement to the ADEA where the jury found the defendant had acted "willfully").

[3] Depending on whether or not the defendant's conduct was willful, the plaintiff's damages will be limited to a period beginning three or two years, respectively, before the suit was filed,. See Reich v. Newspapers of New England, Inc., 44 F.3d 1060, 1079 (1st Cir. 1995) (FLSA) (interpreting 29 U.S.C. § 255 (2001)).

[4] "FLSA violations are willful where the employer 'knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.'" Reich, 44 F.3d at 1079 (citing McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988) (FLSA)).

[5] An award for lost benefits must be based on losses the plaintiff suffered, not the cost that the defendant avoided. McMillan v. Mass. Soc'y for the Prevention of Cruelty to Animals, 140 F.3d 288, 305 (1st Cir. 1998) (Title VII and Equal Pay Act) (rejecting an award for lost benefits calculated as a percentage of lost salary where there was no evidence that the plaintiff suffered any loss in benefits as a result of a reduced salary). Therefore, in order to recover for lost insurance coverage, the plaintiff must show that he or she incurred out-of-pocket expenses as a result of the lost or diminished insurance coverage. Id. Similarly, to recover for retirement benefits, the plaintiff must show that the defendant employer's contribution to retirement benefits was tied to the plaintiff's salary. Id.

[6] McMillan v. Mass. Soc'y for the Prevention of Cruelty to Animals, 140 F.3d 288, 305 (1st Cir. 1998) (Title VII and Equal Pay Act) (affirming back pay award calculated by comparing the plaintiff's salary with the average of the salaries of equivalent employees). Damages other than back pay, benefits and liquidated damages are not available. See Vazquez v. E. Air Lines, Inc., 579 F.2d 107, 109 (1st Cir. 1978) (ADEA) ("courts have consistently refused to grant FLSA litigants compensatory damages, other than those allowed under 29 U.S.C. § 216(b)").

[7] There is some conflict in the caselaw about whether this is a question for the jury or for the court. The First Circuit has generally held that "[t]he decision to award prejudgment interest is within the discretion of the trial court." Criado v. IBM Corp., 145 F.3d 437, 446 (1st Cir. 1998) (ADA); accord Troy v. Bay State Computer Group, Inc., 141 F.3d 378, 383 (1st Cir. 1998) (Title VII); Hogan v. Bangor & Aroostook R.R. Co., 61 F.3d 1034, 1038 (1st Cir. 1995) (ADA); Powers v. Grinnell Corp., 915 F.2d 34, 41 (1st Cir. 1990) (ADEA); Conway v. Electro Switch Corp., 825 F.2d 593, 602 (1st Cir. 1987) (Title VII); cf. Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist., 648 F.2d 761, 763 (1st Cir.) (§§ 1981 and 1983) ("we agree" that "prejudgment interest is required to make injured parties whole when the injuries they suffer are not 'intangible'"), rev'd and vacated on other grounds by 454 U.S.

(continued next page)

807 (1981), remanded to 670 F.2d 1 (1st Cir. 1982) (reaffirming unaffected conclusions). However, in at least one case, the court made this statement even though the trial court submitted the question of prejudgment interest to the jury. Scarfo v. Cabletron Sys., Inc., 54 F.3d 931, 960-61 (1st Cir. 1995) (Title VII and EPA). In another case, the court implied that prejudgment interest is a jury question, citing the rule that governs prejudgment interest in § 1983 cases. Kolb v. Goldring, Inc., 694 F.2d 869, 875 (1st Cir. 1982) (ADEA) (citing Furtado v. Bishop, 604 F.2d 80, 97-98 (1st Cir. 1979) ("[P]laintiff did not request prejudgment interest from the jury. He was therefore barred from subsequently seeking it from the judge."). **[See discussion of the rule governing prejudgment interest in § 1983 cases supra note ___.]**

This confusion likely flows from the language of the court's holding in Earnhardt v. Puerto Rico, 744 F.2d 1 (1st Cir. 1984) (Title VII), language that has been cited in most of the subsequent cases to discuss the issue. In Earnhardt, a bench trial where the plaintiff did not request prejudgment interest until he filed a motion to amend the judgment, the First Circuit held (without citation to any other authority):

> The determination of the amount of damages is, absent legal error, a matter for the finder of fact. It cannot be said that either prejudgment interest or an award for lost fringe benefits must, as a matter of law, be part of the damages awarded in a Title VII case. The question of whether they are necessary to make a plaintiff whole is within the discretion of the district court.

Id. at 3.

Considering all of these cases, it appears that an award of prejudgment interest in an Equal Pay Act case is within the court's discretion, but the court may exercise that discretion by submitting the question to the jury. This bracketed paragraph may be used in cases where the question of prejudgment interest is submitted to the jury.

Prejudgment interest is not available if the plaintiff is awarded liquidated damages. Powers v. Grinnell Corp., 915 F.2d 34, 41 (1st Cir. 1990) (ADEA).

[8] These bracketed paragraphs may be used in cases where the plaintiff's claimed damages include future losses, such as retirement benefits, that must be reduced to net present value. See Loeb v. Textron, Inc., 600 F.2d 1003, 1021 (1st Cir. 1979) (ADEA) ("any pension benefits due a prevailing plaintiff normally should be liquidated as of the date damages are settled, and should approximate the present discounted value of plaintiff's interest" (internal citation omitted)).

[9] "The discount rate should be based on the rate of interest that would be earned on the 'best and safest investments.'" Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 537 (1983) (longshoreman's workers' compensation) (quoting Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 491 (1916) (Federal Employers' Liability Act)). The "best and safest investments" are those which provide a "risk-free stream of future income," not those made by "investors who are willing to accept some risk of default." Pfeifer, 462 U.S. at 537; Kelly, 241 U.S. at 490-91.

[10] Whether the damages a plaintiff recovers are taxable depends on both the statutory source of the recovery and the type of injury the plaintiff sustained, because the federal tax code excludes from taxable income "any damages . . . received . . . on account of personal physical injuries or physical sickness." 26 U.S.C. § 104; see also, e.g., O'Gilvie v. United States, 519 U.S. 79 (1996) (tax case; medical malpractice) (punitive damages awards are taxable); Commissioner v. Schleier, 515 U.S. 323 (1995) (tax case; ADEA) (back pay and liquidated damages awards in ADEA case are both taxable); United States v. Burke, 504 U.S. 229 (1992) (tax case; Title VII) (before 1991 amendment, Title VII damages were not "tort-like" and thus were taxable); Dotson v. United States, 87 F.3d 682, 685-86 (5th Cir. 1996) (tax case; ERISA) (applying Schleier and Burke in ERISA case); Wulf v. City of Wichita, 883 F.2d 842, 871-75 (10th Cir. 1989) (§ 1983) (examining decisions by the Third, Fourth and Ninth circuits); Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1579-80 (5th Cir. 1989) (Title VII and § 1983) ("The distinction between the § 1983 award and the Title VII award is important for federal income tax purposes."); Thompson v. Commissioner, 866 F.2d 709, 712 (4th Cir. 1989) (tax case: Title VII and Equal Pay Act). As a general rule, tort-type damages are non-taxable, even if they include damages based on the plaintiff's lost wages, but an award that more closely resembles contract damages, such as an award of back pay, is taxable.

Even after the tax status of each element of a plaintiff's claimed damages is properly established, it is not clear how the tax status of any particular element should affect the final calculation of damages. For example, consider a case involving lost wages. If those wages had been paid properly, they would have been taxed when earned. Therefore, an argument could be made that any award should be reduced to reflect the after-tax value based on the tax rate the plaintiff was subject to in the year in question. On the other hand, an amount the plaintiff receives for those lost wages may be taxable when the plaintiff receives them; thus an argument could be made that the

(continued next page)

plaintiff's damages should be enhanced so that the he or she actually receives, after taxes, the amount the jury awarded. As a practical matter, these two factors may offset each other, in which case there is no reason to include a jury instruction about the tax consequences of an award. For an example of the difficulty of resolving this issue, see Wulf, 883 F.2d at 873. See also Johnston, 869 F.2d at 1580 ("We decline to require district courts to act as tax consultants every time they grant back pay awards, speculating as to what deductions and shelters the plaintiff will find, and then calculating the plaintiff's potential tax liability.")

This instruction does not attempt to resolve these issue. In a case where the tax consequences of all or part of a damages award are at issue, it will be necessary to supplement the language of this instruction to reflect the particular circumstances of that case.

8.5 Special Verdict Form: Equal Pay Act Damages

[Updated: 6/14/02]

Special Verdict Form

1. Has [plaintiff] proven by a preponderance of the evidence that [defendant] violated federal law by discriminating against [her/him] on the basis of sex by paying [her/him] less than [male/female] workers in jobs that require substantially equal skill, effort and responsibility, and that are performed under similar working conditions?

Yes____ No____

If "no," answer no further questions. If "yes," proceed to next question.

2. Has [plaintiff] proven that [defendant] committed this violation of federal law willfully?

Yes____ No____

If "no," proceed to next question. If "yes," proceed to question 4.

2. What damages do you award [plaintiff] to compensate [her/him] for lost pay and/or benefits that [she/he] would have received from [defendant], from [date ***two*** years before plaintiff filed his or her complaint] until today, if the sex discrimination had not occurred?

Yes____ No____

Answer no further questions.

4. What damages do you award [plaintiff] to compensate [her/him] for lost pay and/or benefits that [she/he] would have received from [defendant], from [date ***three*** years before plaintiff filed his or her complaint] until today, if the sex discrimination had not occurred?

$_____

9.1 Punitive Damages[1]

[Updated: 3/1/10]

Pattern Jury Instruction

If you have awarded compensatory or nominal damages,[2] you may also award punitive damages to [plaintiff] under some circumstances. To obtain punitive damages, [plaintiff] must prove by a preponderance of the evidence[3] that in [specify adverse action], [defendant][4] either knew that its actions violated federal law or acted with reckless or callous[5] indifference to that risk.[6] If [plaintiff] satisfies this requirement, it is entirely up to you whether or not to award punitive damages. But it should be presumed that [plaintiff] has been made whole by compensatory damages, so you should award punitive damages only if [defendant's] culpability is so reprehensible as to warrant further sanctions to achieve punishment or deterrence.[7]

[8]{The [protected characteristic] discrimination here was on the part of [identify individual(s)]. You may hold [defendant] liable in punitive damages for [his/her/their] conduct only if you find that [defendant] ratified or authorized [his/her/their] actions or that [he/she/they] committed the wrongful conduct while [he/she/they] [was/were] (a) serving in a managerial capacity[9] and (b) acting within the scope of [his/her/their] employment. In deciding whether [identified individual(s)] [was/were] serving in a "managerial capacity," you should consider the type of authority [defendant] gave [him/her/them] and the amount of discretion [he/she/they] possessed in what was to be done and how it was to be accomplished. A managerial employee is one who supervises other employees and has responsibility for and authority over a particular aspect of the employer's business. An employee must be important, but need not be top management or an officer to be acting in a managerial capacity. Conduct is within the "scope of employment" if the conduct is the kind of activity the employee was hired to perform, occurs substantially within the authorized time and space limits and was motivated at least in part by the purpose to serve [defendant].}[10]

[11]{However, if you determine that [his/her/their] [protected characteristic] discrimination was contrary to [defendant]'s good faith efforts to comply with the federal law forbidding [protected characteristic] discrimination, [plaintiff] is not entitled to punitive damages. In determining the good faith of [defendant], you may consider whether, before the conduct in question, [defendant] instituted policies prohibiting discrimination, and trained its personnel to ensure equal treatment of [appropriate category, *e.g.*, women]. On this issue of good faith, the defendant bears the burden of proof.}

If you decide to award punitive damages, the amount[12] to be awarded is within your sound discretion. The purpose of a punitive damage award is to punish a defendant or deter a defendant and others from similar conduct in the future. Factors you may consider include, but are not limited to, the nature of [defendant]'s conduct (how reprehensible or blameworthy was it),[13] the impact of that conduct on [plaintiff], the ratio between the actual compensatory damages and the punitive damages,[14] the relationship between [plaintiff] and [defendant], the likelihood that [defendant] or others would repeat the conduct if the punitive award is not made, and any other circumstances shown by the evidence, including any mitigating or extenuating circumstances that bear on the size of such an award.[15] You may determine reprehensibility by considering

whether the harm was physical as opposed to economic; whether the conduct showed indifference to or disregard for the health or safety of others; whether the target of the conduct has financial vulnerability; whether the conduct involved repeated actions[16] or was an isolated instance; and whether the harm was the result of intentional malice, trickery, deceit, or mere accident.[17]

---

[1] This instruction is for Title VII, ADA, § 1981, and § 1983 cases. Use Instruction 7.2 for ADEA cases and Instruction 7.5 for Equal Pay Act cases. Punitive damages are available under 42 U.S.C. § 1981 for racial discrimination, under 42 U.S.C. § 1981a for discrimination prohibited under Title VII and Subchapter I of the Americans with Disabilities Act, and under 42 U.S.C. § 1983 for civil rights discrimination. 42 U.S.C. §§ 1981, 1981a(a), 1983 (2001); Iacobucci v. Boulter, 193 F.3d 14, 25-26 & n.7 (1st Cir. 1999) (§ 1983) (holding case law decided under § 1981a applicable to § 1983 punitive damages awards); McKinnon v. Kwong Wah Rest., 83 F.3d 498, 507 (1st Cir. 1996) (Title VII) ("[Section 1981a] permits courts to award damages in cases of intentional discrimination . . . in the same circumstances as such awards are permitted under 42 U.S.C. § 1981 for race discrimination."). Punitive damages are not available under § 202 of the ADA, 42 U.S.C. § 12132 (public entity discrimination), § 504 of the Rehabilitation Act, 29 U.S. C. § 794(a) (discrimination by entities that receive federal funding), or Title VI of the Civil Rights Act, 42 U.S.C. § 2000d (racial discrimination in federally funded programs and activities). Barnes v. Gorman, 536 U.S. 181, 189-90 (2002).

In any event, punitive damages generally are not available against a government, government agency, or a political subdivision. 42 U.S.C. § 1981a(b)(1) (2001); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270-71 (1981) (holding that punitive damages are not available in a § 1983 action against a municipality, and noting that similar immunity applied to "other units of state and local government"); Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist., 670 F.2d 1, 1-4 (1st Cir. 1982) (applying the City of Newport holding to § 1981 actions).

The First Circuit has suggested that in the small percentage of mixed motives cases where there is *no* direct, "unequivocal evidence that the defendant acted *at least in part* out of a reprehensible motive such as racial or gender discrimination or a clear-cut desire to punish free speech," "no evidence show[ing] that [the defendant] had any conscious purpose to violate the law," nor "circumstances [that] are vivid or egregious" because the plaintiff's "behavior over a substantial period would have given the most tolerant of employers reasons . . . to be rid of him," an award of punitive damages "would be wrong and close to a miscarriage of justice." Broderick v. Evans, 570 F.3d 68, 74-75 (1st Cir. 2009) (describing the § 1983 employment retaliation case as "very difficult . . . , prolonged by the lengthy [acrimonious] history between the parties" and affirming a district court's refusal to submit punitive damages to the jury even though "[a]t first blush, . . . a jury could infer that [an improper retaliatory] purpose . . . is inherently wicked or reckless").

[2] "[T]he law of this circuit is that no punitive damages may be awarded in a Title VII case in the absence of an award of compensatory damages or of nominal damages." Azimi v. Jordan's Meats, Inc., 456 F.3d 228, 237 (1st Cir. 2006). But the First Circuit has recognized that other circuits disagree and that it has not addressed the question in a § 1981 case. Id. at 238.

[3] In Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 23 n.11 (1991), the Supreme Court declined to impose the clear and convincing evidence standard on state punitive damages.

[4] This sentence should be modified as appropriate to satisfy the First Circuit's view that "the inquiry should focus on the acting party's state of mind." Romano v. U-Haul Int'l, 233 F.3d 655, 669 (1st Cir. 2000)

[5] The propriety of the term "callous indifference" may be debated. The statute refers only to "malice" and "reckless indifference" when authorizing punitive damages. 42 U.S.C. § 1981a(b)(1) (2001) (providing for punitive damages when defendant "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual"); see also Romano v. U-Haul Int'l, 233 F.3d 655, 669 (1st Cir. 2000) (Title VII); Marcano-Rivera v. Pueblo Int'l, Inc., 232 F.3d 245, 253-54 (1st Cir. 2000) (ADA) (discussing only "malice" and "reckless indifference"). However, the Supreme Court and the First Circuit have both stated that Congress modeled the punitive damages language of § 1981a on the language used in Smith v. Wade, 461 U.S. 30 (1983) (§ 1983). See Kolstad v. American Dental Ass'n, 527 U.S. 526, 535-36 (1999) (Title VII); Iacobucci v. Boulter, 193 F.3d 14, 26 n.7 (1st Cir. 1999) (§ 1983); see also McKinnon v. Kwong Wah Rest., 83 F.3d 498, 507 (1st Cir. 1996) (Title VII) ("The legislative history of the Section notes: Plaintiffs must . . . establish[] that the employer acted with malice or reckless or callous indifference to their rights . . . to recover punitive damages." (citations omitted)). Smith used the term "callous" as well as "reckless." Not

(continued next page)

surprisingly, then, several First Circuit cases have continued to use the "callous indifference" language, despite its absence from the language of § 1981a. Dimarco-Zappa v. Cabanillas, 238 F.3d 25, 37 (1st Cir. 2001) (§ 1983) (citing Smith v. Wade, 461 U.S. 30, 56 (1983)); Iacobucci, 193 F.3d at 26 (same). There is no indication in the language of any of these opinions that the use or omission of the word "callous" was conscious or significant. Instead, the courts all emphasize the importance of finding that the defendant acted in disregard of a "subjective consciousness" of the risk that his or her conduct might violate federal law. Therefore, in order for a party to object to the use (or omission) of the word "callous" from a jury instruction, that party would have to distinguish cases like Smith, Dimarco-Zappa, and Iacobucci that used the words "reckless" and "callous" seemingly interchangeably.

[6] This is a subjective standard, focused on the actor's state of mind. Powell v. Alexander, 391 F.3d 1, 15 (1st Cir. 2004). Moreover, the federal law in question must be the one on which the plaintiff obtained a liability verdict, not some other federal law. Id. at 18 (where claim was for a First Amendment violation, a defendant's knowledge that her actions might violate the ADA not enough). Evidence of egregious or outrageous acts is not sufficient, but it may be probative if it demonstrates awareness of the risk that the conduct would violate federal law. Id. at 19.

[7] This language comes from State Farm Mutual Auto Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003). The question of reprehensibility is for the jury. See Philip Morris USA v. Williams, 549 U.S. 346, 355 (2007); McDonough v. City of Quincy, 452 F.3d 8, 24 (1st Cir. 2006).

[8] The next two bracketed paragraphs of this instruction are for vicarious liability cases. Romano v. U-Haul Int'l, 233 F.3d 655 (1st Cir. 2000) (Title VII), describes Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999) (Title VII), as permitting vicarious liability for punitive damages in four situations:

> (1) when the agent has been authorized by the principal to commit the misconduct in question; (2) when the principal recklessly employed the unfit agent; (3) when the agent, acting in a managerial capacity, committed the misconduct within the scope of employment; or, (4) when the agent's bad act was subsequently approved the by principal.

233 F.3d at 669. The instruction deals only with situations (3) and (4), the ones most likely to arise. It also reflects the Romano description of a Kolstad limitation: "absolving an employer from liability for punitive damages if a good-faith effort to comply with the requirements of Title VII is made." Id. According to Romano, this is an affirmative defense where the defendant bears the burden of proof: "We hold that a written non-discrimination policy is one indication of an employer's efforts to comply with Title VII. But a written statement, without more, is insufficient to insulate an employer from liability. A defendant must also show that efforts have been made to implement its policy, through education of its employees and active enforcement of its mandate." Id. at 670; see also Kolstad, 527 U.S. at 544-46 (outlining the justification for the "good faith effort" safe harbor).

The First Circuit has not addressed the issue of whether punitive damages are appropriate where the harassment was by a coworker. The circuits that have addressed this issue have permitted the availability of punitive damages where the harassment was inflicted by a coworker. See Swinton v. Potomac Corp., 270 F.3d 794, 811 (9th Cir. 2001), cert. denied, 122 S. Ct. 1609 (2002) (in coworker harassment case the court found that employer failed to implement its antidiscrimination policy in good-faith where employee charged with carrying out the policy failed to take corrective action after employee complained of harassment. The court opined that :[the employer] made a considered judgment to place responsibility for reporting on an employee's direct supervisor. It could well have required some other supervisor or manager further up the chain to be the point of contact."); Deters v. Equifax Credit Information Servs., Inc., 202 F.3d 1262, 1271 (10th Cir. 2000) (plaintiff sexually harassed by co-workers complained to manager designated to receive such reports, but manager failed to act on those complaints, and court held that employer could be liable for punitive damages and not avail itself to Kolstad's "good faith" defense because the very person the company entrusted to act on complaints of harassment failed to do so). But see Cooke v. Stefani Mgt. Servs., Inc., 250 F.3d 564, 568-69 (7th Circ. 2001) (where sexual harasser was plaintiff's direct supervisor court refused to allow punitive damages because "common sense should have led [plaintiff] to report the harassment to someone superior to [her harassing supervisor] in the chain of command" even though harassment policy directed to report incidents of harassment to manager).

[9] Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999) (Title VII), said that there is "no good definition" of this term, that it involves "a fact-intensive inquiry," quotes a treatise that "[i]n making this determination, the court should review 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" and concludes by saying: "Suffice it to say here that the examples provided in the Restatement of Torts suggest that an employee must be 'important,' but perhaps need

(continued next page)

not be the employer's 'top management, officers, or directors,' to be acting 'in a managerial capacity.'" Id. at 543 (discussing the problem of trying to define "managerial capacity"); see also 1 L. Schlueter & K. Redden, Punitive Damages, § 4.4(B)(2)(a), at 183-89 (4th ed. 2000); 2 J. Kircher & C. Wiseman, Punitive Damages: Law and Practice, § 24:05, at 24-19 to 24-24 (2000) (formerly edited by, and cited in Kolstad as, J. Ghiardi & J. Kircher); Restatement (Second) of Torts § 909 (1977); Restatement (Second) of Agency § 217C (1957). We have used the Kolstad language, along with language from In re Exxon Valdez, 270 F.3d 1215, 1233, 1235-36 (9th Cir. 2001), aff'd by an equally divided court, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008), involving punitive damages for a federal maritime tort, concluding that Kolstad has overcome the First Circuit's earlier diffidence about this portion of the Restatement. See CEH, Inc. v. F/V Seafarer, 70 F.3d 694, 705 (1st Cir. 1995).

[10] This definition comes from Kolstad v. American Dental Ass'n, 527 U.S. 526, 543-44 (1999) (Title VII) (approving Restatement formulation).

[11] This bracketed paragraph should only be used in cases where the employee who committed the wrongful conduct was serving in a managerial capacity. In cases where the employer ratified or authorized the discriminatory actions, this defense is not available. See Kolstad v. American Dental Ass'n, 527 U.S. 526, 542-45 (1999) (Title VII).

[12] Under § 1981a, the total damages available (including both punitive and other damages) are limited according to the number of employees employed by the defendant. 42 U.S.C. § 1981a(b)(3). However, the section also provides that "the court shall not inform the jury of [these] limitations." Id. § 1981a(c)(2).

[13] Méndes-Matos v. Municipality of Guaynabo, 557 F.3d 36 (1st Cir. 2009).

[14] State Farm Mutual Auto Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003), states that few awards exceeding a single-digit ratio will satisfy due process and that anything over 4 to 1 "might be close to the line of constitutional impropriety."

[15] With all the attention the Supreme Court has given to the constitutionality of punitive damages under state law, apart from Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999) and Exxon Shipping Co. v. Baker, 128 S. Ct. at 2631-33 (under federal maritime law, "where the tortious action was worse than negligent but less than malicious," a 1:1 ratio between punitive and compensatory damages "is a fair upper limit"), it has had little to say about the standards used in federal law cases either as a matter of constitutional law or under its supervisory powers. The general focus of Supreme Court cases on the topic of punitive damages, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996); Honda Motors Co. v. Oberg, 512 U.S. 415 (1994); TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991); Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988), has been on the standards of *appellate* review for punitive damage awards, not the standards (if any) that should guide jurors. Appellate courts are instructed to consider "(1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions; and (3) the sanctions imposed in other cases for comparable misconduct." Leatherman, 532 U.S. at 425 (citations omitted); accord BMW, 517 U.S. at 574-75. As the First Circuit noted in Zimmerman v. Direct Federal Credit Union, 262 F.3d 70 (1st Cir. 2001) (Title VII):

> BMW furnishes three general guideposts for conducting such a review: (1) What is the degree of reprehensibility of the defendant's conduct? (2) What is the ratio between the compensatory and punitive damages? (3) What is the difference between the punitive damage award and the civil penalties imposed for comparable conduct?

Id. at 81 (citing BMW, 517 U.S. at 575). The first two standards are reflected in the jury instruction. We have not incorporated the third—the sanctions imposed in other cases—on the reasoning that it is more a subject for judicial, not jury, determination. In theory, however, evidence could be introduced concerning other sanctions for a jury to consider. The instruction also directs the jury to consider "other mitigating or extenuating circumstances" bearing on the appropriate size of a punitive damage award. The Supreme Court implicitly approved such an instruction in TXO Prod. Corp., Inc. v. Alliance Resources Corp., 509 U.S. 443, 463-64 n.29 (1993).

[16] Conduct affecting non-parties is relevant to determining reprehensibility only if it is "misconduct of the sort that harmed" the plaintiff. State Farm Mutual Auto Ins. Co. v. Campbell, 538 U.S. 408, 410 (2003). In State Farm, the Supreme Court said that, where the plaintiffs did not present evidence of conduct by the defendant similar to the conduct that harmed them, the conduct that harmed them was "the only conduct relevant to the

(continued next page)

reprehensibility analysis." Id. Therefore, if the jury has heard evidence of dissimilar conduct affecting non-parties, it should be instructed that it may not consider that conduct in assessing reprehensibility.

[17] This list of factors comes directly from State Farm Mutual Auto Ins. Co. v. Campbell, 538 U.S. 408, 418-19 (2003), where the Court reiterated that degree of culpability is the most important factor. State Farm also said: "A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." Id. at 421. Such an instruction will ordinarily not be pertinent in a federal law claim. On the other hand, the principles of Philip Morris USA v. Williams, 549 U.S. 346 (2007), may be relevant to a federal claim. Philip Morris held that punitive damages *could not be* used "to punish for harm caused strangers," *i.e.*, for injuries inflicted upon nonparties, but that harm to other victims *could be* used "to determine reprehensibility." Id. at 346. The Court did not suggest how a jury instruction could be crafted to make a jury understand such a fine distinction, and seemed to be more concerned with matters of evidence and argument. The pattern instruction here does focus on reprehensibility. Possibly a sentence should be added to the effect: "You must not, however, increase any award for damages you believe were caused to others than [the plaintiff]." Although Philip Morris may be limited because it was concerned with Fourteen Amendment due process limitations on a state's power (and the concern that one state's policy not be imposed on other states through a punitive damage award for consequences in other states), the Court also reasoned from broader principles that could apply to the Fifth Amendment as well: the principle against "punishing an individual without first providing that individual with 'an opportunity to present every available defense'"; the concern for adding "a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate"; and "no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others." Id. at 354. We have not listed the defendant's wealth as a factor. Although the Supreme Court has never actually prohibited consideration of wealth, there are expressions of concern. See State Farm, 538 U.S. at 427 ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."), and 417 ("'the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences,'" quoting Honda Motors Co. v. Oberg, 512 U.S. 415, 432 (1994)). See also TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 489-95 (1993) (O'Connor, J., dissenting).

10.1 Charge to a Hung Jury[1]

[New: 6/24/09]

Members of the jury, I am going to ask you to continue your deliberations to try to agree upon a verdict and resolve this case. I have a few additional thoughts and comments I would like you to consider.

This case is important to the parties. The trial has been expensive in terms of time, effort, money and emotional strain to both the plaintiff and the defense. If you fail to agree on a verdict, the case is left open and may have to be tried again. A second trial would be costly to both sides, and there is no reason to believe that the case can be tried again, by either side, better or more exhaustively than it has been tried before you.

Any future jury would be selected in the same manner and from the same source as you were chosen. There is no reason to believe that the case could ever be submitted to a jury of people more conscientious, more impartial, or more competent to decide it or that more or clearer evidence could be produced on behalf of either side.

As I stated in my previous instructions, it is your duty to consult with one another and to deliberate with a view to reaching agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but you should do so only after considering the evidence with your fellow jurors.

In the course of your deliberations you should not hesitate to reexamine your own views, and to change your opinion if you are convinced that it is wrong. To reach a unanimous result you must examine the questions submitted to you openly and frankly, with proper regard to the opinions of others and with a disposition to reexamine your own views. Each of you ought to consider whether your own position is a reasonable one if it makes so little impression upon the minds of other equally honest and conscientious fellow jurors who bear the same responsibility, serve under the same oath, and have heard the same evidence. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict.

You may conduct your deliberations as you choose, but I suggest that you carefully reexamine and consider all the evidence in the case bearing upon the questions before you in light of my instructions on the law.

You may be as leisurely in your deliberations as the occasion may require and you may take all the time that you feel is necessary.

I remind you that in your deliberations you are to consider the instructions I have given to you as a whole. You should not single out any part of any instruction, including this one, and ignore others.

You may now go back to the jury room and continue your deliberations.

[1] This proposed instruction is derived largely from Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, Federal Jury Practice and Instructions §§ 106.09, 106.10 (5th ed. 2000).

The First Circuit has not addressed the use of an Allen (Allen v. United States, 164 U.S. 492 (1896)) charge in civil cases, but other circuits include civil Allen charges in their pattern instructions. See Third Circuit, General Instructions for Civil Cases § 3.4; Eighth Circuit, Model Civil Jury Instructions § 3.07; Ninth Circuit, Model Civil Jury Instructions § 3.5; Eleventh Circuit, Pattern Jury Instructions (Civil Cases) § 9. The former Fifth Circuit approved of the use of civil Allen charges in Brooks v. Bay State Abrasive Products, Inc., 516 F.2d 1003, 1004 (5th Cir. 1975), which was cited in United States v. Chigbo, 38 F.3d 543, 546 (11th Cir. 1994). In Brooks, the court stated that it approved the use of an Allen charge if it makes clear to members of the jury that (1) they are duty bound to adhere to honest opinions; and (2) they are doing nothing improper by maintaining a good faith opinion even though a mistrial may result. See also Railway Exp. Agency v. Mackay, 181 F.2d 257, 262-63 (8th Cir. 1950); Hill v. Wabash Ry. Co., 1 F.2d 626, 631-32 (8th Cir. 1924).