

**MANUAL OF  
MODEL CIVIL  
JURY INSTRUCTIONS**

**FOR THE  
DISTRICT COURTS  
OF THE EIGHTH CIRCUIT**

**2023**

*Reflecting changes made through July 12, 2023.*

## **DEDICATION**

The Committee is honored to dedicate these instructions to the late Honorable Scott O. Wright, one of the founding fathers of the Judicial Committee on Model Jury Instructions for the Eighth Circuit. He served as Chairman of the Committee from its creation in 1983 and guided the Committee until 2009. His belief that jury trials are essential to our liberty, and his dedication to giving juries written instructions in language that could be understood by the average juror, have guided the Committee from its beginning. The leadership and encouragement of Scott Wright are largely responsible for the creation of the Committee and its continued existence.

It is a great privilege to recognize Judge Scott Wright's leadership on the Committee and to dedicate these Instructions in recognition of his outstanding contributions.

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## INTRODUCTION

The Committee proposes these instructions and verdict forms for use in civil cases to aid judges in their communication with jurors and to aid attorneys in the presentation of their cases. The Committee endeavored to use clear and simple language that reflects the law of the Eighth Circuit and that will prevail on appeal. That said these proposed instructions are not the only method for instructing a jury properly. *See United States v. Ridinger*, 805 F.2d 818, 821 (8th Cir. 1986). “The Model Instructions, . . . are not binding on the district courts of this circuit, but are merely helpful suggestions to assist the district courts.” *United States v. Norton*, 846 F.2d 521, 525 (8th Cir. 1988).

Every effort has been made to assure conformity with current Eighth Circuit law; however, it cannot be assumed that all of these model instructions in the form given necessarily will be appropriate under the facts of a particular case. The Manual covers issues about what instructions are most frequently given, but because each case turns on unique facts, instructions should be drafted or adapted to conform to the facts in each case. These instructions may be found on the Internet in Word and Portable Document Format (pdf) at <https://www.juryinstructions.ca8.uscourts.gov/>

In drafting instructions, the Committee has attempted to use simple language, short sentences, the active voice, and to omit unnecessary words. We have tried to use plain language because giving the jury the statutory language, or language from appellate court decisions, is often confusing.

We believe that instructions should be as brief as possible and limited to what the jury needs to know for the case. We recommend sending a copy of the instructions as given to the jury room.

Readers are reminded of Federal Rule of Civil Procedure 51(c), which requires a specific objection, on the record, before the jury is instructed if possible, and (d), which requires a proper, timely objection if instruction error is to be preserved for appeal, unless it amounts to plain error.

The instructions in each chapter are organized in the following format, so that similar types of instructions have the same numerical extensions of the section numbers. Below, the “x” designates the Chapter number and certain series extensions designate the types of instructions:

x.00 designates the Overview or legal treatise prepared by the subcommittee

x.01 to .19 Explanatory Instructions (ones not falling into the following groups)

x.20 to .39 Definitions

x.40 to .59 Elements of Claims

x.60 to .69 Elements of Defenses

x.70 to .79 Damages

x.80 to .89 General Verdict Forms

x.90 to .99 Special Verdict Forms

The Committee greatly appreciates members of the Civil Jury Instructions Subcommittee, whose diligent research and writing, and commitment to this project are essential to the excellent quality of the chapter Overviews, Jury Instructions, Verdict Forms, Notes on Use, and Committee Comments. The subcommittee members are to be commended also for their continuing efforts revising the Manual to accurately reflect the law and to meet the needs of the trial judges and attorneys in the District Courts of the Eighth Circuit.

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# 1. PRELIMINARY INSTRUCTIONS FOR USE AT COMMENCEMENT OF TRIAL

## 1.00 OVERVIEW

These preliminary instructions should be read to the jury at the commencement of trial. They need not be submitted in written form even if other instructions are given in written form at the time the case is submitted to the jury.

(Instruction No. 1.01 should be read to the jury panel before voir dire and Instruction No. 1.02 should be read at the end of voir dire.)

## CHAPTER 1 INSTRUCTIONS

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## **1.01 EXPLANATORY: BEFORE VOIR DIRE**

Members of the Jury Panel, we are about to begin the process of selecting which of you will be the jury that tries this case. In that process you will be asked questions by me or by the attorneys or by both that touch on your qualifications to sit as jurors in this case. You will be placed under oath or asked to affirm that you will truthfully and completely answer these questions put to you.

Your undivided attention to this process is very important. So, if you have a cell phone or other communication device, please take it out now and turn it off. Do not turn it to vibration or silent; please power it down or off. During this jury selection process, you must leave it off. (Pause for thirty seconds to allow them to comply, then tell them the following:)

During this jury selection process and during the trial, it is important that all the information you receive about the case comes from the courtroom. So, from now on until you are discharged from the case you may not discuss this case with anyone and that includes the other potential jurors, except during deliberations if you are selected as a juror. However, you may tell your family, close friends, and other people about your participation in this trial, but only so they will know when you are required to be in court. If you do that, please warn them not to ask you about this case or try to tell you anything they know or think they know about it, or discuss this case in your presence.

Also, just as importantly, you must not communicate any information at all about the case to anyone by any means, directly or indirectly, in face-to-face conversation or by any digital media.<sup>1</sup>

If you discuss the case with someone other than the other jurors during deliberations, you may be influenced in your verdict by the opinions of people other than the other jurors. That would not be fair to the parties and it would result in a verdict that is not based entirely on the evidence in court and the law the court gives you.

It is very important that you abide by these rules. Failure to follow these instructions, and indeed any instructions the court gives you during the trial could result in the case having to be retried. And failure to follow these and the court's other instructions could result in you being held in contempt of court and punished accordingly.

Those of you who are selected to try this case will receive similar instructions as we go through the trial.

Are there any of you who cannot or will not abide by these rules concerning communication with others during this trial? (Then continue with voir dire.)

#### **Note on Use**

1. For a more explicit list of digital and other media sources of information to be avoided by the jury please see *Eighth Circuit Manual of Model Jury Instructions (Criminal)*, Nos. .01 and .02.

## **1.02 EXPLANATORY: RECESS AT END OF VOIR DIRE**

During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends. Do not allow anyone to discuss the case with you or within your hearing. “Do not discuss” also means do not e-mail, send text messages, blog or engage in any other form of written, oral or electronic communication, as I instructed you earlier.

You must decide this case only from the evidence received by the court here in the courtroom and the instructions on the law that I give you.

Do not read any newspaper or other written account, watch any televised account or streamed video account, or listen to any streamed internet or radio program on the subject of this trial.

Do not conduct any Internet research or consult with any other sources about this case, the people involved in the case, its general subject matter, or the law.<sup>1</sup>

You must keep your mind open and free of outside information. Only in this way will you be able to decide the case fairly, based solely on the evidence received in court and my instructions on the law. If you decide this case on anything else, you will have done an injustice. It is very important that you follow these instructions.

I might not repeat these things to you before every recess, but keep them in mind until you are discharged.

### **Note on Use**

1. For a more explicit list of digital and other media sources of information to be avoided by the jury please see *Eighth Circuit Manual of Model Jury Instructions (Criminal)*, Nos. .01 and .02.

### **1.03 EXPLANATORY: GENERAL; NATURE OF CASE; DUTY OF JURY; CAUTIONARY**

Members of the Jury: I am now going to give you some instructions about this case and about your duties as jurors. At the end of the trial I will give you more instructions. I may also give you instructions during the trial. All instructions - those I give you now and those I give you later - whether they are in writing or given to you orally – are equally important and you must follow them all.

[Describe your court’s digital electronic device policy, such as “You must leave your cell phone, PDA, smart phone, iPhone, tablet computer, and any other wireless communication devices] in the jury room during the trial and may only use them during breaks. However, you are not allowed to have those devices in the jury room during your deliberations. You must give them to the [bailiff] [deputy clerk] [court security officer] for safekeeping just before you start to deliberate. They will be returned to you when your deliberations are complete.”]

[This is a civil case brought by plaintiff[s] [here name the plaintiff(s)] against defendant[s] [here name defendant(s)]. [Describe the parties’ claims and defenses; counterclaims and defenses to the counterclaims.] It will be your duty to decide from the evidence [what party is entitled to your verdict(s)] [whether the plaintiff(s) is [are] entitled to a verdict against the defendant(s).]

Your duty is to decide what the facts are from the evidence. You are allowed to consider the evidence in the light of your own observations and experiences. After you have decided what the facts are, you will have to apply those facts to the law that I give you in these and in my other instructions. That is how you will reach your verdict. Only you will decide what the facts are. However, you must follow my instructions, whether you agree with them or not. You have taken an oath to follow the law that I give you in my instructions.

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness says, or only part of it, or none of it.

In deciding what testimony to believe, consider the witnesses' intelligence, their opportunity to have seen or heard the things they testify about, their memories, any reasons they might have to testify a certain way, how they act while testifying, whether they said something different at another time, whether their testimony is generally reasonable, and how consistent their testimony is with other evidence that you believe.

Do not let sympathy, or your own likes or dislikes, influence you. The law requires you to come to a just verdict based only on the evidence, your common sense, and the law that I give you in my instructions, and nothing else.

Nothing I say or do during this trial is meant to suggest what I think of the evidence or what I think your verdict should be.

## **1.04 EXPLANATORY: EVIDENCE; LIMITATIONS**

When I use the word “evidence,” I mean the testimony of witnesses, documents and other things I receive as exhibits, facts that I tell you the parties have agreed are true, and any other facts that I tell you to accept as true.

Some things are not evidence. I will tell you now what is not evidence:

1. Lawyers’ statements, arguments, questions, and comments are not evidence.
2. Documents or other things that might be in court or talked about, but that I do not receive as exhibits are not evidence.
3. Objections are not evidence. Lawyers have a right – and sometimes a duty – to object when they believe something should not be a part of the trial. Do not be influenced one way or the other by objections.

If I sustain a lawyer’s objection to a question or an exhibit, that means the law does not allow you to consider that information. When that happens, you have to ignore the question or the exhibit, and you must not try to guess what the information might have been.

4. Testimony and exhibits that I strike from the record, or tell you to disregard, are not evidence, and you must not consider them.

5. Anything you see or hear about this case outside the courtroom is not evidence, and you must not consider it [unless I specifically tell you otherwise].

Also, I might tell you that you can consider a piece of evidence for one purpose only, and not for any other purpose. If that happens, I will tell you what purpose you can consider the evidence for and what you are not allowed to consider it for. You need to pay close attention when I give an instruction about evidence that you can consider for

only certain purposes, because you might not have that instruction in writing later in the jury room.

Some of you may have heard the terms “direct evidence” and “circumstantial evidence.” You should not be concerned with those terms, since the law makes no distinction between the weight to be given to direct and circumstantial evidence.

### **1.05 EXPLANATORY: BENCH CONFERENCES AND RECESSES**

During the trial, I will sometimes need to talk privately with the lawyers. I may talk with them here at the bench while you are in the courtroom, or I may call a recess and let you leave the courtroom while I talk with the lawyers. Either way, please understand that while you are waiting, we are working. We have these conferences to make sure that the trial is proceeding according to the law and to avoid confusion or mistakes. We will do what we can to limit the number of these conferences and to keep them as short as possible.

## **1.06 EXPLANATORY: NO TRANSCRIPT AVAILABLE [NOTE-TAKING]**

At the end of the trial, you will have to make your decision based on what you recall of the evidence. You will not have a written copy of the testimony to refer to. Because of this, you must pay close attention to the testimony and other evidence as it is presented here in the courtroom.

[If you wish, however, you may take notes to help you remember what the witnesses say. If you take notes, do not show them to anyone until you and your fellow jurors go to the jury room to decide the case after you have heard and seen all of the evidence. And do not let taking notes distract you from paying close attention to the evidence as it is presented. The Clerk will provide each of you with a pad of paper and a pen or pencil. At each recess, leave them \_\_\_\_\_.]

[When you leave at night, your notes will be locked up and returned to you when you return. When the trial is over your notes will be destroyed. They will not be read by anyone other than you.]

### **1.07 EXPLANATORY: QUESTIONS BY JURORS**

When the lawyers have finished asking all of their questions of a witness, you will be allowed to ask the witness questions (describe procedure to be used here). I will tell you if the rules of evidence do not allow a particular question to be asked. After all of your questions, if there are any, the lawyers may ask more questions. [Do not be concerned or embarrassed if your question is not asked; sometimes even the lawyers' questions are not allowed.]

## 1.08 EXPLANATORY: CONDUCT OF THE JURY

Jurors, to make sure this trial is fair to [both/all] parties, you must follow these rules:

*First*, do not talk or communicate among yourselves about this case, or about anyone involved with it, until the end of the trial when you go to the jury room to consider your verdict.

*Second*, do not talk with anyone else about this case, or about anyone involved with it, until the trial has ended and you have been discharged as jurors.

*Third*, when you are outside the courtroom, do not let anyone tell you anything about the case, or about anyone involved with it until the trial has ended and your verdict has been accepted by me. If someone tries to talk to you about the case during the trial, please report it to the [bailiff] [deputy clerk]. (Describe person.)

*Fourth*, during the trial, do not talk with or speak to any of the parties, lawyers, or witnesses in this case – not even to pass the time of day. It is important not only that you do justice in this case, but also that you act accordingly. If a person from one side of the lawsuit sees you talking to a person from the other side – even if it is just about the weather – that might raise a suspicion about your fairness. So, when the lawyers, parties and witnesses do not speak to you in the halls, on the elevator or the like, please understand that they are not being rude. They know they are not supposed to talk to you while the trial is going on, and they are just following the rules.

*Fifth*, you may need to tell your family, close friends, and other people that you are a part of this trial. You can tell them when you have to be in court. But you must warn them not to ask you about this case, tell you anything they know or think they know about this case, or talk about this case in front of you. Remember: You must not communicate with anyone in any manner about anything or anyone, including the court, related to this case.

You must not tell anyone anything about the jury's deliberations in this case until after I accept your verdict or until I give you specific permission to do so. If you talk about the case with someone besides the other jurors during deliberations, it looks as if you might already have decided the case or that you might be influenced in your verdict by their opinions. That would not be fair to the parties, and it might result in the verdict being thrown out and the case having to be tried over again.

During the trial, while you are in the courthouse and after you leave for the day, do not give any information to anyone, by any means, about this case.

*Sixth*, do not do any research or investigate the case facts or the law-- on the Internet, in libraries, newspapers, dictionaries or otherwise. Do not visit or view any place discussed in this case, and do not use the Internet or other means to search for or view any place discussed in the testimony.

*Seventh*, do not read or otherwise receive any information, including any news stories or Internet articles or blogs that are about the case, or about anyone involved with it. Do not listen to any radio or television reports, or digital streaming, about the case or about anyone involved with it. [In fact, until the trial is over I suggest that you reduce or limit [avoid at all] reading or receiving any digital streaming or any newspapers or news journals, and avoid listening to any television or radio newscasts at all.] I do not know whether there will be news reports about this case, but if there are, you might accidentally find yourself reading or listening to something about the case. If you want, you can have someone collect information or clip out any stories and set them aside to give to you after the trial is over. [I assure you, that by the time you have heard all the evidence in this case, you will know what you need to [decide it] [return a just verdict].

The parties have a right to have you decide their case based only on evidence admitted here in court. If you research, investigate, or experiment on your own, or get information from other [places] [sources], your verdict might be influenced by inaccurate, incomplete, or misleading information. Witnesses here in court take an oath to

tell the truth, and the accuracy of their testimony is tested through cross-examination. All of the parties are entitled to a fair trial before an impartial jury, and you have to conduct yourselves in a way that assures the integrity of the trial process. If you decide a case based on information not admitted in court, you will deny the parties a fair trial. You will deny them justice. Remember, you have taken an oath to follow the rules, and you must do so. [If you do not, the case might have to be retried, and you could be held in contempt of court and possibly punished.]

*Eighth*, do not make up your mind during the trial about what your verdict should be. Keep an open mind until after you and your fellow jurors have discussed all the evidence.

[*Ninth*, it is important that you discharge your duties as jurors without discrimination or bias against any party, witness, or counsel on account of that person's race, color, ethnicity, national origin, religion, lack of religion, gender, gender identity, sexual orientation, disability, or economic circumstances.]

## **1.09 EXPLANATORY: OUTLINE OF TRIAL**

The trial will proceed in the following manner:

First, the plaintiff[’s][s’] lawyer may make an opening statement. Next, the defendant[’s][s’] lawyer may make an opening statement. An opening statement is not evidence, but it is a summary of the evidence the lawyers expect you will see and hear during the trial.

After opening statements, the plaintiff[s] will then present evidence. The defendant[’s][s’] lawyer will have a chance to cross-examine the plaintiff[’s][s’] witness[es]. After the plaintiff[s] [has/have] finished presenting [his/her/their] case, the defendant[s] may present evidence, and the plaintiff[’s][s’] lawyer will have a chance to cross-examine [his/her/their] witness[es].

After you have seen and heard all of the evidence from [both/all] sides, the lawyers will make closing arguments that summarize and interpret the evidence. Just as with opening statements, closing arguments are not evidence. [Before] [After] the closing arguments, I will instruct you further on the law. After the lawyers’ arguments and after the court’s instructions you will go to the jury room to deliberate and decide on your verdict.

## 2. INSTRUCTIONS FOR USE DURING TRIAL

### 2.00 OVERVIEW

Instructions contained in this section may be read to the jury during the course of the trial. They are not generally intended for submission in written form as final instructions at the conclusion of the case, although there is no particular reason why, in appropriate circumstances, they could not be submitted to the jury as part of the written package. Generally, they will not be reread to the jury at the conclusion of the case, although the court has discretion to do so.

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## **2.01 EXPLANATORY: DUTIES OF JURY; RECESSES**

During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends. Do not allow anyone to discuss the case with you or within your hearing. “Do not discuss” also means do not e-mail, send text messages, blog or engage in any other form of written, oral or electronic communication, as I instructed you before.

Do not read or listen to any statements about this trial in any method of communication, including any newspaper or other written account, any televised account, any radio program, any digital streaming or other production, on the Internet or elsewhere. Do not conduct any Internet research or consult with any other sources about this case, the people involved in the case, or its general subject matter. You must keep your mind open and free of outside information. Only in this way will you be able to decide the case fairly based solely on the evidence and my instructions on the law. If you decide this case on anything else, you will have done an injustice. It is very important that you follow these instructions.

[As I instructed you earlier, it is important that you discharge your duties as jurors without discrimination or bias regarding any party, witness, or counsel on account of race, color, ethnicity, national origin, religion, lack of religion, gender, gender identity, sexual orientation, disability, or economic circumstances.]

I may not repeat these things to you before every recess, but keep them in mind throughout the trial.<sup>1</sup>

### **Notes on Use**

1. This language may be omitted for subsequent breaks during trial, but not for overnight or weekend recesses.

## 2.02 EXPLANATORY: STIPULATED TESTIMONY

The plaintiff[s] and the defendant[s] have stipulated - that is, they have agreed - that if \_\_\_\_\_ were called as a witness [(he) (she)] would testify in the way counsel have just stated. You should accept that as being \_\_\_\_\_'s testimony, just as if it had been given here in court from the witness stand.

### Committee Comments

There is, of course, a difference between stipulating that a witness would give certain testimony and stipulating that certain facts are established. *United States v. Lambert*, 604 F.2d 594, 595 (8th Cir. 1979). As to the latter kind of stipulation, *see infra* Model Instruction 2.03.

*See 8th Cir. Crim. Jury Instr. 2.02* (2018); *9th Cir. Crim. Jury Instr. 2.3* (2010); *9th Cir. Civ. Jury Instr. 2.1* (2017).

“Where there is stipulation as to testimony, the parties may contest the truth or accuracy of that testimony. *See United States v. Garcia*, 593 F.2d 77, 79 (8th Cir. 1979). In such a situation, it may be appropriate to instruct the jury on the factual areas that remain disputed. *See e.g., United States v. Renfro*, 600 F.2d 55, 59 (6th Cir. 1979), for an example of such an instruction where only authenticity was stipulated.” Committee Comments, Eighth Circuit Manual of Model Jury Instructions 2.02 (Criminal) (2018).

## 2.03 EXPLANATORY: STIPULATED FACTS

The plaintiff[s] and the defendant[s] have stipulated – that is, they have agreed – that [certain facts are as counsel have just stated] [the following facts are true]. You must, therefore, treat those facts as having been proved.

### Committee Comments

There is, of course, a difference between stipulating that certain facts are established, and stipulating that a witness would give certain testimony. *United States v. Lambert*, 604 F.2d 594, 595 (8th Cir. 1979). As to the latter kind of stipulation, *see infra* Model Instruction 2.02.

When parties enter into stipulations as to material facts, those facts will be deemed to have been conclusively proved, and the jury may be so instructed. *See Garnes v. Gulf & Western Mfg. Co.*, 789 F.2d 637, 643 (8th Cir. 1986); *see also United States v. Martin*, 777 F.3d 984, 993 (8th Cir. 2015).

*See 8th Cir. Crim. Jury Instr. 2.03* (2018 ); *9th Cir. Crim. Jury Instr. 2.4* (2010); *9th Cir. Civ. Jury Instr. 2.2* (2017).

## 2.04 EXPLANATORY: JUDICIAL NOTICE

I have decided to accept as proved the following fact[s]: \_\_\_\_\_.

You must accept [(this) (these)] fact[s] as proved.

### Committee Comments

An instruction regarding judicial notice should be given at the time notice is taken.

Fed. R. Evid. 201(f), while permitting the judge to determine that a fact is sufficiently undisputed to be judicially noticed, also requires that the jury be instructed that it must accept as conclusive any fact judicially noticed in a civil case.

*See 8th Cir. Crim. Jury Instr. 2.04 (2014); Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 102.20 (6th ed. 2011); 9th Cir. Crim. Jury Instr. 2.5 (2010); 9th Cir. Civ. Jury Instr. 2.3 (2017). See generally Fed. R. Evid. 201; West Key # "Evidence" 1-52.*

## **2.05 EXPLANATORY: TRANSCRIPT OF RECORDED CONVERSATION**

As you have [also] heard, there is a written transcript of the [audio] [video] recording [you are about to hear] [you are about to see]. That transcript also undertakes to identify the speakers engaged in the conversation.

You are permitted to have the transcript for the limited purpose of helping you follow the conversation as you listen to the recording, and also to help you identify the speakers. The recording is evidence for you to consider. The transcript, however, is not evidence.

You are specifically instructed that whether the transcript correctly or incorrectly reflects the conversation or the identity of the speakers is entirely for you to decide based upon what you have heard here about the preparation of the transcript, and upon your own examination of the transcript in relation to what you hear on the recording. The recording itself is the primary evidence of its own contents. If you decide that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.

Differences between what you hear in the recording and read in the transcript may be caused by such things as the inflection in a speaker's voice, or by inaccuracies in the transcript. You should, therefore, rely on what you hear rather than what you read when there is a difference.

### **Committee Comments**

The transcript, absent stipulation of the parties, should not go to the jury room. *See United States v. Kirk*, 534 F.2d 1262 (8th Cir. 1976), *cert. denied*, 430 U.S. 906 (1977), *reversed, in part, on other grounds*, 723 F.2d 1379 (8th Cir. 1983).

*See 8th Cir. Crim. Jury Instr. 2.06A* (2014); *5th Cir. Pattern Civil Jury Instr. 2.14* (2014). *See generally United States v. Bentley*, 706 F.2d 1498 (8th Cir. 1983); *United States v. McMillan*, 508 F.2d 101 (8th Cir. 1974).

## **2.06 EXPLANATORY: PREVIOUS TRIAL**

You have heard evidence that there was a previous trial of this case. Keep in mind, however, that you must decide this case solely on the evidence presented to you in this trial. The fact of a previous trial should have no bearing on your decision in this case.<sup>1</sup>

### **Notes on Use**

1. The instruction should be modified if the results of the prior trial are introduced.

### **Committee Comments**

*See 8th Cir. Crim. Jury Instr. 2.20 (2014); Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 102:42 (6th ed. 2011); 9th Cir. Crim. Jury Instr. 2.15 (2017). See generally West Key # "Evidence" 575-83. This instruction should not be given unless specifically requested.*

## **2.07 EXPLANATORY: CROSS-EXAMINATION OF PARTY’S CHARACTER WITNESS**

The questions and answers you have just heard were permitted only to help you decide if the witness really knew about \_\_\_\_\_’s<sup>1</sup> reputation for truthfulness.<sup>2</sup> The information developed on that subject may not be used by you for any other purpose.<sup>3</sup>

### **Notes on Use**

1. Insert name of person whose character is being challenged.
2. Fed. R. Evid. 404(a) and 608 generally limit character evidence in civil cases to reputation for truth and veracity. It may involve cross-examination on character traits that relate to truth and veracity (gave false information to a law enforcement officer; falsified expense account records).
3. This instruction should be given if requested by the party who has offered the character witness at the time the evidence is introduced.

### **Committee Comments**

*See 8th Cir. Crim. Jury Instr. 2.10 (2014); 7th Cir. Civil Jury Instr. 2.10 (2017); Kevin F. O’Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 102:43 (6th ed. 2011). See generally Fed. R. Evid. 404, 405, 608; West Key # “Criminal Law” 673(2), “Witnesses” 274(1). See also Gross v. United States, 394 F.2d 216 (8th Cir. 1968).*

## **2.08 EXPLANATORY: EVIDENCE ADMITTED AGAINST ONLY ONE PARTY**

Each party is entitled to have the case decided solely on the evidence that applies to that party. Some of the evidence in this case is limited under the rules of evidence to one of the parties, and cannot be considered against the others.

The evidence you [are about to hear] [just heard]<sup>1</sup> can be considered only in the case against \_\_\_\_\_.<sup>2</sup>

### **Notes on Use**

1. If desired, the trial judge may give a brief summary of the evidence that is admitted against only one of the parties.
2. State name of party or parties.

### **Committee Comments**

This type of instruction may be used when evidence limited to one or more parties is admitted. *Cf. United States v. Kelly*, 349 F.2d 720, 757 (2nd Cir. 1965), *cert. denied*, 384 U.S. 947 (1966); *but see United States v. Polizzi*, 500 F.2d 856, 903 (9th Cir. 1974) (not error to refuse a defendant's requested instruction that no evidence introduced by the codefendants could be used against him or her where he or she rested at close of the plaintiff's case).

*See 8th Cir. Crim. Jury Instr.* 2.14 (2014); Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 102.41 (6th ed. 2011); *9th Cir. Crim. Jury Instr.* 1.13 (2010).

Fed. R. Evid. 105 requires such an instruction if requested when evidence is admitted against less than all parties.

## **2.09 EXPLANATORY: EVIDENCE ADMITTED FOR LIMITED PURPOSE**

The evidence [(you are about to hear) (you have just heard)] may be considered by you only on the [(issue) (question)] of \_\_\_\_\_. It may not be considered for any other purpose.

### **Committee Comments**

Such an instruction is appropriate at the time evidence admitted for a limited purpose is received; for example, when a prior inconsistent statement is admitted, or evidence is admitted of prior similar incidents to prove notice by the defendant of a defect.

With respect to the use of prior inconsistent statements, Fed. R. Evid. 105 gives a party the right to require a limiting instruction explaining that the use of this evidence is limited to credibility. This instruction is appropriate for that purpose. Note, however, that the limiting instruction should not be given if the prior inconsistent statement was given under oath in a prior trial, hearing or deposition, because such prior sworn testimony of a witness is not hearsay and may be used to prove the truth of the matters asserted. Fed. R. Evid. 801(d)(1)(A).

*See infra* Model Instruction 3.03 for additional comments on credibility. *See 9th Cir. Crim. Jury Instr.* 2.11 (2010); *5th Cir. Civil Jury Instr.* 2.6 (2014); *7th Cir. Civil Jury Instr.* 1.09 (2017); Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 104.42 (6th ed. 2011).

## 2.10 EXPLANATORY: IMPEACHMENT OF WITNESS BY PRIOR CONVICTION

You have heard evidence that witness<sup>1</sup> \_\_\_\_\_ has been convicted of [a crime] [crimes]. You may use that evidence only to help you decide whether to believe the witness and how much weight to give [(his) (her)] testimony and not for any other purpose.

### Notes on Use

1. If the party in a civil case has a conviction that is introduced in evidence, it would be appropriate to modify Eighth Cir. Crim. Inst. 2.16 and give the following instruction, unless the evidence is admitted under Fed. R. Evid. 404(b) to prove motive, intent, plan, etc. Crim. Inst. 2.16, modified for civil cases is as follows:

You [are about to hear] [have heard] evidence that (name) was previously convicted of [a] crime[s]. You may use that evidence only to help you decide whether to believe [(his) (her)] testimony and how much weight to give it. That evidence does not mean that [(he) (she)] engaged in the conduct alleged here, and you must not use that evidence as any proof [(he) (she)] engaged in that conduct.

If the evidence is admitted under Fed. R. Evid. 404(b), Crim. Inst. 2.08 may be modified and used.

### Committee Comments

The admissibility of prior convictions to impeach a witness's credibility is governed by Fed. R. Evid. 609. If the conviction involves dishonesty or false statements, it may be admitted even if not a felony. Fed. R. Evid. 609. There is substantial dispute about how much information may be injected concerning the prior conviction. Some judges do not even allow evidence of what crime, or what punishment was involved. The judge may allow evidence of the specific crime committed and the sentence. *Ross v. Jones*, 888 F.2d 548, 551 (8th Cir. 1989). However, Fed. R. Evid. 105 gives a party the right to require a limiting instruction explaining that the use of this evidence is limited to credibility.

*See 8th Cir. Crim. Jury Instr.* 2.18 (2014); Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 102.44 (6th ed. 2011); *5th Cir. Civ. Jury Instr.* 2.17 (2014); *7th Cir. Civ. Jury Instr.* 1.15 (2017); *9th Cir. Crim. Jury Instr.* 4.8 (2010); *9th Cir. Civ. Jury Instr.* 2.8 (2017). *See generally* Fed. R. Evid. 609, 105; West Key # "Witnesses" 344 (1-5), 345 (1-4).

## **2.11 EXPLANATORY: DEMONSTRATIVE SUMMARIES NOT RECEIVED AS EVIDENCE**

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, or other underlying evidence in the case. Those charts or summaries are used for convenience. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts shown by the evidence in the case, you should disregard these charts and summaries and decide the facts from the books, records or other underlying evidence.

### **Committee Comments**

*See 8th Cir. Crim. Jury Instr. 4.11 (2014); 7th Cir. Civ. Jury Inst. 1.24 (2017).*

*This instruction should be given only where the chart or summary is used solely as demonstrative evidence.* Where such exhibits are admitted into evidence pursuant to Fed. R. Evid. 1006, do not give this instruction. For summaries admitted as evidence pursuant to Fed. R. Evid. 1006, see Instruction 2.12, *infra*.

Sending purely demonstrative charts to the jury room is disfavored. If they are submitted limiting instructions are strongly suggested. *United States v. Possick*, 849 F.2d 332, 339 (8th Cir. 1988). The court may advise the jury that demonstrative evidence will not be sent back to the jury room.

## 2.12 EXPLANATORY: FRE RULE 1006 SUMMARIES

Certain [schedules] [summaries] [charts] were admitted in evidence [as Exhibits \_\_\_ and \_\_\_]. You may use those [schedules] [summaries] [charts] as evidence, even though the underlying documents and records are not here.<sup>1</sup> [However, the [accuracy] [authenticity] of those [schedules] [summaries] [charts] has been challenged. It is for you to decide how much weight, if any, you will give to them. In making that decision, you should consider all of the testimony you heard about the way they were prepared.]<sup>2</sup>

### Notes on Use

1. This instruction is not necessary if a stipulation instruction has been given on the subject.
2. The bracketed portion of this instruction should be given if the accuracy or authenticity has been challenged.

### Committee Comments

*See 8th Cir. Crim. Jury Instr.* 4.12 (2014). *See generally* Fed. R. Evid. 1006, 1008(c).

This instruction is based on Rule 1006 of the Federal Rules of Evidence, which permits a summary, chart, or calculation to be admitted as evidence without admission of the underlying documents as long as the opposing party has had an opportunity to examine and copy the documents at a reasonable time and place and if those underlying documents would be admissible. The trial judge may admit such a summary to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court without admission of the underlying documents so long as (1) the summary fairly summarizes voluminous trial evidence; (2) the summary assists the jury in understanding the testimony already introduced; and (3) the witness who prepared the charts is subject to cross-examination with all documents used to prepare the summary. *United States v. Hawkins*, 796 F.3d 843, 865 (8th Cir. 2015). Additionally, parties may use a “pedagogic device,” such as a summary of witness testimony and/or trial exhibits, to organize testimony and other evidence for the jury. *United States v. Needham*, 852 F.3d 830, 837 (8th Cir. 2017).

The Rules contemplate that the summaries will not be admitted until the court has made a preliminary ruling as to their accuracy. *See* Fed. R. Evid. 104; *United States v. Robinson*, 774 F.2d 261, 276 (8th Cir. 1985). As Rule 1008(c) makes clear, the trial judge makes only a preliminary determination regarding a Rule 1006 summary, the accuracy of which is challenged. The admission is within the sound discretion of the trial judge. *United States v. Green*, 428 F.3d 1131, 1135 (8th Cir. 2005). Likewise, admission of a pedagogic device is within the sound discretion of the trial court, and review of its admissibility is limited to whether the pedagogic device was so unfair and misleading as to require a reversal. *United States v. Needham*, 852 F.3d at 837. If the determination is to admit the summary, the jury remains the final arbiter with respect to how much weight it will be given and should be instructed accordingly.

The “voluminous” requirement of Rule 1006 does not require that it literally be impossible to examine all the underlying records, but only that in-court examination would be an inconvenience. *United States v. Possick*, 849 F.2d 332, 339 (8th Cir. 1988).

When this type of exhibit is allowed in the jury room during deliberations, a limiting instruction is appropriate, but failure to give an instruction on the use of charts is not reversible error. *See United States v. Green*, 428 F.3d at 1134 (“[T]he district court did not err in instructing the jury to consider the charts as evidence while also taking into account ‘all of the testimony’ heard and the ‘way in which [the charts] were prepared.’”).

There may be cases in which a variety of summaries are before the jury, some being simply demonstrative evidence, some being unchallenged Rule 1006 summaries, and some being challenged Rule 1006 summaries. In that situation, or any variant thereof, it will be necessary for the trial court to distinguish between the various items, probably by exhibit number, and to frame an instruction that makes the appropriate distinctions.

## 2.13 EXPLANATORY: WITHDRAWAL

The claim of the plaintiff[s] that the defendant[s] \_\_\_\_\_<sup>1</sup> is no longer before you and will not be decided by you.

The defense of defendant[s] that \_\_\_\_\_ is no longer before you and will not be decided by you.

### Notes on Use

1. Describe briefly the claim that is being withdrawn. If a defendant is dismissed, modify the instruction as follows:

The claim of plaintiff against defendant \_\_\_\_\_ is no longer before you and will not be decided by you.

(**Note:** If a counterclaim or a defense is dismissed, transpose the names of the plaintiff and the defendant.)

### Committee Comments

This is a simplified form. An identical instruction, Model Instruction 3.05, *infra*, has been included in section 3 for advising the jury of the withdrawal of a claim at the end of the trial. This instruction is intended for use during the time the claim is withdrawn and may be modified and used for the withdrawal of counterclaims or affirmative defenses. If this instruction is given during the course of trial, it need not be given with the final instructions. The judge may wish to discuss the matter of withdrawal of a claim with the lawyers to obtain an agreement as to what the jurors are told.

See Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 102.60 (6th ed. 2011).

## **2.14 EXPLANATORY: DEPOSITION EVIDENCE AT TRIAL**

Testimony will now be presented to you in the form of a deposition. A deposition is the recorded answers a witness made under oath to questions asked by lawyers before trial. The deposition testimony to be offered [was recorded in writing and now will be read to you] [was electronically video recorded and that recording now will be played for you]. You should consider the deposition testimony, and judge its credibility, as you would that of any witness who testifies here in person. [When the deposition is read to you, you should not place any significance on the manner or tone of voice used to read the witness's answers to you.]

### **Committee Comments**

This instruction should be given when deposition testimony is offered and allowed as substantive evidence. *See* Fed. R. Evid. 801(d)(2), 804(b)(1); FED. R. CIV. P. 32(a). The Committee recommends that this instruction be given immediately before a deposition is read or electronically played to the jury. If a successive deposition is offered into evidence, the court may remind the jury of this instruction instead of repeating the entire instruction.

This instruction should not be used when deposition testimony is used for impeachment purposes only. FED. R. CIV. P. 32(a)(2).

## 2.15 EXPLANATORY: LIFE EXPECTANCY EVIDENCE

You have heard opinion evidence in the form of [a] statistical table(s) [life expectancy table(s)] [mortality table(s)], identified as [Plaintiff] or [Defendant] Exhibit(s) \_\_\_\_\_, [(and) a witness's expert testimony] about the life expectancy of [here name relevant person] from and after [the incident mentioned in the evidence] [this trial]. The life expectancy of any individual person depends more upon the circumstances of his or her own life than it does upon the expectancy of the lives of others. The life expectancy evidence you have heard, [both] the documentary table(s) [and the witness's testimony], are not to be accepted by you as establishing the life expectancy of anyone, including [here name relevant person]. Such evidence has been received in evidence only to aid you, the jury, in your decision of what [here name relevant person]'s life expectancy might reasonably be expected to be, in view of all the circumstances of (his) (her) life only for the purpose of your determining damages in this case. In this regard, you must consider all the evidence received by the court and all the instructions the court has given you and will give you in this case.

### Committee Comments

Civil jury trials frequently involve future damages suffered by individuals. Evidence on that issue can include the trial judge taking judicial notice of a mortality table or other form of life expectancy opinion evidence. *Crane v. Crest Tankers, Inc.*, 47 F.3d 292, 295 (8th Cir. 1995). Such evidence might also be the testimony of an expert about the actual mortality data of individuals suffering from the subject individual's impairment(s).

In *Continental Cas. Co. v. Jackson*, the Eighth Circuit has cautioned that juries should be instructed on the limited use of life expectancy tables:

Life tables are generally admissible on a limited basis in wrongful death or damage actions for consideration of the probabilities of damage over a period of years. They in no way serve to show whether a person will or will not die by natural causes or otherwise at any particular age. Nor do they tend to prove probabilities of such. And even when life expectancy tables are received into evidence *it has long been held the court should fully instruct the jury as to their limited use.*

400 F.2d 285, 293 (8th Cir. 1968) (italics added) (citing *Scott v. Chicago, R. I. & P. Ry. Co.*, 141 N.W. 1065, 1069 (Iowa 1913) ("The tables are not to be accepted as establishing the expectancy of the injured party, but only as an aid in arriving at what that expectancy might be, in view of all the conditions surrounding the particular life in question, after, as well as before, the injury."))

*Cf.* 3 Fed. Jury Prac. & Instr. § 128:21, Life Expectancy--Table of Mortality (6th ed.).

### 3. INSTRUCTIONS FOR USE AT CLOSE OF TRIAL

#### 3.00 OVERVIEW

If issue/element instructions are submitted to the jury in writing, then these general instructions should also be submitted in writing at the same time. They are intended as general instructions to be submitted after all evidence has been presented. They may be given either before or after closing arguments, or may be given partially before and partially after arguments. FED. R. CIV. P. 51.

The elements instructions included herein all have what might be called a converse tail; that is, a last sentence that tells the jury their verdict must be for the defendant if any of the elements have not been proved. It would also be proper if the court or parties desire, to delete that sentence and have a separate instruction that tells the jury their verdict must be for the defendant unless they find that any required element of the plaintiff’s case has not been proved. *See infra* Model Instruction 15.60 for the format to be used for such instruction. This approach has the advantage of letting a defendant “target” or “focus” the case on the element that is most contested. It also may aid the jury to know where their attention should be focused.

#### CHAPTER 3 INSTRUCTIONS

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### **3.01 EXPLANATORY: ADDITIONAL INSTRUCTIONS**

Members of the jury, the instructions I gave at the beginning of the trial and during the trial are still in effect. Now I am going to give you additional instructions.

You have to follow all of my instructions – the ones I gave you earlier, as well as those I give you now. Do not single out some instructions and ignore others, because they are all important. [This is true even though I am not going to repeat some of the instructions I gave you [at the beginning of] [during] the trial.]

[You will have copies of [the instructions I am about to give you now] [all of the instructions] in the jury room. [You will have copies of some of the instructions with you in the jury room; others you will not have copies of. This does not mean some instructions are more important than others.] Remember, you have to follow all instructions, no matter when I give them, whether or not you have written copies.<sup>1</sup>

[You must discharge your duties as jurors in your deliberations and rendering of a verdict without discrimination or bias against any party, witness, or counsel regarding race, color, ethnicity, national origin, religion, lack of religion, gender, gender identity, sexual orientation, disability, or economic circumstances.]

#### **Notes on Use**

1. Optional for use when the final instructions are to be sent to the jury room with the jury. The Committee recommends that practice.

#### **Committee Comments**

*See* Kevin F. O’Malley, *et al.*, 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 103.01 (6th ed. Supp. 2017). *See generally* West Key # “Criminal Law” 887.

### **3.02 EXPLANATORY: JUDGE'S OPINION**

I have not intended to suggest what I think your verdict[s] should be by any of my rulings or comments during the trial.

[During this trial I have asked some questions of witnesses. Do not try to guess my opinion about any issues in the case based on the questions I asked.]<sup>1</sup>

#### **Notes on Use**

1. Use only if judge has asked questions during the course of the trial.

### 3.03 EXPLANATORY: CREDIBILITY OF WITNESSES

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

You may consider a witness's intelligence; the opportunity the witness had to see or hear the things testified about; a witness's memory, knowledge, education, and experience; any reasons a witness might have for testifying a certain way; how a witness acted while testifying; whether a witness said something different at another time;<sup>1</sup> whether a witness's testimony sounded reasonable; and whether or to what extent a witness's testimony is consistent with other evidence you believe.

[In deciding whether to believe a witness, remember that people sometimes hear or see things differently and sometimes forget things. You will have to decide whether a contradiction is an innocent misrecollection, or a lapse of memory, or an intentional falsehood. That may depend on whether it has to do with an important fact or only a small detail.]

#### Notes on Use

1. With respect to the use of prior inconsistent statements, Fed. R. Evid. 105 gives a party the right to require a limiting instruction explaining that the use of this evidence is limited to credibility. Note, however, that such a limiting instruction should not be given if the prior inconsistent statement was given under oath in a prior trial, hearing or deposition, because such prior sworn testimony of a witness is not hearsay and may be used to prove the truth of the matters asserted. Fed. R. Evid. 801(d)(1)(A).

#### Committee Comments

The form of credibility instruction given is within the discretion of the trial court. *B & B Hardware, Inc. v. Hargis Industries, Inc.*, 252 F.3d 1010, 1012 (8th Cir. 2001) (quoting *Cross v. Cleaver*, 142 F.3d 1059, 1067 (8th Cir. 1998)); *Clark v. United States*, 391 F.2d 57, 60 (8th Cir. 1968); *United States v. Merrival*, 600 F.2d 717, 719 (8th Cir. 1979). In *Clark* the court held that the following instruction given by the trial court correctly set out the factors to be considered by the jury in determining the credibility of the witnesses:

You are instructed that you are the sole judges of the credibility of the witnesses and of the weight and value to be given to their testimony. In determining such credibility and weight you will take into consideration the character of the witness, his or her

demeanor on the stand, his or her interest, if any, in the result of the trial, his or her relation to or feeling toward the parties to the trial, the probability or improbability of his or her statements as well as all the other facts and circumstances given in evidence.

391 F.2d at 60. In *Merrival*, the court held that the following general credibility instruction provided protection for the accused:

You, as jurors, are the sole judges of the truthfulness of the witnesses and the weight their testimony deserves.

You should carefully study all the testimony given, the circumstances under which each witness has testified, and every matter in evidence that tends to show whether a witness is worthy of belief. Consider each witness's ability to observe the matters as to which he or she has testified and whether each witness is either supported or contradicted by other evidence in the case.

600 F.2d at 720 n.2.

The general credibility instruction given in *United States v. Phillips*, 522 F.2d 388, 391 n.3 (8th Cir. 1975) covers other details:

The jurors are the sole judges of the weight and credibility of the testimony and of the value to be given to each and any witness who has testified in the case. In reaching a conclusion as to what weight and value you ought to give to the testimony of any witness who has testified in the case, you are warranted in taking into consideration the interest of the witness in the result of the trial; take into consideration his or her relation to any party in interest; his or her demeanor upon the witness stand; his or her manner of testifying; his or her tendency to speak truthfully or falsely, as you may believe, the probability or improbability of the testimony given; his or her situation to see and observe; and his or her apparent capacity and willingness to truthfully and accurately tell you what he or she saw and observed; and if you believe any witness testified falsely as to any material issue in this case, then you must reject that which you believe to be false, and you may reject the whole or any part of the testimony of such witness. (Emphasis omitted.)

The instruction in the text is a paraphrase of *9th Cir. Crim. Jury Instr.* 3.9 (2010) and Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 101.43 (6th ed. 2011), as approved in *United States v. Hastings*, 577 F.2d 38, 42 (8th Cir. 1978). However, any factors set out in the *Phillips*, *Clark*, or *Merrival* instructions may be added in as deemed relevant to the case.

A general instruction on the credibility of witnesses is in most cases sufficient. Whether a more specific credibility instruction is required with respect to any particular witness or class of witnesses is generally within the discretion of the trial court.

The credibility of a child witness is covered in Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 105.12 (6th ed. 2011). *9th Cir. Crim. Jury Instr.* 4.12 recommends that no "child witness" instruction be given. This Committee joins in those comments.

The testimony of police officers is addressed in *Golliher v. United States*, 362 F.2d 594, 604 (8th Cir. 1966).

Factors to be taken into account in determining whether a special instruction is warranted with respect to a drug user are discussed in *United States v. Johnson*, 848 F.2d 904, 905-06 (8th Cir. 1988).

In assessing a witness's credibility, the jury properly considers a number of factors. *See 9th Cir. Crim. Jury Instr.* 3.9 (2010); Kevin F. O'Malley, *et al.*, 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 105.01 (6th ed. Supp. 2017); *11th Cir. Civ. Jury Instr.* 3 (2005); *United States v. Hastings*, 577 F.2d 38, 42 (8th Cir. 1978). *See generally* West Key # "Criminal Law" 785(1-16).

### **3.04 EXPLANATORY: BURDEN OF PROOF (Ordinary Civil Case)**

You must decide whether certain facts have been proved [by the greater weight of the evidence]. A fact has been proved [by the greater weight of the evidence], if you find that it is more likely true than not true. You decide that by considering all of the evidence and deciding what evidence is more believable.

You have probably heard the phrase “proof beyond a reasonable doubt.” That is a stricter standard than “more likely true than not true.” It applies in criminal cases, but not in this civil case; so put it out of your mind.

#### **Committee Comments**

The phrases that are bracketed are optional, depending upon the preference of the judge. The Committee recognizes that judges may desire to use the burden-of-proof formulation found in the pattern jury instructions adopted by their particular states. If such a burden-of-proof instruction is used, this instruction must be modified accordingly.

### 3.05 EXPLANATORY: EXPERT OPINION

You [have heard] [are about to hear] testimony from [expert] [witness's name] who [testified] [will testify] to opinions and the reasons for the opinions. This opinion testimony is allowed because of the education or experience of this witness.

You should judge this opinion testimony just as you would any other testimony. You may accept it or reject it and give it the weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all other evidence in this case.

#### Committee Comments

See Fed. R. Evid. 702, 703, 704, and 705.

Under Fed. R. Evid. 702, the trial judge has the gatekeeping responsibility to “ensur[e] that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” *Russell v. Whirlpool Corp.*, 702 F.3d 450, 456–57 (8th Cir. 2012) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) and citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993)). The trial court has “great latitude” in determining whether an expert meets these requirements, *First Union Nat’l Bank v. Benham*, 423 F.3d 855, 861 (8th Cir.2005), but “the assumption of the gatekeeper role is mandatory, not discretionary.” *Russell*, 702 F.3d at 456 (citing *Daubert*, 509 U.S. at 592–93).

Although the term “expert” is used in the heading of this instruction, the committee recommends that the parties, attorneys, and judge refrain from using the term “expert” in front of the jury. This practice “ensures that trial courts do not inadvertently put their stamp of authority” on a witness’s opinion. It also “protects against the jury’s being overwhelmed by the so-called ‘experts’.” See Fed. R. Evid. 702 advisory committee’s note (2000) (quoting Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word “Expert” Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 559 (1994).

Under Fed. R. Evid. 703, if an expert in a given field would reasonably rely on certain facts or data in coming to an opinion, the facts and data do not necessarily have to be admissible for the opinion to be admitted. If the facts or data are otherwise inadmissible, however, they may be disclosed to the jury “only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.” See Fed. R. Evid. 703.

### **3.06 EXPLANATORY: WITHDRAWAL OF CLAIM OR DEFENSE**

The claim of the plaintiff[s] that defendant[s] \_\_\_\_\_<sup>1</sup> is no longer a part of this case, so you will not decide that claim.<sup>2</sup>

The defense of defendant[s] that \_\_\_\_\_ is no longer before you and will not be decided by you.

#### **Notes on Use**

1. Describe briefly the claim that is being withdrawn. If a defendant is dismissed, modify the instruction as follows:

The claim of the plaintiff against defendant \_\_\_\_\_ is no longer a part of this case, so you will not consider it.

2. Describe briefly the defense that is being withdrawn. If a defense is withdrawn, modify the instruction as follows:

The defense of \_\_\_\_\_ is no longer a part of the case, so you will not consider it.

#### **Committee Comments**

This instruction is intended for use when the claim is withdrawn and may be modified and used for the withdrawal of counterclaims or affirmative defenses. If this instruction is given during the course of trial, it need not be given with the final instructions. The judge may wish to discuss the matter of withdrawal of a claim with the lawyers to obtain an agreement as to what the jurors are told.

*See* Kevin F. O'Malley, *et al.*, 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 102.60 (6th ed. 2011).

**3.07 EXPLANATORY: ELECTION OF FOREPERSON; DUTY TO DELIBERATE; COMMUNICATIONS WITH COURT; CAUTIONARY; UNANIMOUS VERDICT; VERDICT FORM**

There are rules you must follow when you go to the jury room to deliberate and return with your verdict.

*First*, you will select a foreperson. That person will preside over your discussions and speak for you here in court.

*Second*, your verdict must be the unanimous decision of all jurors. Therefore, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement, if you can do this without going against what you believe to be true.

Each of you must come to your own decision, but only after you have considered all the evidence, discussed the evidence fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your mind if the discussion persuades you that you should. But, do not come to a decision just because other jurors think it is right, or just to reach a unanimous verdict. Remember you are not for or against any party. You are judges – judges of the facts. Your only job is to study the evidence and decide what is true.

*Third*, during your deliberations, including during any recess taken during deliberations, you must not, directly or indirectly, communicate with or provide any information to anyone by any means or by any medium, about anything relating to this case, until I accept your verdict and discharge you from further service in this case.

*Fourth*, as stated in my instructions at the beginning of the trial, you may not in any manner seek out or receive any information about the case from any source other than the evidence received by the court and the law of the case I have provided to you.

You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on information known only by you and not your fellow jurors or the parties in the case. This would unfairly and adversely impact the judicial process.

*Fifth*, if you need to communicate with me during your deliberations, send me a note signed by one or more of you. Give the note to the [marshal] [bailiff] [court security officer] and I will answer you as soon as I can, either in writing or here in court. While you are deliberating, do not tell anyone - including me - how many jurors are voting for any side.

*Sixth*, nothing I have said or done was meant to suggest what I think your verdict should be. The verdict is entirely up to you.<sup>1</sup>

*Finally*, the verdict form is your written decision in this case. [The form reads: (read form)]. You will take [this] [these] form[s] to the jury room, and when you have all agreed on the verdict[s], your foreperson will fill in the form[s], sign and date [it] [them], and tell the [marshal] [bailiff] [court security officer] that you are ready to return to the courtroom.

[If more than one form was furnished, you will bring the unused forms in with you.]

#### **Notes on Use**

1. The trial judge may give a fair summary of the evidence as long as the comments do not relieve the jury of its duty to find that each party has proved those elements upon which such party has the burden of proof. Judges may, in appropriate cases, focus the jury on the primary disputed issues, but caution should be exercised in doing so. *See United States v. Neumann*, 887 F.2d 880, 882-83 (8th Cir. 1989) (*en banc*).

#### **Committee Comments**

If a hung jury is possible, use Model Instruction 3.08, *infra*.

Paragraphs third and fourth of this instruction reflect information in the Proposed Model Jury Instructions recommended by the Judicial Conference Committee on Court Administration and Case Management (June 2012).

### **3.08 EXPLANATORY: “ALLEN” CHARGE TO BE GIVEN AFTER EXTENDED DELIBERATION**

As I told you earlier, it is your duty to consult with one another, deliberate, and try to reach agreement, if you can do that without violating your conscience. Of course, you must not give up your honest beliefs about the evidence just because of what other jurors believe to be true, or just because you want to reach a verdict. Each of you must decide the case for yourself, but only after considering and discussing the evidence with your fellow jurors.

When you deliberate, you should be willing to re-examine your own views and change your mind, if you decide you were mistaken. For all jurors to agree, you will have to openly and frankly examine and discuss the questions you have to decide. Listen to the opinions of others and be willing to re-examine your own views.

Finally, remember that you are not representing [either][any] side. You are, instead, judges – judges of the facts; judges of the believability of the witnesses; and judges of the weight of the evidence. Your only job is to find the truth from the evidence. You may take all the time you need.

There is no reason to think that this case would be tried in a better way or that a different jury would be more likely to reach a decision. If you cannot agree on a verdict, the case is left open, and it will have to be retried at some later time.<sup>1</sup>

[You are reasonable people. Please go back now to continue your deliberations using your best judgment.]<sup>2</sup>

#### **Notes on Use**

1. A more expanded version of this instruction has been approved by this Circuit. *See United States v. Thomas*, 946 F.2d 73, 76 (8th Cir. 1991) (expressly approving an earlier version of the Eighth Circuit Model *Allen* instruction and citing *United States v. Smith*, 635 F.2d 716, 722-23 (8th Cir. 1980)); *United States v. Singletary*, 562 F.2d 1058, 1060-61 (8th Cir. 1977); *United States v. Hecht*, 705 F.2d 976, 979 (8th Cir. 1983).

2. Use this sentence when this charge is being given after deliberations have begun.

## Committee Comments

This instruction is a modification of *8th Cir. Crim. Jury Instr.* 10.02 (2012). See also the Committee Comments in that instruction. The language of this instruction covers the essential points of the traditional “Allen” charge, taken from the instruction approved in *United States v. Smith*, 635 F.2d 716, 722-23 (8th Cir. 1980). Judge Gibson noted in *Potter v. United States*, 691 F.2d 1275, 1277 (8th Cir. 1982) that “caution . . . dictates . . . that trial courts should avoid substantial departures from the formulations of the charge that have already received judicial approval.”

It is not necessarily reversible error for the trial court to give a supplemental instruction *sua sponte* and even without direct announcement by the jury of its difficulty. *Smith*, 635 F.2d at 721. The safe practice, however, would be to give such an instruction only after the jury has directly communicated its difficulty or if the length of time spent in deliberations, considering the nature of the issues and length of trial, makes it clear that difficulty does exist. A premature supplemental charge certainly could, in an appropriate case, be sufficient cause for reversal.

The trial court may make reasonable inquiries to determine if a jury is truly deadlocked, but may not ask the jury the nature and extent of its division. *Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Brasfield v. United States*, 272 U.S. 448 (1926); *United States v. Amaya*, 731 F.3d 761 (8th Cir. 2013) (polling the jury before it reaches a verdict “can rarely be resorted to without bringing to bear, in some degree . . . an improper influence upon the jury.”) (quoting *Brasfield*, 272 U.S. at 450); *United States v. Warfield*, 97 F.3d 1014 (8th Cir. 1996) (judge may not inquire how jury stands numerically). The fact that the court inadvertently learns the division of the jurors does not, by itself, prevent the giving of a supplemental charge. *United States v. Johnson*, 114 F.3d 808, 814 (8th Cir. 1997) (relying on *United States v. Cook*, 663 F.2d 808 (8th Cir. 1981); *Anderson v. United States*, 262 F.2d 764, 773-74 (8th Cir. 1959)). Such an instruction can be coercive, however, where the sole dissenting juror is aware that the court knows his identity. *United States v. Sae-Chua*, 725 F.2d 530 (9th Cir. 1984).

In this circuit the defendant is not entitled to an instruction that the jury has the right to reach no decision. *United States v. Herra-Herra*, 860 F.3d 1128, 1131 (8th Cir. 2017) (citing *United States v. Arpan*, 887 F.2d 873 (8th Cir. 1989) (*en banc*)).

A court may give an *Allen* charge without consent of the lawyers. It has been widely approved by federal courts of appeal as a fair and reasonable way to urge jurors to reach a verdict. The Eighth Circuit, in criminal cases, has consistently upheld the authority of the court to give the *Allen* charge after extended jury deliberation *without* either requesting or receiving consent from the attorneys representing the parties. See, e.g., *United States v. Singletary*, 562 F.2d 1058, 1060 (8th Cir. 1977); *United States v. Ringland*, 497 F.2d 1250, 1252-53 (8th Cir. 1974).

The Third Circuit has totally banned *Allen* charges, holding that such charges are overly coercive. *United States v. Eastern Medical Billing, Inc.*, 230 F.3d 600 (3rd Cir. 2000); *United States v. Graham*, 758 F.2d 879 (3rd Cir. 1985); *United States v. Fioravanti*, 412 F.2d 407 (3d Cir. 1969), *cert. denied*, 396 U.S. 837 (1967). The Tenth Circuit has cautioned that the *Allen* charge should be included, if at all, in the original instructions due to the “inherent danger in this

type of instruction when given to an apparently deadlocked jury.” *United States v. Wynn*, 415 F.2d 135, 137 (10th Cir. 1969).

While the Eighth Circuit has “encouraged district courts to consider with particular care whether a supplemental *Allen* instruction is absolutely necessary under the circumstances,” *Potter v. United States*, 691 F.2d 1275, 1277 (8th Cir. 1982) (citing *United States v. Smith*, 635 F.2d at 722), the Eighth Circuit has refused to adopt the Third Circuit ban on *Allen* charges. *United States v. Skillman*, 442 F.2d 542, 558 (8th Cir. 1971).

“There is no established bright-line for an acceptable length of deliberation after an *Allen* charge.” *United States v. Aldridge*, 413 F.3d 829, 833 (8th Cir. 2005) “[T]here is no clear rule as to the proper amount of deliberation time, and the appropriateness of the deliberation time is dependent on the facts of a particular case.” *Id.* (citing *Smith*, 635 F.2d at 721). In *United States v. Cortez*, 935 F.2d 135 (8th Cir. 1991), the Eighth Circuit set out a four part test to determine whether an *Allen* charge had an impermissibly coercive effect on the jury: the content of the instruction, the length of deliberation after the *Allen* charge, the total length of deliberation, and “any indicia in the record of coercion or pressure upon the jury.” *Id.* at 141–42 (quoting *Smith*, 635 F.2d at 721). “As a result, the clearly established law in this area provides very little specific guidance. About all that can be said is that coercive instructions are unconstitutional, coerciveness must be judged on the totality of the circumstances, and the facts of *Lowenfield* (polling a deadlocked jury and reading a slightly modified *Allen* charge) were not unconstitutionally coercive.” *Wong v. Smith*, 562 U.S. 1021, 1023 (2010).

Although *Allen* charges have primarily been considered in criminal cases, courts in civil cases also have authority to give *Allen* charges. *See Williams v. Fermenta Animal Health Company*, 984 F.2d 261 (8th Cir. 1993); *Railway Express Agency v. Mackay*, 181 F.2d 257, 262–63 (8th Cir. 1950); *Hill v. Wabash Ry. Co.*, 1 F.2d 626, 631 (8th Cir. 1924). *See also* 3 Sand, Siffert, Reiss, Sexton and Thrope, *Modern Federal Jury Instructions*, Instruction 78-4 Comment, p. 78-12 to 78-13 (1990). Therefore, courts in both criminal and civil cases have the authority to give *Allen* charges without the consent of attorneys for the parties.

*See* Kevin F. O’Malley, *et al.*, 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 102.60 (6th ed. Supp. 2017).

## 4. PRISONER/PRETRIAL DETAINEE CIVIL RIGHTS CASES

### 4.00 OVERVIEW

The instructions in this Chapter focus on civil rights actions brought by prisoners under 42 U.S.C. § 1983.<sup>1</sup> Chapters 12 and 13 address employment claims brought under § 1983.

Section 1983 provides a remedy to persons deprived of their federal constitutional rights and some federal statutory rights under color of law. These instructions generally address the elements of § 1983 claims, the elements of specific types of constitutional violations that commonly arise, some pertinent defenses, and damages.

The Committee notes that factual differences can significantly affect the legal standards and jury instructions that apply in a case. For instance, the facts relevant to an inadequate-medical-care case include whether the plaintiff is a convicted inmate or pretrial detainee, whether the claim is based on a condition of confinement, and whether the defendant is an individual, supervisor, policymaker, or municipality. Another crucial distinction referenced in the instructions is the need to differentiate between convicted inmates, pretrial detainees, and private persons.

The Supreme Court has consistently affirmed that “[t]here is no iron curtain drawn between the Constitution and the prisons of this country.” *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974); *see also Beard v. Banks*, 548 U.S. 521, 528 (2006); *Shaw v. Murphy*, 532 U.S. 223, 228–29 (2001); *Turner v. Safley*, 482 U.S. 78, 84 (1987); *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). Still, “simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights...” *Bell*, 441 U.S. at 545–46 (citation and internal quotation marks omitted); *see also Courtney v. Bishop*, 409 F.2d 1185, 1187 (8th Cir. 1969) (internal citations omitted) (“Lawful incarceration necessarily operates to deprive a prisoner of certain rights and privileges he would otherwise enjoy in the free society, a retraction justified by considerations underlying our penal system. A convict[ed prisoner], however, does not lose all of his civil rights—for those that are fundamental follow him, with appropriate limitations, through the prison gate.”).

#### *Sentenced Prisoners*

“It is undisputed that the treatment a prisoner receives in prison and the conditions under which [the prisoner] is confined are subject to scrutiny under the Eighth Amendment.” *Helling v. McKinney*, 509 U.S. 25, 31 (1993); *see also Farmer v. Brennan*, 511 U.S. 825, 832 (1994). The Eighth Amendment prohibits the imposition of cruel and unusual punishments and “embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency.” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citation and internal quotation marks omitted). “No static ‘test’ can exist by which courts determine whether conditions of confinement are cruel and

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<sup>1</sup> “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,...”

unusual, for the Eighth Amendment ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’” *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). “The Constitution ‘does not mandate comfortable prisons.’” *Farmer*, 511 U.S. at 832 (quoting *Rhodes*, 452 U.S. at 349).

### *Pretrial Detainees*

Pretrial detainee § 1983 claims “are analyzed under the Fourteenth Amendment’s Due Process Clause rather than the Eighth Amendment prohibition of cruel and unusual punishment.” See *Kahle v. Leonard*, 477 F.3d 544, 550 (8th Cir. 2007). “This makes little difference as a practical matter, though: Pretrial detainees are entitled to the same protection under the Fourteenth Amendment as [convicted prisoners] receive under the Eighth Amendment.” *Holden v. Hirner*, 663 F.3d 336, 341 (8th Cir. 2011).

Additionally, different legal standards are applied in establishing liability against individuals and against local governing bodies for the deprivation of certain constitutional rights. “Where a particular Amendment ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.” *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). When necessary, these instructions include right-specific mental states because § 1983 itself “contains no independent state-of-mind requirement” apart from what is necessary to state a violation of the underlying right. *Daniels v. Williams*, 474 U.S. 327, 328 (1986).

### *Qualified Immunity*

Qualified immunity is a doctrine that “shields a government official from liability unless [the official’s] conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known.” *McGuire v. Cooper*, 952 F.3d 918, 922 (8th Cir. 2020) (citations and internal quotation omitted). The inquiry into a qualified immunity defense is two-fold: whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right; and whether that right was clearly established at the time of the defendant’s alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

The issue of qualified immunity can be difficult to resolve as it “is frequently intertwined with unresolved factual questions.” *Littrell v. Franklin*, 388 F.3d 578, 585 (8th Cir. 2004) (discussing submission of excessive force issue to the jury). When there is a question concerning the facts pled by a plaintiff to establish a § 1983 violation, a jury must decide the predicate facts, enabling the court to determine whether qualified immunity applies. *Id.* at 584-85. See also *Thompson v. King*, 730 F.3d 742, 750 (8th Cir. 2013) (citing *Littrell*, 388 F.3d at 584-85); *Luckert v. Dodge Cty.*, 684 F.3d 808, 817 (8th Cir. 2012) (“Qualified immunity is a legal question for the court, not the jury, to decide in the first instance, based either on the allegations or, if material facts are in dispute, on the facts found by the jury.”).

When “factual questions prevent a district court from ruling on the issue of qualified immunity, it is appropriate to tailor special interrogatories to the facts of the case. This practice allows the jury to make any requisite factual findings that the district court may then rely upon to

make its own qualified immunity ruling.” *Littrell*, 388 F.3d at 585. “In short, where questions of historical fact exist, the jury must resolve those questions so that the court may make the ultimate legal determination of whether the officers’ actions were objectively reasonable in light of clearly established law.” *Id.* at 586. The elements instruction should set forth facts that, if found to be true, entitle the plaintiff to a verdict.

### *Damages*

To seek compensatory and punitive damages for deprivation of rights under § 1983, a plaintiff must allege “an ‘actual, compensable injury.’” *Waters v. Madson*, 921 F.3d 725, 740 (8th Cir. 2019) (quoting *Heck v. Humphrey*, 512 U.S. 477, 487 n. 7 (1994)). An actual injury is required because “the abstract value of a constitutional right may not form the basis for § 1983 damages.” *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986).

“[N]ominal damages, and not damages based on some undefinable ‘value’ of infringed rights, are the appropriate means of ‘vindicating’ rights whose deprivation has not caused actual, provable injury.” *Id.* at fn. 11 (citing *Carey v. Phipus*, 435 U.S. 247, 254 (1978)).

*Carey* instructed that “[r]ights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests. . .” 435 U.S. at 254. *Carey* further explained the role of nominal, compensatory, and punitive damages:

Common-law courts traditionally have vindicated deprivations of certain “absolute” rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.

*Id.* at 266 (footnote omitted). *See also Garrett v. Clarke*, 147 F.3d 745, 747 (8th Cir. 1998) (“If [plaintiff] proves [his Fourth Amendment search] claim, he is entitled to a finding of liability and nominal damages even if he cannot prove actual damages.”).

The Eighth Circuit concluded that a jury is “required to award nominal damages once it has found cruel and unusual punishment if it has not been able to convert into dollars the injury and pain a plaintiff has suffered.” *Cowans v. Wyrick*, 862 F.2d 697, 699 (8th Cir. 1988); accord *Foulk v. Charrier*, 262 F.3d 687, 701 (8th Cir. 2001). Similarly, a plaintiff may submit a nominal damages instruction in a Fourth Amendment unlawful entry claim. *Miller v. Albright*, 657 F.3d 733, 736-39 (8th Cir. 2011). In *Miller*, Miller sued two officers under the Fourth Amendment for unlawful entry, excessive force, and unlawful arrest. *Id.* at 734. He submitted jury instructions for both compensatory and punitive damages, however, did not propose an instruction for nominal damages. The instructions given were virtually identical to what Miller requested and Miller did not object to the form of the instructions. The jury found in favor of Miller on the unlawful entry claim and entered verdicts for the officers on the remaining claims. Before the court discharged the jury, Miller requested that the district court direct the jury to award nominal

damages. The request was denied. Subsequently, Miller filed a motion to alter or amend judgment under Fed. R. Civ. Pro. 59(e) and that request was denied. In his appeal, Miller invited the Eighth Circuit to adopt an exception to Fed. R. Civ. Pro. 51 that would permit a plaintiff to request nominal damages after the return of a verdict, but before dismissal of the jury, in cases where a plaintiff alleges multiple constitutional claims and one claim has damages, and one does not. *Id.* at 735-36. The Court declined and affirmed the district court’s denial of Miller’s belated requests for a nominal damage instruction as to his unlawful entry claim. *Id.* at 736. However, the Court did note that the evidence supported the inclusion of a nominal damage instruction on the unlawful entry claim since Miller offered proof of actual damages related to his excessive force claim but did not introduce evidence of damages resulting from the unlawful entry claim. *Id.* at 738.

When a plaintiff seeks compensatory and punitive damages, the elements of claim instruction must include an injury element. The Committee recommends that if the parties agree that only nominal damages are appropriate, district courts need not include injury as a necessary element in the verdict director. If the court enters a verdict in favor of the plaintiff, the court may then enter judgment in the plaintiff’s favor in the amount of one dollar. *See infra* Model Instruction 4.71.

## **CHAPTER 4 INSTRUCTIONS AND VERDICT FORM**

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#### **4.01 § 1983 CLAIM—INTRODUCTORY INSTRUCTION**

The plaintiff [here insert name] brings [his] [her] claim[s] under the federal statute, 42 U.S.C. § 1983, which provides that any person or persons who, “under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory,” deprives another of any rights, privileges, or immunities secured by the Constitution or laws of the United States shall be liable to the injured party.

#### **Committee Comments**

For cases where there is not a stipulation to the action being under “under color of law,” a more detailed discussion of what “under color of law” means is provided in the Committee Comments to Instruction No. 4.20.

## 4.20 DEFINITION: UNDER COLOR OF LAW

[(If the parties dispute that the action was under color of law):

Acts are done under color of law when a person acts or [falsely appears] [falsely claims] [purports] to act in the performance of official duties under any state, county or municipal law, ordinance or regulation.]

[(If the parties stipulate that the action was under color of law):

In this case, the parties have stipulated [agreed] that Defendant [name] acted “under color” of law, and you must accept that fact as proved.]

### Committee Comments

Whether an official was acting under color of law is a factual question for the jury. *See Dossett v. First State Bank*, 399 F.3d 940, 947-50 (8th Cir. 2005) (holding that the district court’s “color of law” instruction was unduly narrow and remanding for trial). The phrases “state action” and “color of law” are used interchangeably. *Cf. Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982) (“it is clear that in a § 1983 action brought against a state official, the statutory requirement of action ‘under color of state law’ and the ‘state action’ requirement of the Fourteenth Amendment are identical.”).

In *Monell v. Dep’t of Social Services of New York*, 436 U.S. 658, 694 (1978), the Supreme Court held that “a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents,” rather “it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.” The Eighth Circuit discussed how “acting under color of state law” should be defined in *Neighborhood Enterprises, Inc. v. City of St. Louis*, 540 F.3d 882, 885 (8th Cir. 2008):

In *West v. Atkins*, 487 U.S. 42 (1988), the Supreme Court explained that “[t]o state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.” *Id.* at 49. The Court went on to state:

The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power “possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” *United States v. Classic*, 313 U.S. 299, 326 (1941). In *Lugar v. Edmondson Oil Co.*, [457 U.S. 922], the Court made clear that if a defendant’s conduct satisfies the state-action requirement of the Fourteenth

Amendment, “that conduct [is] also action under color of state law and will support a suit under § 1983.” *Id.* at 935. In such circumstances, the defendant’s alleged infringement of the plaintiff’s federal rights is “fairly attributable to the State.” *Id.* at 937.

To constitute state action, “the deprivation must be caused by the exercise of some right or privilege created by the State ... or by a person for whom the State is responsible,” and “the party charged with the deprivation must be a person who may fairly be said to be a state actor.” *Id.* “[S]tate employment is generally sufficient to render the defendant a state actor.” *Id.*; at 936, n. 18. It is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State. *See Monroe v. Pape*, 365 U.S. [167, 172 (1961)]. Thus, generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law.

*West*, 487 U.S. at 49–50 (citations omitted).

The element is satisfied if the defendant acts or purports to act in the performance of official duties, even if he oversteps his authority and misuses power.” *Johnson v. Phillips*, 664 F.3d 232, 240 (8th Cir. 2011). In most cases, the under color of law issue is not challenged, and the jury need not be instructed on it. If an instruction is needed, this instruction should typically be sufficient.

#### **4.21 DEFINITION: SUBSTANTIAL RISK OF SERIOUS HARM**

A substantial risk of serious harm is present when a prisoner faces an objectively intolerable risk of harm such that prison officials cannot argue that they were subjectively blameless for the resulting harm to the prisoner.

#### **Committee Comments**

The Committee recognizes that the definition of “substantial risk of serious harm” is complicated. Defining the term is likely unnecessary in most cases. This is because the deliberate indifference instruction (Model Instruction 4.23), and the elements of claim instruction for Failure to Protect from Attack (Model Instruction 4.44) and Conditions of Confinement (Instruction 4.46), direct users to describe the “substantial risk of serious harm to or serious medical need of the plaintiff.”

If a definition of “substantial risk of serious harm” is needed, this instruction provides the current language used to describe what it means. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994), held that for a prisoner to recover against prison officials for failing to protect him, he must prove that: (1) “he [was] incarcerated under conditions posing a substantial risk of serious harm”; and (2) the prison official was deliberately indifferent to that substantial risk of serious harm. In defining deliberate indifference, the Court, in *Farmer*, explained:

[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health and safety; the official must both be aware of facts from which the inference could be drawn that *a substantial risk of serious harm exists, and he must also draw the inference.*

*Id.* at 837 (emphasis added).

Additionally, the Eighth Circuit explained that this rigorous standard of proof is appropriate because “only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.” *Jensen v. Clarke*, 73 F.3d 808, 810 (8th Cir. 1996) (citing *Wilson v. Seiter*, 501 U.S. 294, 297 (1991)).

*See also Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015) (convicted prisoner, lethal injection case). For the method of execution to be successfully challenged under the Eighth Amendment “there must be a substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment.” *Johnson v. Lombardi*, 809 F.3d 388, 390 (8th Cir. 2015) (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008); *Schoelch v. Mitchell*, 625 F.3d 1041 (8th Cir. 2010) (pretrial detainee case).

#### **4.22 DEFINITION: SERIOUS MEDICAL NEED**

A serious medical need is one that has been diagnosed by a physician as requiring treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.

#### **Committee Comments**

*See Barton v. Taber*, 908 F.3d 1119, 1124 (8th Cir. 2018). Whether an inmate's condition is a serious medical need is a question of fact. *Schaub v. VonWald*, 638 F.3d 905, 914 (8th Cir. 2011).

“Deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment.” *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (citation omitted). It is well established that pretrial detainees are “entitled to at least as much protection under the Fourteenth Amendment as under the Eighth Amendment.” *Johnson v. Leonard*, 929 F.3d 569, 575 (8th Cir. 2019) (quoting *Hartsfield v. Colburn*, 371 F.3d 454, 457 (8th Cir. 2004)).

#### 4.23 DEFINITION: DELIBERATE INDIFFERENCE

Deliberate indifference is established only if there is actual knowledge of [here describe the substantial risk of serious harm to or serious medical need of] the plaintiff and if the defendant disregards that [risk or need] by intentionally refusing or intentionally failing to take reasonable measures to deal with the problem. Negligence or inadvertence does not constitute deliberate indifference.

##### Committee Comments

*See Farmer v. Brennan*, 511 U.S. 825, 835-847 (1994) (clearly limiting deliberate indifference to intentional, knowing or recklessness in the criminal law context that requires actual knowledge of a serious risk); *Wilson v. Seiter*, 501 U.S. 294, 302-06 (1991). The court limits Eighth Amendment claims to those in which the plaintiff can show actual subjective intent rather than just recklessness in the tort sense. In *Wilson*, the Court characterized Eighth Amendment violations as only acts that are “*deliberate act[s] intended to chastise or deter*” or “*punishment [that] has been deliberately administered for a penal or disciplinary purpose.*” *Wilson*, 501 U.S. at 300 (emphasis added). The Court, continuing to follow the deliberate indifference standard, clearly stated that negligence was not sufficient. *Id.*; *see also Blair v. Bowersox*, 929 F.3d 981, 988 (8th Cir. 2019). “Deliberate disregard is a mental state ‘equivalent to criminal-law recklessness, which is ‘more blameworthy than negligence,’ yet less blameworthy than purposely causing or knowingly bringing about a substantial risk of serious harm to the inmate.” *Barr v. Pearson*, 909 F.3d 919, 921 (8th Cir. 2018) (quoting *Schaub v. VonWald*, 638 F.3d 905, 914–15 (8th Cir. 2011)).

*See also Johnson v. Leonard*, 929 F.3d 569, 577 (8th Cir. 2019). The *Johnson* case discusses inmates’ claims of deliberate indifference to medical needs. *See supra* Model Instruction 4.43. In *Johnson*, the court stated that a “pretrial detainee [] is entitled to at least as much protection under the Fourteenth Amendment as under the Eighth Amendment.” 929 F.3d at 575 (citation and quotation marks omitted).

The Committee believes the phrase “deliberate indifference” should be defined in most cases, although Eighth Circuit case law does not require it.

#### **4.24 DEFINITION: MALICIOUSLY**

“Maliciously” means intentionally injuring another without just cause.

#### **Committee Comments**

*See Levine v. Roebuck*, 550 F.3d 684, 690 (8th Cir. 2008) (citing *Howard v. Barnett*, 21 F.3d 868 (8th Cir. 1994).)

#### **4.25 DEFINITION: SADISTICALLY**

“Sadistically” means engaging in extreme or excessive cruelty or delighting in cruelty.

#### **Committee Comments**

*See United States v. Miller*, 477 F.3d 644, 647 (8th Cir. 2007) (citing *Howard v. Barnett*, 21 F.3d 868, 872 (8th Cir.1994)).

#### **4.40 ELEMENTS OF CLAIM: EXCESSIVE USE OF FORCE—ARREST OR OTHER SEIZURE OF PERSON BEFORE CONFINEMENT**

Your verdict must be for plaintiff [here insert name] and against defendant [here insert name] [here generally describe the claim]<sup>1</sup> if all the following elements have been proved:<sup>2</sup>

*First*, the defendant [here describe an act such as “struck, hit, kicked, or shot”]<sup>3</sup> the plaintiff [“when arresting”, “when stopping”, or “when in the process of arresting or stopping”]<sup>4</sup> [him] [her]; and

*Second*, the force used was excessive because it was not reasonably necessary to [here describe the purpose for which force was used such as “arrest the plaintiff,” “take the plaintiff into custody,” or “stop the plaintiff for investigation”]; and

*Third*, as a direct result, the plaintiff was injured;<sup>5</sup> and

[*Fourth*, the defendant was acting under color of law.]<sup>6</sup>

If any of the above elements has not been proved, then your verdict must be for the defendant.

In determining whether the force, [if any]<sup>7</sup> was “excessive,” you must consider: the need for the application of force; the relationship between the need and the amount of force that was used; the extent of the injury inflicted; and whether a reasonable officer on the scene, without the benefit of hindsight, would have used that much force under similar circumstances. [You should keep in mind that the decision about how much force to use often must be made in circumstances that are tense, uncertain and rapidly changing.]<sup>8</sup>

[Deadly force<sup>9</sup> may be used only if it is reasonably believed necessary to [(apprehend a dangerous, fleeing felon) (prevent a significant threat of death or serious physical harm to the officer or others)].<sup>10</sup>

A warning must be given, if [feasible] [possible], before deadly force may be used.] You must [decide] [determine] whether the officer’s actions were reasonable in the light of the facts and circumstances confronting the officer [without regard to the officer’s own state of mind, intention or motivation].<sup>11</sup>

[“Deadly force” is force intended or reasonably likely to cause death or serious physical injury.]<sup>12</sup>

### Notes on Use

1. Describe the claim if the plaintiff has more than one claim against this defendant.
2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.
3. The defendant’s conduct, indicated by the plaintiff’s evidence, should be described generally. This instruction assumes that probable cause for the arrest or stop is not in dispute. If it is an issue, that claim should be submitted in a separate instruction.
4. Select the appropriate option based on the facts of the case.
5. A finding that the plaintiff suffered some actual injury or damage is necessary before an award of substantial compensatory damages may be made under 42 U.S.C. § 1983. *Dawkins v. Graham*, 50 F.3d 532, 535 (8th Cir. 1995); *see also Corpus v. Bennett*, 430 F.3d 912, 916 (8th Cir. 2005) (where the jury found no direct injury, nominal damages were an appropriate means to vindicate constitutional rights whose deprivation had not caused an actual provable injury). Specific language that describes the damage the plaintiff suffered may be included here and in the damage instruction. Model Instruction 4.70, *infra*. A nominal damages instruction may have to be submitted under *Cowans v. Wyrick*, 862 F.2d 697, 700 (8th Cir. 1988). *See infra* Model Instruction 4.71.
6. Use this language if there is an issue as to whether the defendant was acting under color of law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, the defendant will concede this element. If so, it need not be included in this instruction. If this paragraph is used, color of law will have to be defined on the factual issue specified. *See* Model Instruction 4.20.
7. If the defendant denies the use of any force, include this phrase.
8. Add this phrase if appropriate. *See Graham v. Connor*, 490 U.S. 386, 396-397 (1989). It should not be used if repetitious. *See Billingsley v. City of Omaha*, 277 F.3d 990, 996-997 (8th Cir. 2002). It need not be included if the defendant denies all use of force. *Boesing v. Spiess*, 540 F.3d 886, 891 (8th Cir. 2008).
9. If the phrase is used in the instruction, add the definition of deadly force.

10. If deadly force is used, add this phrase or other appropriate language. *See Tennessee v. Garner*, 471 U.S. 1, 15-22 (1985); *Rahn v. Hawkins*, 464 F.3d 813, 818 (8th Cir. 2006).

11. If there is evidence of the defendant officer's ill will toward the plaintiff, add this phrase. *See Graham v. Connor*, 490 U.S. 386, 397 (1989).

12. If deadly force was used, or may have been used, use this or another definition. *See Kuha v. City of Minnetonka*, 365 F.3d 590, 597-98 (8th Cir. 2004) (use of police dog not deadly force); RESTATEMENT 2d OF TORTS § 131 (1965); Force, *Black's Law Dictionary* (11th ed. 2019) ("violent action known to create a substantial risk of causing death or serious bodily harm"). There are a variety of formulations, all of which are similar.

### Committee Comments

In *Graham v. Connor*, 490 U.S. 386, 393 (1989), the Supreme Court held that a "reasonableness" standard, derived from the Fourth Amendment, applied in cases involving the use of force in making an arrest or an investigatory stop or other seizure. ~~Id.~~ at 393. *See also Jackson v. Stair*, 944 F.3d 704, 710 (8th Cir. 2019) (When an excessive force claim is made against a law enforcement officer related to conduct involving an arrest, "the conduct should be analyzed under an objective reasonableness standard."); *Andrews v. Neer*, 253 F.3d 1052, 1060 (8th Cir. 2001) (same). Relevant considerations include the severity of the crime at issue, whether the person posed an immediate safety threat, and whether the person was actively resisting arrest or attempting to flee. *Jackson*, 944 F.3d at 710. The relevant facts should be judged from the perspective of a reasonable officer on the scene and not with 20/20 hindsight vision. *Id.* While the degree of injury suffered "is certainly relevant in so far as it tends to show the amount and type of force used," a de minimis injury does not foreclose an excessive force claim brought under the Fourth Amendment. *Chambers v. Pennycook*, 641 F.3d 898, 906 (8th Cir. 2011).

In *Tennessee v. Garner*, the Court held "[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so . . . Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985); *see also Scott v. Harris*, 550 U.S. 372, 382, 385-86 (2007) (high speed chase that resulted in the suspect being rendered a quadriplegic was found reasonable and officer was entitled to summary judgment); *Raines v. Counseling Assocs., Inc.*, 883 F.3d 1071, 1074 (8th Cir. 2018) (district court's denial of summary judgment on the issue of qualified immunity was not a final decision where question of fact existed as to whether suspect aggressively advanced on officers before being shot 21 times; appeal dismissed).

A threat to use deadly force does not constitute deadly force. *See* § 3.11(2), Model Penal Code; Force, *Black's Law Dictionary* (11th ed. 2019).

Once an individual becomes a pretrial detainee, the use of force is measured by a substantive due process standard of the Fifth and Fourteenth Amendments. *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1048-49 (8th Cir. 1989). See generally, Model Instruction 4.41, *infra*, for the use of excessive force claims of pretrial detainees. The Eighth Circuit has not decided when the person’s status changes from “arrestee” to “pretrial detainee.” *Andrews v. Neer*, 253 F.3d 1052, 1060-61 (8th Cir. 2001) (8th Circuit has not drawn a bright-line rule dividing the end of arrestee’s status). However, a review of Eighth Circuit case law indicates that status as a pretrial detainee begins sometime after the arrest and completion of the booking process. See *Wilson v. Spain*, 209 F.3d 713, 715-16 (8th Cir. 2000) (discussing the split of the federal circuit courts on this issue and history of the 8th Circuit’s holdings). See also *Chambers*, 641 F.3d at 905 (“[I]t is appropriate to use a Fourth Amendment framework to analyze excessive force claims arising out of incidents occurring shortly after arrest.”). The individual’s status as a pretrial detainee continues until they have been sentenced. See *Williams-El v. Johnson*, 872 F.2d 224, 228-29 (8th Cir. 1989) (a person convicted, not yet sentenced, is still a pretrial detainee); *Wilson*, 209 F.3d at 715.

This instruction does not cover cases involving injuries to persons other than to the suspect. *Terrell v. Larson*, 396 F.3d 975, 979 (8th Cir. 2005) (en banc) considered the requisite level of culpability for a § 1983 substantive due process claim involving an officer’s decision to respond to a domestic violence call by driving 60-65 miles per hour and running a red light, at which location the patrol car collided with a motorist’s vehicle and killed the driver. The Eighth Circuit previously applied the intent-to-harm standard from *County of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998) “to all substantive due process claims based upon the conduct of public officials engaged in a high-speed automobile chase aimed at apprehending a suspected offender, regardless of whether the chase conditions arguably afforded pursuing officers time to deliberate.” *Terrell*, 396 F.3d at 977 (citations omitted). *Terrell* extended the application of *Lewis* “to an officer’s decision to engage in high-speed driving in response to other types of emergencies, and to the manner in which the police car is then driven in proceeding to the scene of the emergency.” *Id.* at 979 (citations omitted).

#### **4.41 ELEMENTS OF CLAIM: EXCESSIVE USE OF FORCE—PRETRIAL DETAINEES**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on plaintiff's claim [generally describe claim] if all the following elements have been proved:<sup>1</sup>

*First*, the defendant [here describe an act such as “struck, hit, kicked, or shot”]<sup>2</sup> the plaintiff; and

*Second*, the force used was excessive because it was not reasonably necessary to [here describe the purpose for which force was used such as “restore order,” or “maintain discipline,”]<sup>3</sup>; and

*Third*, as a direct result, the plaintiff was injured;<sup>4</sup> and

[*Fourth*, the defendant was acting under color of law.]<sup>5</sup>

If any of the above elements has not been proved, then your verdict must be for the defendant.

In determining whether the force [if any]<sup>6</sup> was excessive, you must consider: the need for the application of force; the relationship between the need and the amount of force that was used; the extent of the injury inflicted; whether it was used for punishment rather than for a legitimate purpose such as maintaining order or security within [here describe the facility in which the plaintiff was incarcerated]; and whether a reasonable officer on the scene would have used the same force under similar circumstances.

[You should keep in mind that the decision about how much force to use often must be made in circumstances that are tense, uncertain and rapidly changing.]<sup>7</sup> [Deadly force<sup>8</sup> may be used only if it is reasonably believed necessary to [(apprehend a dangerous, fleeing felon) (prevent a significant threat of death or serious physical harm to the officer or others)].<sup>9</sup> A warning must be given, if [feasible [possible], before deadly

force may be used.] You must [decide] [determine] whether the officer’s actions were reasonable in the light of the facts and circumstances confronting the officer [without regard to the officer’s own state of mind, intention or motivation].<sup>10</sup>

[“Deadly force” is force intended or reasonably likely to cause death or serious physical injury.]<sup>11</sup>

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. The defendant’s conduct, indicated by the plaintiff’s evidence, should be described generally. This instruction assumes that probable cause for the arrest or stop is not in dispute. If it is an issue, that claim should be submitted in a separate instruction.

3. See *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1048 (8th Cir. 1989), and *Andrews v. Neer*, 253 F.3d 1052, 1060-61 (8th Cir. 2001), for the standard for the pretrial detainee in custody.

4. Specific language describing the plaintiff’s damages may be included here, and in the damages instruction, Model Instruction 4.70, *infra*. Nominal damages will also have to be submitted under *Cowans v. Wyrick*, 862 F. 2d 697, 700 (8th Cir. 1988). See *infra* Model Instruction 4.71.

5. Use this language if there is an issue as to whether the defendant was acting under color of law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, the defendant will concede this element. If so, it need not be included in this instruction. If this paragraph is used, color of law will have to be defined on the factual issue specified. See Model Instruction 4.20.

6. If the defendant denies the use of any force, include this phrase.

7. This phrase should not be included in cases where the evidence indicates the circumstances were not “tense, uncertain, and rapidly changing.” *Rahn v. Hawkins*, 464 F.3d 813, 818 (8th Cir. 2006); *Estate of McVay v. Sisters of Mercy Hlth Sys.*, 399 F.3d 904, 908 (8th Cir. 2005) (citing *Graham v. Connor*, 490 U.S. 386, 396-97 (1989)). It need not be included if the defendant denies all use of force. *Boesing v. Spiess*, 540 F.3d 886 (8th Cir. 2008).

8. If the phrase is used in the instruction, add the definition of deadly force.

9. If deadly force is used, add this phrase or other appropriate language. See *Rahn v. Hawkins*, 464 F.3d 813, 818 (8th Cir. 2006); *Tennessee v. Garner*, 471 U.S. 1, 9-10 (1985).

10. If there is evidence of the defendant officer’s ill will toward the plaintiff, add this phrase. *See Graham v. Connor*, 490 U.S. 386, 398 & n. 12 (1989).

11. If deadly force was used or may have been used, use this or another definition. *See Kuha v. City of Minnetonka*, 365 F.3d 590, 597-98 (8th Cir. 2004) (use of police dog not deadly force); Force, *Black’s Law Dictionary* (11th ed. 2019) (“violent action known to create a substantial risk of causing death or serious bodily harm”). There are a variety of formulations, all of which are similar.

### Committee Comments

The Fourth Amendment determines a person’s right to be free from excessive force at the time of the arrest. *See infra* Committee Comments to Model Instruction 4.40. However, different constitutional protections may apply at different custodial continuum junctures running from initial arrest to post-conviction incarceration. *See Andrews v. Neer*, 253 F.3d 1052, 1061 (8th Cir. 2001). Precisely *when* the standards shift is the subject of debate. *See Wilson v. Spain*, 209 F.3d 713, 715 (8th Cir. 2000); *see also Chambers v. Pennycook*, 641 F.3d 898, 905 (8th Cir. 2011) (“We have noted the existence of a ‘legal twilight zone’ between arrest and sentencing, where it is unclear whether excessive force claims are governed by the Fourth Amendment or cases decided based on the Fourteenth Amendment and substantive due process.”) (quoting *Wilson*, 209 F.3d at 715)).

The Eighth Circuit has not decided when the person’s status changes from “arrestee” to “pretrial detainee.” *Andrews*, 253 F.3d at 1060-61 (8th Circuit has not drawn a bright line rule dividing the end of arrestee’s status). However, a review of Eighth Circuit case law indicates that status as pretrial detainee begins sometime after the arrest and completion of the booking process. *See Wilson*, 209 F.3d at 715-16 (discussing the split of the federal circuit courts on this issue, and history of the 8th Circuit’s holdings); *see also Chambers*, 641 F.3d at 905 (“[I]t is appropriate to use a Fourth Amendment framework to analyze excessive force claims arising out of incidents occurring shortly after arrest.”); *Davis v. White*, 794 F.3d 1008, 1011 (8th Cir. 2015) (Fourth Amendment’s “objective reasonableness” standard applies to excessive force claims that “arise before the end of a detainee’s booking process.”). The individual’s status as a pretrial detainee continues until they have been sentenced. *Williams-El v. Johnson*, 872 F.2d 224, 228-29 (8th Cir. 1989) (a person convicted, not yet sentenced, is still a pretrial detainee); *see also Wilson*, 209 F.3d at 715.

Once an individual becomes a pretrial detainee, the use of force is measured by a substantive due process standard of the Fifth and Fourteenth Amendments. *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1048-49 (8th Cir. 1989). In *Kingsley v. Hendrickson*, the Supreme Court held that the objective reasonableness standard applies to excessive force due process claims by pretrial detainees. 576 U.S. 389, 396-99 (2015).

In applying the objective reasonableness standard to detainees in jail, the Supreme Court “explained that a court must take account of the legitimate interests in managing a jail, acknowledging as part of the objective reasonableness analysis that deference to policies and practices needed to maintain order and institutional security is appropriate.” *Id.* at 399. The use of force must be objectively reasonable in the light of the situation presented. *Andrews*, 253 F.3d at 1060 (citing *Johnson-El*, 878 F.2d at 1048-49). When making this determination, the court

must consider: (1) the need for applying force; (2) the relationship between that need and amount of force used; (3) the threat reasonably perceived; (4) the extent of injury inflicted; (5) whether force was used for punishment or instead to achieve a legitimate purpose such as maintaining order or security; and (6) whether a reasonable officer on the scene would have used such force under similar circumstances. *Id.* at 1061, n.7.

Under the Fourteenth Amendment, a pretrial detainee's constitutional rights are violated if the detainee's conditions of confinement amount to punishment. *Morris v. Zefferi*, 601 F.3d 805, 809 (8th Cir. 2010). This is because an inmate who is a pretrial detainee cannot be punished before adjudication of guilt. *Id.*; *see also Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (“[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”) (citation omitted)). Constitutionally infirm practices are punitive in intent, not rationally related to a legitimate purpose, or those that are rationally related but are excessive in light of their purpose. *Johnson-El*, 878 F.2d at 1048. While technically under the Fourteenth Amendment, as a practical matter, a pretrial detainee's rights are analyzed under the Eighth Amendment the same as a convicted prisoner's rights. *Kahle v. Leonard*, 477 F.3d 544, 550 (8th Cir. 2007). “Although the [Eighth Circuit] has yet to establish a clear standard for pretrial detainees, [they] repeatedly have applied the same ‘deliberate indifference’ standard as is applied in Eighth Amendment claims made by convicted inmates.” *Morris*, 601 F.3d at 809. However, the Eighth Circuit has “previously suggested that the burden of showing a constitutional violation is lighter for a pretrial detainee under the Fourteenth Amendment than for a post-conviction prisoner under the Eighth Amendment.” *Id.*

In evaluating an excessive-force claim under the Fourth Amendment, the Eighth Circuit observed, the degree of injury suffered in an excessive-force case “is certainly relevant insofar as it tends to show the amount and type of force used.” *Chambers*, 641 F.3d at 906; *see also Rohrbough v. Hall*, 586 F.3d 582, 586 (8th Cir. 2009) (“A court may also evaluate the extent of the [plaintiff's] injuries.”). However, a *de minimis* injury does not foreclose a Fourth Amendment excessive-force claim. *Chambers*, 641 F.3d at 906.

Similarly, in evaluating an excessive-force claim under the Eighth Amendment, the United States Supreme Court in *Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010) (citing *Hudson v. McMillian*, 503 U.S. 1, 7 (1992)), stated that although the extent of physical injury may be relevant, it is only one factor that may be used to determine “whether the use of force could plausibly have been thought necessary in a particular situation.” (internal citation omitted).

Cases involving food, clothing, shelter, medical care, and reasonable safety must be decided under the deliberate indifference standard for pretrial detainees and convicted prisoners. *Butler v. Fletcher*, 465 F.3d 340, 345 (8th Cir. 2006); *Crow v. Montgomery*, 403 F.3d 598, 601 (8th Cir. 2005); *Whitnack v. Douglas County*, 16 F.3d 954, 957 (8th Cir. 1994).

#### **4.42 ELEMENTS OF CLAIM: EXCESSIVE USE OF FORCE—CONVICTED PRISONERS**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on plaintiff's claim [generally describe claim] if all the following elements have been proved:<sup>1</sup>

*First*, the defendant [here describe an act such as “struck, hit, or kicked”]<sup>2</sup> the plaintiff; and

*Second*, the force used was excessive and applied maliciously and sadistically<sup>3</sup> for the purpose of causing harm; [and not in a good faith effort to achieve a legitimate purpose;]<sup>4</sup> and

*Third*, as a direct result, the plaintiff was injured;<sup>5</sup> and

[*Fourth*, the defendant was acting under color of law.]<sup>6</sup>

If any of the above elements has not been proved, then your verdict must be for the defendant.

In determining whether the force[, if any]<sup>7</sup> was excessive,<sup>8</sup> you must consider: the need for the application of force; the relationship between the need and the amount of force that was used[;] [and] the extent of the injury inflicted[; and whether the force was used to achieve a legitimate purpose or maliciously and sadistically for the purpose of causing harm].

“Maliciously” means intentionally injuring another without just cause or reason. “Sadistically” means engaging in extreme or excessive cruelty or delighting in cruelty.

#### **Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. The defendant's conduct, indicated by the plaintiff's evidence, should be described generally.

3. The issue of the defendant's intent must be addressed as an element of the claim. *See Howard v. Barnett*, 21 F.3d 868, 872 (8th Cir. 1994) ("In all cases where a prisoner alleges an Eighth Amendment violation based on excessive use of force, the fact-finder may not conclude that the Eighth Amendment was violated unless it finds that the force was applied 'maliciously and sadistically for the very purpose of causing harm'..."); *Cummings v. Malone*, 995 F.2d 817, 822 (8th Cir. 1993) (excessive force instruction must include "the malicious and sadistic standard as the jury's core inquiry"). If the plaintiff claims force was used for an illegitimate purpose, for example, to deter his access to the courts, the trial judge should consider a modification of this phrase to reflect that improper purpose. If no force at all was appropriate, the term "excessive" could be replaced with "unnecessary." It has been suggested that the jury should not be directed to consider whether the force was applied maliciously if institutional security was not involved. *See Wyatt v. Delaney*, 818 F.2d 21, 23 (8th Cir. 1987). However, this element repeatedly has been associated with Eighth Amendment violations in excessive force cases. *See Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988) (citing *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)) ("Whether pain is inflicted unnecessarily and wantonly depends, at least in part, upon whether 'force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. \* \* \* '[S]uch factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted,' *ibid.*, are relevant to that ultimate determination."). The cases frequently use the phrase "maliciously and sadistically." As noted above, the term "sadistically" is necessary to a correct statement of the law. *Howard*, 21 F.3d at 872. In *Wilkins v. Gaddy*, 559 U.S. 34, 40 (2010), the Court stated that a prisoner must show not only that an "assault actually occurred but that it was carried out 'maliciously and sadistically' rather than as a part of 'a good faith effort to maintain or restore discipline.'" The term "sadistic," to some people, has sexual connotations. The Committee, therefore, recommends that both "maliciously" and "sadistically" be defined. *See infra* Model Instructions 4.24 and 4.25.

4. Use this phrase if the defendant acknowledges the use of force but asserts that their use of force was necessary to achieve a legitimate purpose.

5. Specific language describing the plaintiff's damages may be included here and in the damage instruction, Model Instruction 4.70, *infra*. De minimis or modest nature of alleged injuries will no doubt limit the damages that can be recovered but do not preclude an excessive force claim. *Wilkins v. Gaddy*, 559 U.S. 34, 40 (2010). The jury must award nominal damages if it finds the alleged injuries to have no monetary value or are insufficient to justify a more substantial measure of damages with reasonable certainty. *See Howard*, 21 F.3d at 873 (8th Cir. 1994) (citing *Cowans*, 862 F.2d at 700 (8th Cir. 1988)). *See also infra* Model Instruction 4.71.

6. Use this language if there is an issue as to whether the defendant was acting under color of state law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, the defendant will concede this element. If so, it need not be included in this instruction. If this paragraph is used, color of law will have to be defined on the factual issue specified. *See* Model Instruction 4.20.

7. If the defendant denies the use of any force, include this phrase.

8. If deadly force was used, it may be appropriate to modify this instruction to tell the jury when deadly force is allowed. *See Rahn v. Hawkins*, 464 F.3d 813 (8th Cir. 2006); *Tennessee v. Garner*, 471 U.S. 1 (1985).

### **Committee Comments**

This instruction should be used only when a *convicted* person claims his or her constitutional rights were violated because of the use of force by a state official. If the plaintiff was a convicted prisoner at the time of the alleged violation, the appropriate standard derives from the Eighth Amendment. *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (“the unnecessary and wanton infliction of pain ... constitutes cruel and unusual punishment forbidden by the Eighth Amendment.”); “[W]henever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishment Clause, the core judicial inquiry is that set out in *Whitley*: whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Jackson v. Gutzmer*, 866 F.3d 969, 974 (8th Cir. 2017) (citing *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992)); *see also Santiago v. Blair*, 707 F.3d 984, 990 (8th Cir. 2013). “Because the use of force is sometimes required in prison settings, guards are liable only if they are completely unjustified in using force., i.e., they are using it maliciously and sadistically.” *Ward v. Smith*, 844 F.3d 717, 721 (8th Cir. 2016) (citing *Irving v. Dormire*, 519 F.3d 441, 446 (8th Cir. 2008)). *See Treats v. Morgan*, 308 F.3d 868, 872 (8th Cir. 2002) (identifying factors to be considered in deciding whether a particular use of force was reasonable).

#### **4.43 ELEMENTS OF CLAIM: DENIAL OF MEDICAL CARE**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on plaintiff's claim [generally describe claim] if all the following elements have been proved:<sup>1</sup>

*First*, the plaintiff had a serious need for [describe the plaintiff's medical need, such as "treatment for a broken leg" or "pain medication"]; and

*Second*, the defendant was aware of the plaintiff's serious need for the ["medical care" or "pain medication"]; and

*Third*, the defendant,<sup>2</sup> with deliberate indifference, failed to ["provide the medical care" or "direct that the medical care be provided" or "allow the plaintiff to obtain the medical care needed"] [within a reasonable time];<sup>3</sup> and

*Fourth*, as a direct result, the plaintiff was injured;<sup>4</sup> and

[*Fifth*, the defendant was acting under color of law.]<sup>5</sup>

If any of the above elements has not been proved, then your verdict must be for the defendant.

#### **Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. This instruction assumes that the defendant was responsible for providing care for the plaintiff's serious medical needs. If the defendant has no duty, then a directed verdict would be appropriate. If the duty is disputed, the issue may be a question of law for the judge to decide. If a specific fact is disputed, which will determine the defendant's responsibility, that fact should be submitted to the jury. For example, it may be disputed whether a certain person was working on a certain day. That question should be specifically submitted to the jury. The legal question of whether a duty arises from a specific set of facts is a question for the judge.

3. Add this phrase if alleging the medical care was provided but not at a reasonable time.

4. Specific language describing the plaintiff's damages may be included here and in the damage instruction, Model Instruction 4.70, *infra*. De minimis or modest nature of alleged injuries will no doubt limit the damages that can be recovered but do not preclude an excessive force claim. *Wilkins v. Gaddy*, 559 U.S. 34, 40 (2010). The jury must award nominal damages if it finds the alleged injuries to have no monetary value or are insufficient to justify a more substantial measure of damages with reasonable certainty. *See Howard v. Barnett*, 21 F.3d 868, 873 (8th Cir. 1994) (citing *Cowans v. Wyrick*, 862 F.2d 697, at 700 (8th Cir. 1988)). *See also infra* Model Instruction 4.71.

5. Use this language if the issue of whether the defendant was acting under color of law is still in the case. Color of law will have to be defined. *See* 42 U.S.C. § 1983 and Model Instruction 4.20, *infra*.

### **Committee Comments**

*See infra* Model Instruction 4.41 for a discussion of the standards to be applied when dealing with the use of force on pretrial detainees. Medical claims of pretrial detainees are governed by the same “deliberate indifference” standard as used for convicted prisoners. *Johnson v. Leonard*, 929 F.3d 569, 577 (8th Cir. 2019); *Butler v. Fletcher*, 465 F.3d 340 (8th Cir. 2006).

This instruction is derived from *Estelle v. Gamble*, 429 U.S. 97 (1976), which applies the Eighth Amendment to the United States Constitution to medical claims and sets the standards. The court, in *Wilson v. Seiter*, 501 U.S. 294 (1991), did not change the standard, although it made it more explicit that the deliberate indifference standard applies to all conditions of confinement cases of convicted persons and that negligence is not sufficient.

The Eighth Circuit has noted that pretrial detainees under the Fourteenth Amendment have *at least* the same protections as convicted inmates under the Eighth Amendment. *Stickley v. Byrd*, 703 F.3d 421, 423 (8th Cir. 2013). The Court may someday find pretrial detainees are entitled to additional protections under the Fourteenth Amendment.

#### 4.44 ELEMENTS OF CLAIM: FAILURE TO PROTECT FROM ATTACK

Your verdict must be for the Plaintiff and against the Defendant(s) on Plaintiff's failure to protect claim if all of the following elements have been proved:<sup>1</sup>

*First*, [here describe the attacker(s) such as "one or more [inmates]" [here describe an act such as "struck hit or kicked"]<sup>2</sup> the Plaintiff; and the Plaintiff was incarcerated under conditions posing a substantial risk of serious harm;

*Second*, the Defendant(s) knew of and was aware of the substantial risk of an attack [or disregarded the risk to Plaintiff's safety]; and

*Third*, the Defendant, with deliberate indifference to the Plaintiff's need to be protected from [such attack], failed to protect the Plaintiff; and

*Fourth*, as a direct result, the Plaintiff was injured;<sup>3</sup>

[*Fifth*, the Defendant was acting under color of law.]<sup>4</sup>

If any of the above elements has not been proved, then your verdict must be for the Defendant(s).

#### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. The defendant's conduct, indicated by the plaintiff's evidence, should be described generally.

3. Specific language describing the plaintiff's damages may be included here and in the damage instruction, Model Instruction 4.70, *infra*. The plaintiff must show that he suffered objectively serious harm from the defendant's failure to protect. *Schoelch v. Mitchell*, 625 F.3d 1041, 1047 (8th Cir. 2010).

4. Use this language if there is an issue as to whether the defendant was acting under color of law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, the defendant will concede this element. If so, it need not be included in this instruction. If this paragraph is used, color of law will have to be defined on the factual issue specified. *See* Model Instruction 4.20.

### Committee Comments

“To prove unconstitutional failure to protect from harm (plaintiff) must show (1) an objectively sufficient deprivation, meaning that he was incarcerated under conditions posing a substantial risk of serious harm, and (2) that defendant was deliberately indifferent to the substantial risk of harm.” *Schoelch* 625 F.3d at 1046; *see also Glaze v. Byrd*, 721 F.3d 528, 531 (8th Cir. 2013) (“A failure-to-protect claim has two elements. First, the inmate must show that he [was] incarcerated under conditions posing a substantial risk of serious harm. Second, the inmate must show that the official knew of and disregarded the risk to the inmate’s safety.”) (internal quotation marks and citations omitted) (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). Negligence is not sufficient. *See Ambrose v. Young*, 474 F.3d 1070, 1077 (8th Cir. 2007).

Although a pretrial detainee claim is analyzed under the Fourteenth Amendment Due Process Clause rather than the Eighth Amendment, this makes little difference as a practical matter because pretrial detainees are entitled to (at least) the same protections under the Fourteenth Amendment as imprisoned convicts receive under the Eighth Amendment. *Schoelch*, 625 F.3d at 1046; *Kahle v. Leonard*, 477 F.3d 544, 550 (8th Cir. 2007); *see also Morris v. Zefferi*, 601 F.3d 805 (8th Cir. 2010).

#### **4.45 ELEMENTS OF CLAIM: RETALIATION AGAINST PRISONERS FOR PARTICIPATING IN PROTECTED ACTIVITY**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on plaintiff's retaliation claim if all the following elements have been proved:<sup>1</sup>

First, plaintiff [insert name] [filed a § 1983 claim against defendant, filed a grievance against defendant];<sup>2</sup> and

Second, defendant [transferred plaintiff to another facility, reassigned plaintiff to a different work assignment, placed plaintiff in solitary confinement]<sup>3</sup>; and

Third, plaintiff's [transfer, reassignment, placement] might well dissuade a reasonable person in the same or similar circumstances from [filing a § 1983 claim, filing a grievance]; and

Fourth, [defendant's decision to [reassign, place in solitary confinement] was motivated at least in part by plaintiff's [filing a § 1983 claim, filing a grievance]] or [plaintiff would not have been transferred but for his [filing a § 1983 claim, filing a grievance]].<sup>4</sup>

If any of the above elements has not been proved, your verdict must be for defendant and you need not proceed further in considering this claim.

#### **Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that an element is proved only if the jury finds the element is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Describe here the protected conduct.

3. Describe the adverse action.

4. Select the appropriate phrase. If the adverse action was a prison transfer, the plaintiff must show "but for" causation. *See Spencer v. Jackson County Mo.*, 738 F.3d 907, 912 (8th Cir. 2013) ("Spencer must prove that he would not have been transferred 'but for an unconstitutional, retaliatory motive.'") (quoting *Goff v. Burton*, 7 F.3d 734, 738 (8th Cir. 1993)).

### Committee Comments

To demonstrate retaliation in violation of the First Amendment under 42 U.S.C. § 1983, an inmate must show “(1) he engaged in a protected activity, (2) the government official took adverse action against him that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity.” *Spencer*, 738 F.3d at 911 (quoting *Revels v. Vincenz*, 382 F.3d 870, 876 (8th Cir. 2004)). An inmate has a First Amendment right to file a grievance or a lawsuit. *Lewis v. Jacks*, 486 F.3d 1025, 1029 (8th Cir. 2007); see *Spencer*, 738 F.3d at 911 (filing of a lawsuit protected activity); *Revels*, 382 F.3d at 876 (grievances).

In prison transfer cases, however, the plaintiff has to prove that “but for” an unconstitutional, retaliatory motive, the defendant would not have ordered the transfer. *Goff*, 7 F.3d at 736-738.

The retaliatory conduct itself need not be a constitutional violation; the violation is acting in retaliation for “the exercise of a constitutionally protected right.” *Spencer*, 738 F.3d at 911 (quoting *Cody v. Weber*, 256 F.3d 764, 771 (8th Cir. 2001)).

An inmate has a viable § 1983 claim where a prison official files a disciplinary charge in retaliation for the inmate’s exercise of his constitutional rights. *Sanders v. Hobbs*, 773 F.3d 186, 190 (8th Cir. 2014) (citing *Hartsfield v. Nichols*, 511 F.3d 826, 829 (8th Cir. 2008)). Claims of retaliation fail if the alleged retaliatory conduct violations issued were for the actual violation of a prison rule. *Sanders*, 773 F.3d at 190 (quoting *Hartsfield*, 511 F.3d at 829). Even if disputed by the inmate and supported by no other evidence, a report from a correctional officer legally suffices as some evidence upon which to base a prison disciplinary violation if the violation is found by an impartial decision-maker. *Id.*

#### **4.46 ELEMENTS OF CLAIM: CONDITIONS OF CONFINEMENT**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on plaintiff's claim [generally describe claim] if all the following elements have been proved:<sup>1</sup>

*First*, [describe the conditions of confinement here] posed a substantial risk of serious harm to the plaintiff; and

*Second*, the defendant was aware of the substantial risk of serious harm to the plaintiff; and

*Third*, the defendant, with deliberate indifference to the plaintiff's health or safety, failed to ["provide reasonably adequate conditions of confinement" or "remedy the conditions of confinement that posed a substantial risk of serious harm to the plaintiff"]; and

*Fourth*, as a direct result, the plaintiff was injured;<sup>2</sup> and

[*Fifth*, the defendant was acting under color of law.]<sup>3</sup>

If any of the above elements has not been proved, then your verdict must be for the defendant.

#### **Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Specific language describing damages the plaintiff suffered may be included here and in the damages instruction, Model Instruction 4.70, *infra*.

3. Use this language if there is an issue as to whether the defendant was acting under color of law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, the defendant will concede this element. If so, it need not be included in this instruction. If this paragraph is used, color of law will have to be defined on the factual issue specified. *See* Model Instruction 4.20.

## Committee Comments

“To establish a constitutional violation, the plaintiff must show: (1) that the conditions of their confinement posed a substantial risk of serious harm (objective component), and (2) the . . . defendants actually knew of but disregarded, or were deliberately indifferent to, the plaintiffs’ health or safety (subjective component).” *Beaulieu v. Ludeman*, 690 F.3d 1017, 1045 (8th Cir. 2012) (quoting *Crow v. Montgomery*, 403 F.3d 598, 602 (8th Cir.2005) (internal marks omitted). The totality of circumstances is examined when analyzing the conditions of confinement. *Morris v. Zefferi*, 601 F.3d 805, 810 (8th Cir. 2010) (citation omitted). Moreover, conditions posing a substantial risk of current or *future* serious harm may violate the Eighth Amendment. *Taylor v. Crawford*, 487 F.3d 1072, 1080 (8th Cir. 2007) (citations and quotations omitted).

Inmates and pretrial detainees are entitled to certain conditions of confinement, including “reasonably adequate sanitation, personal hygiene, and laundry privileges, particularly over a lengthy course of time.” *Owens v. Scott Cty. Jail*, 328 F.3d 1026, 1027 (8th Cir. 2003) (quoting *Howard v. Adkison*, 887 F.2d 134, 137 (8th Cir. 1989)); see *Beaulieu*, 690 F.3d at 1045. To demonstrate a constitutional violation of such rights, the plaintiff must show he or she “suffered extreme deprivations, meaning that he [or she] was denied the minimal civilized measure of life’s necessities.” *Schoelch v. Mitchell*, 625 F.3d 1041, 1047 (8th Cir. 2010) (citations and quotations omitted).

The plaintiff must show he or she suffered objectively serious harm as a result of the defendant’s failure to protect. *Id.*; see also *Irving v. Dormire*, 519 F.3d 441, 448 (8th Cir. 2008) (“Claims under the Eighth Amendment require a compensable injury to be greater than *de minimis*.”).

The Eighth Circuit has noted that pretrial detainees under the Fourteenth Amendment have *at least* the same protections as convicted inmates under the Eighth Amendment. *Stickley v. Byrd*, 703 F.3d 421, 423 (8th Cir. 2013). The Court may in the future find pretrial detainees are entitled to additional protections under the Fourteenth Amendment.

#### **4.47 ELEMENTS OF CLAIM: SUPERVISORY LIABILITY—FAILURE TO TRAIN OR SUPERVISE**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] for supervisory liability for failure to [train or supervise] if all the following elements have been proved:<sup>1</sup>

*First*, [name of subordinate] acting under the defendant’s supervision violated the plaintiff’s constitutional rights as specified in Instruction \_\_\_\_\_ above; and

*Second*, the Defendant had notice of a pattern of unconstitutional acts by Defendant’s employees; and

*Third*, the Defendant’s [training practices and/or supervision] were inadequate; and

*Fourth*, the defendant was deliberately indifferent in [failing to train and/or supervise employee[s]], such that the [failure to train and/or supervise] reflects a deliberate or conscious choice by the Defendant; and

[*Fifth*, as a direct result, the Plaintiff was injured]; and

[*Sixth*, the defendant was acting under color of law.]<sup>2</sup>

If any of the above elements has not been proved, then your verdict must be for the defendant.

#### **Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Use this language if the issue of whether the defendant was acting under color of law is still in the case. Color of law will have to be defined. *See* 42 U.S.C. § 1983 and Model Instruction 4.20, *infra*.

### Committee Comments

In a failure-to-act case, the plaintiff must demonstrate that a pervasive and unreasonable risk of harm from some specified source existed, and the supervisor's inaction amounts to deliberate indifference or tacit authorization of the offensive practices. *See Williams v. Willits*, 853 F.2d 586, 588 (8th Cir. 1988). When a supervising official who had no direct participation in an alleged constitutional violation is sued for failure to train or supervise the offending actor, the supervisor is entitled to qualified immunity unless plaintiff proves that the supervisor received notice of a pattern of unconstitutional acts committed by a subordinate and was deliberately indifferent to or authorized those acts. *Mendoza v. United States Immigration & Customs Enf't*, 849 F.3d 408, 420 (8th Cir. 2017).

Under § 1983, “a claim for failure to supervise requires the same analysis as a claim for failure to train. Neither claim can succeed without evidence the municipality “[r]eceived notice of a pattern of unconstitutional acts committed by [its employees].” *Atkinson v. City of Mountain View, Mo.*, 709 F.3d 1201, 1217 (8th Cir. 2013) (internal citations and quotation marks omitted).

“[A] single incident, or a series of isolated incidents, usually provides an insufficient basis upon which to assign supervisor liability.” *See Lenz v. Wade*, 490 F.3d 991, 995–96 (8th Cir. 2007).

#### **4.48 ELEMENTS OF CLAIM: MUNICIPAL LIABILITY FOR OFFICIAL POLICY OR UNOFFICIAL CUSTOM**

Your verdict must be for Plaintiff [here insert name] and against Defendant [here insert name] on Plaintiff's [here generally describe the claim]<sup>1</sup> if all the following elements have been proved:<sup>2</sup>

*First*, that the Defendant[s] deprived the Plaintiff of [his] [her] constitutional rights as specified in Instruction \_\_\_;<sup>3</sup> and

*Second*, the deprivation of the Plaintiff's constitutional rights directly resulted from either (1) an official written policy of the Defendant or (2) an unofficial custom; and

*Third*, as a direct result, the Plaintiff was injured; and

[*Fourth*, the Defendant was acting under color of law.]<sup>4</sup>

If any of the above elements has not been proved, then your verdict must be for the defendant.

#### **Notes on Use**

1. Describe whether the claim is for an official municipal policy or an unofficial custom or both.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. Insert the number or title of the applicable "elements of claim" instruction here.

4. Use this language if there is an issue as to whether the defendant was acting under color of law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, the defendant will concede this element. If so, it need not be included in this instruction. If this paragraph is used, color of law will have to be defined on the factual issue specified. *See* Model Instruction 4.20.

#### **Committee Comments**

Section 1983 liability for a constitutional violation may attach to a municipality if the violation resulted from (1) an "official municipal policy"; (2) an unofficial "custom"; or (3) a deliberately indifferent failure to train or supervise. *Atkinson v. City of Mountain View, Mo.*, 709 F.3d 1201, 1214 (8th Cir. 2013) (citing *Monell v. Dep't of Social Services of New York*, 436 U.S.

658, 691 (1978), and *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989)). Because the elements necessary to establish a failure to train or supervise claim differ slightly from an official policy or unofficial custom claim, the Committee recommends separate instructions for official policy and unofficial custom claims and failure to train or supervise claims.

The trial judge must identify those officials who speak with final policymaking authority for the local government. *Atkinson*, 709 F.3d at 1215. Whether a defendant exercised final policymaking authority is a question of state law. *Id.* at 1214-15.

#### 4.49 FRAUDULENTLY OBTAINED WARRANT

Your verdict must be for Plaintiff [here insert name] and against Defendant [here insert name] [here generally describe the claim]<sup>1</sup> if all the following elements have been proved<sup>2</sup>:

*First*, the application for the search warrant [contained [a] materially false statement[s] of fact] [or] [omitted [a] material fact[s]];<sup>3</sup> and

*Second*, [Defendant knowingly made the false statement[s].<sup>4</sup> [and, or] [Defendant deliberately omitted [a] material fact[s] to mislead the judge issuing the warrant [or omitted [a] material fact[s] despite strongly suspecting that the judge would not issue the warrant if Defendant disclosed the omitted fact[s].]; and

[*Third*, Defendant acted under the color of law.]<sup>5</sup>

A statement or omission of fact is material if, without the false statement or the omission, the application would have been insufficient to establish probable cause.

A person knowingly makes a false statement if [he] [she] is aware the statement is false or if [he] [she] has serious doubts about the truth of the statement, but makes it anyway.

“Probable cause” means a fair probability that contraband or evidence of a crime will be found in a particular place, given the circumstances set forth in the affidavit attached to the search warrant. Whether probable cause has been established involves a practical commonsense evaluation of the totality of the circumstances.

If any of the above elements has not been proved, then your verdict must be for the Defendant.

#### Notes on Use

1. Describe the claim if the plaintiff has more than one claim against this defendant.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. The defendant’s conduct, indicated by the plaintiff’s evidence, should be described generally. This instruction assumes that there was an omission or false statement that impacted probable cause for the search.

4. For a claim involving only alleged false statements or only alleged omissions, the court should use only the bracketed material concerning “a false statement of fact” and should not use the bracketed material concerning “an omission of fact.” If the claim involves both alleged false statements and omissions of fact, both bracketed material should be used.

5. Use this language if there is an issue as to whether the defendant was acting under color of law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, the defendant will concede this element. If so, it need not be included in this instruction. If this paragraph is used, color of law will have to be defined on the factual issue specified. *See* Model Instruction 4.20.

### **Committee Comments**

In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court concluded that if an officer intentionally lies or recklessly misrepresents the truth in an affidavit supporting an application for a search warrant, the evidence seized under the authority of the search warrant must be suppressed. “A warrant based upon an affidavit containing deliberate falsehood or reckless disregard for the truth violates the Fourth Amendment and subjects the police officer to § 1983 liability.” *Morris v. Lanpher*, 563 F.3d 399, 402 (8th Cir. 2009) (internal quotations omitted). *Franks* cautioned:

There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger’s attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer or proof. They should point out specifically the portion of the warrant affidavit that is specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any non-governmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing.

*Id.* at 171-72; *see also Michigan v. Summers*, 452 U.S. 692, 702-03 (1981).

Probable cause to issue a warrant exists when an affidavit sets forth sufficient facts to justify a prudent person in the belief that contraband will be found in a particular place. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983); ~~*See also*~~ *United States v. Lemon*, 590 F.3d 612, 614 (8th Cir. 2010) (quotations omitted). Whether probable cause has been established involves the practical commonsense evaluation of the totality of the circumstances. *Gates*, 462 U.S. at 238.

The Supreme Court has addressed the quantum of evidence needed to meet this probable cause standard on numerous occasions:

In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

*Brinegar v. United States*, 338 U.S. 160, 175 (1979).

Probable cause is a “fluid concept turning on the assessment of probabilities in particular factual contexts--not readily or even usefully reduced to a neat set of legal rules.” *Gates*, 462 U.S. at 232. Further, probable cause in an affidavit “must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.” *Id.* at 232. All that is required for probable cause to search is a “fair probability” that contraband or evidence of a crime will be found at the premises searched. *Id.* at 238. Also, affidavits should not be read in a hypertechnical manner. *See United States v. Ventresca*, 380 U.S. 102 (1965).

#### 4.50 ELEMENTS OF CLAIM: UNREASONABLE STOP

Your verdict must be for Plaintiff [here insert name] and against Defendant [here insert name] [here generally describe the claim]<sup>1</sup> if all the following elements have been proved:<sup>2</sup>

*First*, Defendant “seized” Plaintiff [insert brief description of Defendant’s actions];<sup>3</sup> and

*Second*, Defendant did not have a “reasonable suspicion” that Plaintiff [had committed; was committing; was about to commit] a crime; and

*Third*, as a direct result, Plaintiff was injured; and

[*Fourth*, Defendant acted under color of law.]<sup>4</sup>

If any of the above elements has not been proved, then your verdict must be for the Defendant.

A person is “seized” if his movement is restrained by the use of physical force or by a show of authority that the person obeys. [A show of authority occurs when a reasonable person would understand that they are not free to end the encounter.]

A “reasonable suspicion” must be based on specific facts known to the officer, together with the reasonable inferences from those facts. A hunch does not constitute reasonable suspicion.

[You may have heard the phrase, “probable cause.” Probable cause is not required for the type of seizure you are considering. You should consider only whether there was reasonable suspicion for the seizure as I have defined it in this instruction.]<sup>5</sup>

[The fact that the person arrested is not subsequently convicted is not material to whether probable cause existed at the time of the arrest.]<sup>6</sup>

## Notes on Use

1. Describe the claim if the plaintiff has more than one claim against this defendant.
2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.
3. The defendant’s conduct, indicated by the plaintiff’s evidence, should be described generally. This instruction assumes that there was an omission or false statement that impacted probable cause for the search.
4. Use this language if there is an issue as to whether the defendant was acting under color of law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, the defendant will concede this element. If so, it need not be included in this instruction. If this paragraph is used, color of law will have to be defined. *See* Model Instruction 4.20. If both the first and third elements are undisputed, only one element will remain, and the instruction’s second sentence should read: “To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that Defendant did not have reasonable suspicion to seize him/her.”
5. The purpose of this language in the instruction is to clarify for the jury that reasonable suspicion is a different standard from probable cause, a concept that jurors may have heard of outside of court.
6. Use this language if it is relevant.

## Committee Comments

To establish a § 1983 claim for a Fourth Amendment violation, a plaintiff “must demonstrate a search or seizure occurred, and the search or seizure was unreasonable.” *Clark v. Clark*, 926 F.3d 972, 977 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 628 (2019).

“Reasonableness of a seizure is determined by the totality of the circumstances and must be judged from the viewpoint of a reasonable officer on the scene, irrespective of the officer’s underlying intent or motivation.” *McCoy v. City of Monticello*, 342 F.3d 842, 848 (8th Cir. 2003) (citations omitted). If an officer has reasonable suspicion that a crime has occurred and a subject has committed it, the officer may detain the subject while the officer investigates that crime. *Terry v. Ohio*, 392 U.S. 1, 24 (1968). It is “[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.” *Id.* at 19, n. 16; *see also United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *Florida v. Bostick*, 501 US. 429, 434 (1991); *California v. Hodari D.*, 499 U.S. 621, 628 (1991); *Waters v. Madson*, 921 F.3d 725, 736-39 (8th Cir. 2019) (Section 1983 case discussing whether officers had reasonable suspicion to detain driver and passenger after Menard’s employee stopped a vehicle in drive-thru lumberyard for vehicle inspection to verify purchase; Menard’s called police for assistance).

In most situations, the court will decide whether the seizure was sufficiently short or unintrusive to constitute a *Terry* stop. If the court finds the seizure went beyond a *Terry* stop, the court should give Instruction 4.30, for false arrest.

If there is a factual dispute as to whether an investigatory stop or an arrest took place, the court may need to give both sets of instructions and advise the jury to apply one or the other based on its resolution of the disputed facts. The Committee recommends an instruction using the following language:

Your verdict must be for Plaintiff [here insert name] and against Defendant [here insert name] [here generally describe the claim] if all the following elements have been proved:

*First*, determine whether Defendant made an investigatory stop of Plaintiff[, or placed Plaintiff under arrest[, or neither]; and

There is no set rule about the [length of time that a person may be detained] [the procedures that may be used] before the seizure is considered to be an arrest. Rather, you should consider [the length of the detention] [the procedures used to detain Plaintiff, taken in context] [any searches made] [the questions asked of Plaintiff][the location of the detention][whether Plaintiff was moved from the initial location of the detention to another location][the officer's intent][whether the defendant was diligent in pursuing the investigation or whether his conduct caused delay that unnecessarily lengthened the seizure][the impression conveyed to Plaintiff].

*Second*, if you determine the Plaintiff was subjected to an investigatory stop, Plaintiff must show the Defendant seized him without reasonable suspicion; or, if you determine the Plaintiff was arrested, Plaintiff must show that Defendant did not have probable cause to arrest him; and

*Third*, Defendant acted under the color of law.

If any of the above elements has not been proved, then your verdict must be for the Defendant.

“A *Terry* stop may become an arrest, requiring probable cause, if the stop lasts for an unreasonably long time or if officers use unreasonable force.” *United States v. Newell*, 596 F.3d 876, 879 (8th Cir. 2010) (internal quotation marks omitted). “In determining whether a period of time is excessive, we must consider the ‘law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes.’” *United States v. Maltais*, 403 F.3d 550, 556 (8th Cir. 2005) (quoting *United States v. Sharpe*, 470 U.S. 675, 685 (1985)); see *Dunaway v. New York*, 442 U.S. 200, 212 (1979) (the Court relied upon the following facts in finding detention constituted an arrest: (1) the defendant was taken from a private dwelling; (2) he was transported unwillingly to the police station; and (3) he there was subjected to custodial interrogation resulting in a confession); *Florida v. Royer*, 460 U.S. 491, 500 (1983) (detention constituted an arrest where government agents stopped the defendant in an airport, seized his luggage, and took him to a small room used for questioning; plurality wrote that “an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.”); *United States v. Place*, 462 U.S. 696, 709 (1983) (“[t]he length of the detention of respondent’s luggage [90 minutes] alone precludes the conclusion that the seizure was reasonable in the absence of probable cause”; “[I]n assessing the effect of the length of the

detention, we take into account whether the police diligently pursue their investigation.”); *cf Waters*, 921 F.3d at 736-39 (*Terry* stop was not converted into an arrest when a customer was detained for approximately twenty minutes and placed in handcuffs, considering “officers worked diligently to complete their investigation, and that the encounter only lasted as long as it did because Mr. Waters was argumentative and refused to cooperate with the police investigation by failing to obey legitimate requests to identify himself and step out of his vehicle.”)

In some cases, there may be a dispute over whether the encounter between the plaintiff and law enforcement amounted to a seizure at all, or a *Terry* stop, or an arrest. The instruction as drafted does not cover this type of case.

The Eighth Circuit has noted that a plaintiff seeking damages under § 1983 for an unreasonable search must allege (1) an unlawful search and (2) an “actual, compensable injury[,] *Heck v. Humphrey*, 512 U.S. 477, 487 n. 7 (1994), because “the abstract value of a constitutional right may not form the basis for § 1983 damages.” *Memphis Cmty. Sch. Dist. V. Stachura*, 477 U.S. 299, 318 (1986); *Waters*, 921 F.3d at 740 n. 8 (citations omitted).

#### 4.51 ELEMENTS OF CLAIM: FALSE ARREST

Your verdict must be for Plaintiff [here insert name] and against Defendant [here insert name] [here generally describe the claim]<sup>1</sup> if all the following elements have been proved:<sup>2</sup>

*First,*<sup>3</sup> Defendant arrested Plaintiff; and

*Second,* Defendant did not have probable cause to arrest Plaintiff; and

[*Third,* Defendant acted under color of law.]<sup>4</sup>

If any of the above elements has not been proved, then your verdict must be for the Defendant.

Probable cause exists for an arrest if, at the moment the arrest<sup>5</sup> was made, a reasonable person in Defendant's position would have believed that Plaintiff [had committed] [was committing] a crime. In determining whether there was probable cause for the arrest, you should consider what the Defendant knew and the reasonably trustworthy information Defendant had received.

[Probable cause requires more than just a suspicion. But it does not need to be based on evidence that would be sufficient to support a conviction, or even a showing that Defendant's belief was probably right. [The fact that Plaintiff was later acquitted of [*insert crime at issue*] does not by itself mean that there was no probable cause at the time of his arrest.]<sup>6</sup>

[It is not necessary that Defendant had probable cause to arrest Plaintiff for [*insert crime at issue*], so long as Defendant had probable cause to arrest him for some criminal offense.] [It is not necessary that Defendant had probable cause to arrest Plaintiff for all the crimes he was charged with, so long as Defendant had probable cause to arrest him for one of those crimes.]<sup>7</sup>

[Insert definition of crime at issue.]<sup>8</sup>

### Notes on Use

1. Describe the claim if the plaintiff has more than one claim against this defendant.
2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.
3. The first and third elements should be eliminated if they are undisputed. If both of these elements are undisputed, only one element will remain, and the first sentence of the instruction should read: “Your verdict must be for Plaintiff [here insert name] and against Defendant [here insert name] if Defendant did not have probable cause to arrest [him] [her].”
4. Use this language if there is an issue as to whether the defendant was acting under color of law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, the defendant will concede this element. If so, it need not be included in this instruction. If this paragraph is used, color of law will have to be defined on the factual issue specified. *See* Model Instruction 4.20.
5. If the parties dispute whether the defendant was arrested, it may be necessary for the court to define “arrest.”
6. Include this information if it is relevant. The second section of bracketed language regarding the Plaintiff’s subsequent acquittal should only be used in appropriate situations. For authority, *see Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979) (“The validity of the arrest does not depend on whether the suspect actually committed a crime; the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest.”); *Duhe v. City of Little Rock*, 902 F.3d 858, 862 (8th Cir. 2018) (“That Duhe and Holick’s disorderly conduct charges were subsequently dismissed is irrelevant to the probable cause inquiry.”).
7. The bracketed language regarding probable cause for other crimes should only be used in appropriate situations. For authority, *see Devenpeck v. Alford*, 543 U.S. 146, 154-56 (2004) (holding arrest is lawful even if the offense for which there is probable cause to arrest is not closely related to the offense stated by the arresting officer); *United States v. Grooms*, 602 F.3d 939, 942 (8th Cir. 2010) (that defendant was arrested on outstanding warrants “is of no moment” in analysis to determine whether a warrantless search of defendant’s vehicle for evidence of crime under investigation and which was unrelated to outstanding warrants was reasonable under the Fourth Amendment).
8. As a general rule, when giving a false arrest instruction, the court should also instruct the jury regarding the definition of the crime(s) for which the defendant claims to have had probable cause.

## Committee Comments

Traditionally, false arrest was a state tort claim. *See, e.g., Johnson v. City of Minneapolis*, 901 F.3d 963, 966 (8th Cir. 2018) (distinguishing between § 1983 claim and state tort claim for false arrest); *White v. Jackson*, 865 F.3d 1064, 1070 (8th Cir. 2017) (same). By virtue of their elements, they can be pleaded as § 1983 claims.

An arrest is a “seizure” as defined by the Fourth Amendment. *United States v. Watson*, 423 U.S. 411, 428 (1976). More particularly, arrest involves the restriction of movement. *See Henry v. United States*, 361 U.S. 98, 103 (1959); *see also* Black’s Law Dictionary (8th ed. 2004) (defining arrest as: (1) a seizure or forcible restraint; (2) the taking or keeping of a person in custody by legal authority). The United States Supreme Court has concluded a “seizure” within the meaning of the Fourth Amendment occurs when a reasonable person would have believed that he was not free to leave. *Florida v. Royer*, 460 U.S. 491 (1983).

“The Fourth Amendment protects ‘the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’ In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed. Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest.” *Devenpeck v. Alford*, 543 U.S. 146, 593 (2004) (internal citations omitted).

“The substance of all the definitions of probable cause is a reasonable ground for belief of guilt.” *Brinegar v. United States*, 338 U.S. 160, 175 (1949). “A reasonable ground for belief means more than bare suspicion, but less than evidence which would justify condemnation or conviction.” *Baribeau v. City of Minneapolis*, 596 F.3d 465, 474 (8th Cir. 2010). An officer has probable cause to arrest “when the totality of the circumstances at the time of the arrest ‘are sufficient to lead a reasonable person to believe that the defendant has committed or is committing an offense.’” *Borgman v. Kedley*, 646 F.3d 518, 523 (8th Cir. 2011) (quoting *Fisher v. Wal-Mart Stores, Inc.*, 619 F.3d 811, 816 (8th Cir. 2010)).

Today’s prevailing standard for probable cause to arrest is the “objectively reasonable police officer.” *Maryland v. Pringle*, 540 U.S. 366, 371 (2003); *Ornelas v. United States*, 517 U.S. 690, 696 (1996). The instruction directs that the jury may consider a defendant’s position as an officer when determining what the defendant “knew and what reasonably trustworthy information [he] had received” at the time of the arrest.

When determining whether probable existed, a jury must determine the facts “[i]f the material facts are in dispute, with one version establishing reasonable grounds [for arrest] and another refuting it.” *Joseph v. Allen*, 712 F.3d 1222, 1229 (8th Cir. 2013) (citing *Signorino v. Nat’l. Super Markets, Inc.*, 782 S.W.2d 100, 103 (Mo. Ct. App. 1989).

#### **4.52 ELEMENTS OF CLAIM: § 1983 CIVIL CONSPIRACY**

Your verdict must be for Plaintiff [here insert name] and against Defendant [here insert name] [here generally describe the claim]<sup>1</sup> if all the following elements have been proved:<sup>2</sup>

*First*, Defendant conspired with others to deprive Plaintiff of a constitutional right(s); and

*Second*, at least one of the alleged co-conspirators engaged in an overt act in furtherance of the conspiracy; and

*Third*, the overt act injured the Plaintiff; and

*Fourth*, Plaintiff was deprived of the constitutional right or privilege; and

[*Fifth*, Defendant acted under color of law.]<sup>3</sup>

If any of the above elements has not been proved, then your verdict must be for the Defendant.

#### **Notes on Use**

1. Describe the claim if the plaintiff has more than one claim against this defendant.
2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.
3. Use this language if there is an issue as to whether the defendant was acting under color of law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, the defendant will concede this element. If so, it need not be included in this instruction. Color of law will have to be defined on the factual issue specified if this paragraph is included. *See* Model Instruction 4.20.

#### **Committee Comments**

To prove a 42 U.S.C. §1983 conspiracy claim in the Eighth Circuit, a plaintiff must show:

- (1) that the defendant conspired with others to deprive him of constitutional rights;
- (2) that at least one of the alleged co-conspirators engaged in an overt act in furtherance of the conspiracy; and (3) that the overt act injured the plaintiff. The

plaintiff is additionally required to prove a deprivation of a constitutional right or privilege in order to prevail on a 1983 civil conspiracy claim.

*White v. McKinley*, 519 F.3d 806, 814 (8th Cir. 2008) (citing *Askew v. Millerd*, 191 F.3d 953, 957 (8th Cir. 1999)) (internal citations omitted). A plaintiff “must allege with particularity and specifically demonstrate with material facts that the defendants reached an agreement.” *Marti v. City of Maplewood, Mo.*, 57 F.3d 680, 685 (8th Cir. 1995) (citation omitted).

#### 4.70 DAMAGES: ACTUAL—PRISONER CIVIL RIGHTS

If you find in favor of the plaintiff under Instruction \_\_\_\_\_<sup>1</sup>, then you must award the plaintiff an amount of money that will fairly compensate the plaintiff for any damages you find the plaintiff sustained [and is reasonably certain to sustain in the future]<sup>2</sup> as a direct result of [insert appropriate language such as “the conduct of the defendant as submitted in Instruction \_\_\_\_\_” or “the failure to provide the plaintiff with medical care” or “the violation of the plaintiff’s constitutional rights.”]<sup>3</sup> The plaintiff’s claim for damages includes three distinct types of damages and you must consider them separately:

1. *First*, you must determine physical pain and (mental) (emotional) suffering the plaintiff has experienced (and is reasonably certain to experience in the future); the nature and extent of the injury, whether the injury is temporary or permanent (and whether any resulting disability is partial or total) (and any aggravation of a pre-existing condition);

2. *Second*, you must determine reasonable value of the medical (hospital, nursing, and similar) care and supplies reasonably needed by and actually provided to the plaintiff (and reasonably certain to be needed and provided in the future); and

3. *Third*, you must determine (wages, salary, profits, reasonable value of the working time) the plaintiff has lost [and the reasonable value of the earning capacity the plaintiff is reasonably certain to lose in the future] because of [(his) (her)] [(inability) (diminished ability)] to work.]

[Remember, throughout your deliberations you must not engage in speculation, guess, or conjecture, and you must not award any damages under this Instruction by way of punishment or through sympathy.]

#### Notes on Use

1. Insert the number of the “elements of claim” instruction.

2. Use this language if permanent injuries are involved.

3. It is important to use language that limits the damages recovered to those attributable to the defendant's improper conduct. *See Memphis Community Dist. v. Stachura*, 477 U.S. 299, 309-10 (1986).

### **Committee Comments**

Damages that may be recovered under 42 U.S.C. § 1983 are: actual or compensatory, nominal, and punitive. *Memphis Community School Dist.*, 477 U.S. at 306-07. Actual or compensatory damages are to “compensate persons for injuries that are caused by the deprivation of constitutional rights,” and not “undefinable value of infringed right” or “presumed” damages. *Id.* at 307, 309; *see also Corpus v. Bennett*, 430 F.3d 912, 916 (8th Cir. 2005); *Carey v. Piphus*, 435 U.S. 247 (1978). Such damages include compensation for out-of-pocket loss, other monetary losses, reputation impairment, personal humiliation, mental anguish, and suffering. *Memphis Community School Dist.*, 477 U.S. at 306-07. Compensatory damages based on emotional distress “can be awarded . . . even though no actual damages are proven.” *Hayes v. Faulkner Cty., Ark.*, 285 F. Supp. 2d 1132, 1144-45 (E.D. Ark. 2003), *aff’d*, 388 F.3d 669 (8th Cir. 2004) (citing *Guzman v. W. State Bank of Devils Lake*, 540 F.2d 948, 953 (8th Cir. 1976)).

## 4.71 DAMAGES: NOMINAL—PRISONER CIVIL RIGHTS

If you find in favor of the plaintiff under Instruction \_\_\_\_\_,<sup>1</sup> but you find that the plaintiff's damages have no monetary value, then you must return a verdict for the plaintiff in the nominal amount of One Dollar (\$1.00).<sup>2</sup>

### Notes on Use

1. Insert the number or title of the “elements of claim” instruction here.
2. “[O]ne dollar is recognized as an appropriate value for nominal damages.” *Corpus v. Bennett*, 430 F.3d 912, 916 (8th Cir. 2005) (where jury found no direct injury, nominal damages were appropriate means to vindicate constitutional rights whose deprivation had not caused an actual provable injury). See Committee Comments.

### Committee Comments

This instruction is derived from Kevin F. O’Malley, *et al.*, 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 165.70 (6th ed.). It has been modified slightly.

In certain cases, nominal damages may be recovered when there is a violation of constitutional rights. See *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986); *Carey v. Piphus*, 435 U.S. 247 (1978); *Tatum v. Houser*, 642 F.2d 253 (8th Cir. 1981); *Cowans*, 862 F.2d at 700. *Carey* discusses the amount of nominal damages on page 267.

The Committee recommends requiring the jury to find that the plaintiff suffered damage in most cases, unless it is clear that recovery is permitted without a showing of any damage or injury. See *Memphis* and *Carey*. In classic Eighth Amendment cases, damages must be established, and the elements instruction should require the jury to find that the plaintiff sustained damage. However, nominal damages must still be submitted in Eighth Amendment cases if requested. The definition contained in this instruction is the one that should be used.

See *Williams v. Hobbs*, 662 F.3d 994, 1010 (8th Cir. 2011). Nominal damages may be awarded on a per violation basis, but not on a per-day basis.

If a jury finds that the constitutional violation at issue was not a direct cause of injury to a plaintiff yet makes a substantial “nominal” damage award, the district court must reduce the damage award to a legally nominal sum as a matter of law. See *Corpus v. Bennett*, 430 F.3d 912, 915-16 (8th Cir. 2005) (Where jury found that officer’s use of excessive force did not cause injuries to plaintiff but found \$75,000 was the nominal sum that would fairly and adequately compensate plaintiff for the deprivation of his constitutional rights, the trial court did not err in reducing the nominal damages award to one dollar).

#### 4.72 DAMAGES: PUNITIVE—CIVIL RIGHTS

In addition to the damages mentioned in other instructions, the law permits the jury under certain circumstances to award punitive damages.

If you find in favor of the plaintiff under Instruction(s) \_\_\_\_\_ and if it has been proved<sup>1</sup> that the conduct of that defendant as submitted in Instruction \_\_\_\_\_<sup>2</sup> was malicious or recklessly indifferent to the plaintiff's (specify, *e.g.*, medical needs),<sup>3</sup> then you may, but are not required to, award the plaintiff an additional amount of money as punitive damages for the purposes of punishing the defendant for engaging in misconduct and [detering] [discouraging] the defendant and others from engaging in similar misconduct in the future. You should presume that a plaintiff has been made whole for [his, her, its] injuries by the damages awarded under Instruction \_\_\_\_\_.<sup>4</sup>

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. How reprehensible the defendant's conduct was.<sup>5</sup> In this regard, you may consider [whether the harm suffered by the plaintiff was physical or economic or both; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether the defendant's conduct that harmed the plaintiff also posed a risk of harm to others; whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed the plaintiff].<sup>6</sup>

2. How much harm the defendant's wrongful conduct caused the plaintiff [and could cause the plaintiff in the future].<sup>7</sup> [You may not consider harm to others in deciding the amount of punitive damages to award.]<sup>8</sup>

3. What amount of punitive damages, in addition to the other damages already awarded, is needed, considering the defendant's financial condition, to punish the defendant for [his, her, its] wrongful conduct toward the plaintiff and to [deter] [discourage] the defendant and others from similar wrongful conduct in the future.

4. [The amount of fines and civil penalties applicable to similar conduct].<sup>9</sup>

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to the plaintiff.<sup>10</sup>

[You may [assess] [award] punitive damages against any or all defendants or you may refuse to [impose] [award] punitive damages. If punitive damages are [assessed] [awarded] against more than one defendant, the amounts [assessed] [awarded] against those defendants may be the same or they may be different.]<sup>11</sup>

[You may not award punitive damages against the defendant[s] for conduct in other states.]<sup>12</sup>

#### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Use if more than one element instruction.

3. Punitive damages are allowed even though the threshold for liability requires reckless conduct. If the underlying tort liability threshold is less than “reckless,” the bracketed language correctly states the standard for punitive damages under 42 U.S.C. § 1983. *Smith v. Wade*, 461 U.S. 30, 56 (1983) (punitive damages may be awarded “when the defendant’s conduct involves reckless or callous indifference to the plaintiff’s federally protected rights, as well as when it is motivated by evil motive or intent.”); *Washington v. Denney*, 900 F.3d 549, 564 (8th Cir. 2018) (citations omitted). *See Schaub v. VonWald*, 638 F.3d 905, 922-24 (8th Cir. 2011) (the threshold inquiry for an award of punitive damages is whether the evidence supports that the conduct involved was reckless or callous indifference.); *Kolstad v. American Dental Ass’n*, 527 U.S. 526, 535, 536 (1999); *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 903 (8th Cir. 2006), discussing the meaning of “malice” and “reckless indifference.” If the threshold for liability is “malice” or “reckless indifference” or something more culpable, no additional finding should be necessary because the language in the issue/element instruction requires the jury to find the culpability necessary for imposing punitive damages. However, it is recommended that the punitive damages instruction include such language to ensure the jury focuses on that issue.

4. Fill in the number or title of the actual damages or nominal damages instruction here.

5. The word “reprehensible” is used in the same sense as it is used in common parlance. The Supreme Court has stated that “[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the

defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003); *Bryant v. Jeffrey Sand Company*, 919 F.3d 520, 527-28 (2019). In *Philip Morris USA v. Williams*, the Supreme Court held that, while harm to persons other than the plaintiff may be considered in determining reprehensibility, a jury may not punish for the harm caused to persons other than the plaintiff. 549 U.S. 346, 355 (2007). The Court stated that procedures were necessary to assure “that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.” *Id.*

6. Any item not supported by the evidence, of course, should be excluded.

7. This sentence may be used if there is evidence of future harm to the plaintiff.

8. A paragraph instructing the jury that any punitive damages award should not include an amount for harm suffered by persons who are not parties to the case may be necessary if evidence concerning harm suffered by nonparties has been introduced. *See Philip Morris USA*, 549 U.S. at 355; *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 422-24; *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004).

9. Insert this phrase only if evidence has been introduced or the court has taken judicial notice, of fines and penalties for similar conduct. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996), noting “civil penalties authorized in comparable cases” as a guidepost to be considered. *See also State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 428-29.

10. *See State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 425 (stating that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process” and observing that: “Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1 [citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996)] or, in this case, of 145 to 1.”); *see also Bryant*, 919 F.3d at 528.

11. The bracketed language is available for use if punitive damages claims are submitted against more than one defendant.

12. If evidence has been introduced concerning conduct by the defendant that was legal in the state where it was committed, the jury must be told that they cannot award punitive damages against the defendant for such conduct. *See State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 422; *BMW of North America, Inc.*, 517 U.S. at 572-73 (1996); *see also Williams*, 378 F.3d at 797-98. This issue normally will not come up in cases under federal law. In any case in which evidence is admitted for some purposes but may not be considered by the jury in awarding punitive damages, the court should give an appropriate limiting instruction.

### Committee Comments

This instruction attempts to incorporate the constitutionally relevant principles set forth by the Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), *BMW of North America, Inc. v. Gore*, 517 U.S.

559 (1996), *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459-62 (1993). In *State Farm*, 538 U.S. at 417, the Court observed that:

[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and 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 Motor*, 512 U.S. at 432) (quotation marks omitted). See *Baker v. John Morrell & Co.*, 266 F. Supp. 2d 909, 961 (N.D. Iowa 2003), *aff'd*, 382 F.3d 816 (8th Cir. 2004), and *In Re Exxon Valdez*, 296 F. Supp. 2d 1071, 1080 (D. Alaska 2004), for examples of punitive damages instructions in which the court attempted to incorporate constitutional standards.

The last paragraph is based on *State Farm*, 538 U.S. at 421, in which the Court held that:

A state cannot punish a defendant for conduct that may have been lawful where it occurred. . . . Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." The Court specifically mandated that: "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.

*State Farm*, 538 U.S. at 422.

**4.80 GENERAL VERDICT FORM: ONE PLAINTIFF,  
TWO DEFENDANTS, ONE INJURY CASE**

**VERDICT**

**Note:** Complete this form by writing in the names required by your verdict.

On plaintiff (name)'s claim against defendant (name), as submitted in Instruction No. \_\_\_\_\_, we find in favor of

---

(Plaintiff (name)) or (Defendant (name))

On plaintiff (name)'s claim against defendant (name), as submitted in Instruction No. \_\_\_\_\_, we find in favor of

---

(Plaintiff (name)) or (Defendant (name))

**Note:** Complete the following paragraphs only if one or more of the above findings is in favor of the plaintiff.

We find plaintiff (name)'s damages to be:

\$ \_\_\_\_\_ (state the amount or, if none, write the word "none")<sup>1</sup>  
(stating the amount, or if you find that the plaintiff's damages have no monetary value, state the nominal amount of \$1.00).<sup>2</sup>

**Note:** You may not award punitive damages against any defendant unless you have first found against that defendant and awarded the plaintiff nominal or actual damages.

We assess punitive damages against defendant (name) as follows:

\$ \_\_\_\_\_ (state the amount or, if none, write the word “none”).

\_\_\_\_\_  
Foreperson

Dated: \_\_\_\_\_

**Notes on Use**

1. Use this phrase if the jury has not been instructed on nominal damages.
2. Include this paragraph if the jury has been instructed on nominal damages.

## 5. TITLE VII CASES

### 5.00 OVERVIEW

The following instructions are designed for use in *discrimination* claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* For *harassment* claims under Title VII, see Chapter 8. For *retaliation* claims under Title VII, see Chapter 10.

Title VII provides, in part, that it is an unlawful employment practice for an employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a). Race, color, religion, sex and national origin are collectively known as Title VII’s “protected characteristics.”

Under Title VII, “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m) (emphasis added). The motivating factor standard applies regardless of whether the plaintiff presents “direct evidence” of discrimination. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003).

Claims alleging that a protected characteristic was a motivating factor in an employment decision are commonly referred to as “disparate treatment” cases. Title VII also prohibits, in some circumstances, facially neutral practices that have a “disparate impact” on individuals because of a protected characteristic. *See* 42 U.S.C. § 2000e-2(k). Because disparate treatment cases are far more common than disparate impact cases, this Chapter is designed for use in disparate treatment cases. This Chapter does not cover disparate impact cases.

At the summary judgment stage, courts have historically analyzed Title VII disparate treatment cases pursuant to the three-step burden-shifting analysis of *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). After all the evidence has been presented at trial, however, the inquiry should focus on the ultimate issue of intentional discrimination, not on any particular step in the *McDonnell Douglas* paradigm. *See Weber v. Strippit, Inc.*, 186 F.3d 907, 917-18 (8th Cir. 1999); *Gilkerson v. Toastmaster, Inc.*, 770 F.2d 133, 135 (8th Cir. 1985). These instructions are designed accordingly.

### **Damages**

A successful Title VII plaintiff may recover backpay, and compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. 42 U.S.C. § 1981a(a)(1) and (b). The court may also order reinstatement to employment, or “front pay” in lieu of reinstatement. 42 U.S.C. § 2000e-5(g); *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999). Punitive damages are also recoverable where the employer engaged in discriminatory practice(s) with malice or with reckless indifference to the federally protected rights of the employee. 42 U.S.C. § 1981a(b)(1). Damages other than backpay and interest on backpay are subject to limits based on the size of

the employer. *See* 42 U.S.C. § 1981a(b)(3). The jury is not to be informed of the damage limits. 42 U.S.C. § 1981a(c).

No damages may be awarded where an employer proves that it would have taken the same action in the absence of any impermissible motivating factor. 42 U.S.C. § 2000e-5(g)(2)(B). In such instances, the court may only award declaratory relief, limited injunctive relief, and attorneys' fees. *Id.*

### **After-Acquired Evidence**

In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), the Supreme Court ruled that an employer's after-acquired evidence of misconduct by the plaintiff does not act as a bar to liability, but it may cut off the plaintiff's damages as of the date the employer discovered the misconduct. The after-acquired evidence doctrine appears to be an affirmative defense that must be pleaded and proven by the employer-defendant.

To establish an after-acquired evidence defense to damages, the employer must 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 discharge." *McKennon*, 513 U.S. at 362-63; *see also Smith v. AS Am., Inc.*, 829 F.3d 616, 626 (8th Cir. 2016). It is not enough to show that the misconduct was in violation of company policy or *might have* justified termination; instead, the employer must show that the misconduct *would have* resulted in termination. *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 183 (3d Cir. 2009); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1048 (7th Cir. 1999) ("[p]roving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.") (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989)).

The plaintiff-employee cannot circumvent the after-acquired evidence defense by suggesting that the defendant-employer discovered the prior misconduct during the course of discovery. "Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery and even if the information might have gone undiscovered absent the suit." *McKennon*, 513 U.S. at 362.

### **Administrative Prerequisites to Suit**

As an administrative prerequisite to suit, an employee generally must file a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC) within 300 days of the alleged unlawful conduct, must receive a notice of right to sue, and must file suit within 90 days of receipt of the notice of right to sue. *See* 42 U.S.C. § 2000e-5(e) and (f).

## CHAPTER 5 INSTRUCTIONS AND VERDICT FORMS

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### **5.01 EXPLANATORY: “SAME DECISION”**

If you find in favor of the plaintiff under Instruction \_\_\_\_\_,<sup>1</sup> then you must answer the following question in the verdict form[s]: Has it been proved<sup>2</sup> that the defendant [would have discharged]<sup>3</sup> the plaintiff regardless of [(his) (her)] [sex]<sup>4</sup>?

#### **Notes on Use**

1. Insert the number of the elements of claim instruction.
2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.
3. This instruction is designed for use in a discharge case. In a “failure to hire,” “failure to promote” or “demotion” case, the language within the brackets must be modified.
4. Use the protected classification at issue (race, color, religion, sex, or national origin).

#### **Committee Comments**

If a plaintiff prevails on the issue of liability by showing that discrimination was a “motivating factor,” the defendant nevertheless may avoid an award of damages or reinstatement by showing that it would have taken the same action “in the absence of the impermissible motivating factor.” *See* 42 U.S.C. § 2000e-5(g)(2)(B)). This instruction is designed to submit this “same decision” issue to the jury.

The practical effect of a decision in favor of the plaintiff under Model Instruction 5.40, but in favor of the defendant on this question under Title VII, is a judgment for the plaintiff and eligibility for an award of attorney fees but no actual damages. The Committee takes no position on whether the judge should advise the jury or allow the attorneys to argue to the jury the effect of a decision in favor of the defendant on the question set out in this instruction.

## **5.02 EXPLANATORY: BUSINESS JUDGMENT**

You may not return a verdict for the plaintiff just because you might disagree with the defendant's (decision)<sup>1</sup> or believe it to be harsh or unreasonable.

### **Notes on Use**

1. This instruction makes reference to the defendant's "decision." It may be modified if another term, such as "actions" or "conduct," is more appropriate.

### **Committee Comments**

In *Walker v. AT&T Technologies*, 995 F.2d 846 (8th Cir. 1993), the Eighth Circuit ruled that it is reversible error to deny a defendant's request for an instruction that explains that an employer has the right to make subjective personnel decisions for any reason that is not discriminatory. This instruction is based on sample language cited in the Eighth Circuit's opinion. See *Walker*, 995 F.2d at 849; cf. *Blake v. J.C. Penney Co.*, 894 F.2d 274, 281 (8th Cir. 1990) (upholding a different business judgment instruction as being sufficient).

## 5.20 DEFINITION: PRETEXT

You may find that the plaintiff's (sex)<sup>1</sup> was a motivating factor in the defendant's (decision)<sup>2</sup> if it has been proved<sup>3</sup> that the defendant's stated reason(s) for its (decision) [(is) (are)] not the real reason, but [(is) (are)] a pretext to hide (sex) discrimination.<sup>4</sup>

### Notes on Use

1. Use the protected classification at issue (race, color, religion, sex, or national origin).
2. This instruction makes references to the defendant's "decision." It may be modified if another term, such as "actions" or "conduct," would be more appropriate.
3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.
4. *See Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

### Committee Comments

Plaintiffs "may establish unlawful employment discrimination through direct or indirect evidence." *Xuan Huynh v. U.S. Dep't of Transp.*, 794 F.3d 952, 958 (8th Cir. 2015). Plaintiffs can prove a defendant's reason for an adverse employment action is pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Pye v. Nu Aire, Inc.*, 641 F.3d 1011, 1021 (8th Cir. 2011). "Either route amounts to showing that a prohibited reason, rather than the employer's stated reason, actually motivated the employer's action." *Torgerson v. City of Rochester*, 643 F.3d 1031, 1055 (8th Cir. 2011); *see also MacDissi v. Valmont Indus., Inc.*, 856 F.2d 1054, 1059 (8th Cir. 1988) ("[A]n employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred.").

This instruction, which is based on *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), may be used in conjunction with the essential elements instruction when the plaintiff relies substantially or exclusively on "indirect evidence" of discrimination. In an attempt to clarify this standard, the Eighth Circuit, in *Ryther v. KARE 11*, 108 F.3d 832 (8th Cir. 1997), stated:

In sum, when the employer produces a nondiscriminatory reason for its actions, the prima facie case no longer creates a legal presumption of unlawful discrimination. The *elements* of the prima facie case remain, however, and if they are accompanied by evidence of pretext and disbelief of the defendant's proffered explanation, they may permit the jury to find for the plaintiff. This is not to say that, for the plaintiff to succeed, simply

proving pretext is necessarily enough. We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of . . . discrimination.

*Id.* at 837 (footnote omitted); *see also Hudson v. United Systems of Arkansas, Inc.*, 709 F.3d 700, 703-04 (8th Cir. 2013).

## 5.21 DEFINITION: MOTIVATING FACTOR

As used in these instructions, the plaintiff's (sex)<sup>1</sup> was a "motivating factor," if the plaintiff's (sex) played a part<sup>2</sup> [or a role<sup>3</sup>]<sup>4</sup> in the defendant's decision to [discharge]<sup>5</sup> the plaintiff. However, the plaintiff's (sex) need not have been the only reason for the defendant's decision to [discharge] the plaintiff.

### Notes on Use

1. Use the protected classification at issue (race, color, religion, sex, or national origin).
2. See *Wagner v. Jones*, 664 F.3d 259, 271 (8th Cir. 2011); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1101-02 (8th Cir. 1988).
3. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("Whatever the employer's decision making process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome."); see also *Carrington v. City of Des Moines, Iowa*, 481 F.3d 1046, 1053 (8th Cir. 2007).
4. Older case law suggests that other language may be used to define "motivating factor." See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42 (1989) (plaintiff required to prove "employer relied upon sex-based considerations in coming to its decision.").
5. State the alleged adverse employment action.

### Committee Comments

The Committee recommends giving this definition. A court may decide that the term "motivating factor" need not be defined expressly because its common definition is also the applicable legal definition.

## 5.22 DEFINITION: AFTER-ACQUIRED EVIDENCE<sup>1</sup>

If your verdict is in favor of the plaintiff under Instruction No. \_\_\_\_\_, <sup>2</sup> you must answer the following question on the verdict form:

Has it been proved<sup>3</sup> that, even if the plaintiff had not been terminated on [insert termination date], the defendant would have [terminated the plaintiff's employment]<sup>4</sup> on [insert date of discovery of after-acquired evidence]<sup>5</sup> because [insert brief explanation of the defendant's after-acquired reason for termination.]<sup>6</sup>?

### Notes on Use

1. This instruction is intended for use in cases in which the defendant seeks to rely on the after-acquired evidence defense. See Committee Comments below, and Overview 5.00. This instruction ordinarily will be inserted after the "elements of claim" instruction (or, when given, after the "same decision" instruction) and before the actual damages instruction. In addition to instructing on this issue, the verdict form should be modified. *See* Model Instruction 5.81.

2. Insert the number of the "elements of claim" instruction.

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. The after-acquired evidence defense typically is asserted by the defendant to cut off liability for economic damages by suggesting that the plaintiff would have been terminated if it had been aware of the after-acquired evidence of misconduct. When the defense is based on a different fact pattern -- e.g., the defendant asserts that the plaintiff would have been demoted or transferred to a lower-paying job if it had known of the after-acquired evidence -- the appropriate job action should be identified.

5. Insert the appropriate date based upon the defendant's contention of when the plaintiff would have been terminated as a result of the after-acquired evidence.

6. Describe the basis for the defendant's after-acquired evidence defense -- e.g., "the plaintiff's misrepresentation in [(his) (her)] employment application" or "the plaintiff's falsification of expense reports."

### Committee Comments

In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), the Supreme Court ruled that an employer's after-acquired evidence of misconduct by the plaintiff does not act as a bar to liability, but it may cut off the plaintiff's damages as of the date the employer

discovered the misconduct. The after-acquired evidence doctrine appears to be an affirmative defense that must be pleaded and proven by the employer-defendant. See Overview 5.00.

### **5.23 DEFINITION: AGENCY**

A corporation acts only through its agents or employees and any agent or employee of a corporation may bind the corporation by acts and statements made while acting within the scope of the authority delegated to the agent by the corporation, or within the scope of [(his) (her)] duties as an employee of the corporation.

#### **Committee Comments**

This instruction is a modification of Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 108.01 (6th ed. 2012).

The authority of an agent to speak for the principal may vary from state to state and differ from federal law.

## 5.40 ELEMENTS OF CLAIM

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on plaintiff's claim [generally describe claim] if all the following elements have been proved <sup>1</sup> :

*First*, the defendant [discharged] <sup>2</sup> the plaintiff; and

*Second*, the plaintiff's (sex)<sup>3</sup> [was a motivating factor]<sup>4</sup> [played a part] <sup>5</sup> in the defendant's decision.<sup>6</sup>

If either of the above elements has not been proved, your verdict must be for the defendant and you need not proceed further in considering this claim. [You may find that the plaintiff's (sex) [was a motivating factor] [played a part] in the defendant's (decision) if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide (sex) discrimination.] <sup>7</sup>

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that an element is proved only if the jury finds the element is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. This instruction is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified.

3. Use the protected classification at issue (race, color, religion, sex, or national origin).

4. The Committee believes that the phrase "motivating factor" should be defined. *See* Model Instruction 5.21.

5. *See* Model Instruction 5.21, which defines "motivating factor" in terms of whether the characteristic "played a part or a role" in the defendant's decision. The phrase "motivating factor" need not be defined if the definition itself is used in the element instruction.

6. This instruction makes references to the defendant's "decision." It may be modified if another term, such as "actions" or "conduct," would be more appropriate.

7. This sentence may be added, if appropriate. *See* Model Instruction 5.20, and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not

express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.”

### **Committee Comments**

This instruction is designed to submit the issue of liability in “disparate treatment” Title VII cases. Plaintiffs who prevail on the issue of liability will be eligible for a declaratory judgment and attorney fees; however, they cannot recover actual or punitive damages if the defendant shows that it would have made the same employment decision irrespective of any discriminatory motivation. *See* 42 U.S.C. § 2000e-5(g)(2)(B) and Model Instruction 5.01 (“same decision” instruction).

It is unnecessary and inadvisable to instruct the jury regarding the three-step analysis of *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). *See Weber v. Strippit, Inc.*, 186 F.3d 907, 917-18 (8th Cir. 1999); *Gilkerson v. Toastmaster, Inc.*, 770 F.2d 133, 135 (8th Cir. 1985). Accordingly, this instruction is focused on the ultimate issue of whether the plaintiff’s protected characteristic was a “motivating factor” in the defendant’s employment decision.

## 5.41 ELEMENTS OF CLAIM: CONSTRUCTIVE DISCHARGE

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on plaintiff's claim [generally describe claim] if all the following elements have been proved <sup>1</sup> :

*First*, the defendant made the plaintiff's working conditions intolerable, and

*Second*, the plaintiff's (sex) <sup>2</sup> was a motivating factor in the defendant's actions, and

*Third*, [the defendant acted with the intent of forcing the plaintiff to quit] or [the plaintiff's resignation was a reasonably foreseeable result of the defendant's actions] <sup>3</sup>.

If any of the above elements has not been proved, your verdict must be for the defendant and you need not proceed further in considering this claim.

Working conditions are intolerable if a reasonable person in the plaintiff's situation would have deemed resignation the only reasonable alternative. [To act reasonably, the plaintiff had an obligation to give the defendant a reasonable opportunity to remedy [his/her] concerns before resigning.] <sup>4</sup>

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that an element is proved only if the jury finds the element is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Use the protected classification at issue (race, color, religion, sex, or national origin).

3. Select the appropriate phrase or, in some cases both phrases separated by "or," depending on the evidence. *Sanders v. Lee Cty. Sch. Dist. No. 1*, 669 F.3d 888, 893 (8th Cir. 2012) ("To prove a constructive discharge [under Title VII], an employee must show that the employer deliberately created intolerable working conditions with the intention of forcing her to quit" which "can be proven 'through direct evidence or through evidence that the employer could have reasonably foreseen that the employee would quit as a result of its actions.'") (quotation omitted); *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 n.13 (8th Cir. 2000) ("To establish her constructive discharge, Ogden needed to show that a reasonable person would have found the

conditions of her employ intolerable *and that the employer either intended to force her to resign or could have reasonably foreseen she would do so as a result of its actions*”). (emphasis added.)

4. This paragraph aids the jury by providing a definition of what constitutes intolerable working conditions, and explains that the standard is an objective one. The bracketed language may be inserted if appropriate, based on the evidence. *See Blake v. MJ Optical, Inc.*, 870 F.3d 820, 826 (8th Cir. 2017) (“failure to seek a solution before quitting . . . is fatal to her constructive discharge claim”); *Williams v. City of Kansas City, Missouri*, 223 F.3d 749, 753-54 (8th Cir. 2000) (Williams did not show that her resignation was objectively reasonable where she quit without giving her employer a chance to fix the problem); *see also Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 419 (8th Cir. 2010) (an employee has “an obligation not to assume the worse, and not to jump to conclusions too fast”) (quotation omitted).

#### **Committee Comments**

This instruction is designed for use in cases where the plaintiff resigned but claims that the employer’s discriminatory actions forced him or her to do so. *See Vajdl v. Mesabi Acad. of KidsPeace, Inc.*, 484 F.3d 546, 553 (8th Cir. 2007) (“An employee is constructively discharged when an employer deliberately renders the employee’s working conditions intolerable and thus forces her to quit her job.”); *Hukkanen v. International Union of Operating Engineers, Hoisting & Portable Local No. 101*, 3 F.3d 281, 285 (8th Cir. 1993) (“[c]onstructive discharge plaintiffs thus satisfy Bunny Bread’s intent requirement by showing their resignation was a reasonably foreseeable consequence of their employer’s discriminatory actions”) (citing *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981) (employer’s actions “must have been taken with the intention of forcing the employee to quit”)).

## 5.70 DAMAGES: ACTUAL

If you find in favor of the plaintiff under Instruction \_\_\_\_\_<sup>1</sup> and if you answer “no” in response to Instruction \_\_\_\_\_<sup>2</sup>, then you must award the plaintiff such sum as you find will fairly and justly compensate the plaintiff for any damages you find the plaintiff sustained as a direct result of [describe the defendant’s decision - *e.g.*, “the defendant’s decision to discharge the plaintiff”]. The plaintiff’s claim for damages includes two distinct types of damages and you must consider them separately:

*First*, you must determine the amount of any wages and fringe benefits<sup>3</sup> the plaintiff would have earned in [(his) (her)] employment with the defendant if [(he) (she)] had not been discharged on [fill in date of discharge] through the date of your verdict,<sup>4, 5, 6</sup> *minus* the amount of earnings and benefits that the plaintiff received from other employment during that time.

*Second*, you must determine the amount of any other damages sustained by the plaintiff, such as [list damages supported by the evidence].<sup>7</sup> You must enter separate amounts for each type of damages in the verdict form and must not include the same items in more than one category.

[You are also instructed that the plaintiff has a duty under the law to “mitigate” [(his) (her)] damages - that is, to exercise reasonable diligence under the circumstances to minimize [(his) (her)] damages. Therefore, if you find that the plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [(him) (her)], you must reduce [(his) (her)] damages by the amount [(he) (she)] reasonably could have avoided if [(he) (she)] had sought out or taken advantage of such an opportunity.]<sup>8</sup>

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.]<sup>9</sup>

## Notes on Use

1. Insert the number of the “elements of claim” instruction.

2. Insert the number or title of the “same decision” instruction.

3. When certain benefits, such as employer-subsidized health insurance, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. Claims for lost benefits often present difficult issues as to the proper measure of recovery. *See EEOC v. Dial Corp.*, 469 F.3d 735, 744 (8th Cir. 2006) (discussing different approaches and holding district court did not err in awarding lost health insurance premiums). Some courts deny recovery for lost benefits unless the employee purchased substitute coverage, in which case the measure of damages is the employee’s out-of-pocket expenses. *Id.* (citing *Galindo v. Stoodly Co.*, 793 F.2d 1502, 1517 (9th Cir. 1986)). Other courts permit the recovery of the amount the employer would have paid as premiums on the employee’s behalf. *Id.* (citing *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 964-65 (4th Cir. 1985)). The Committee expresses no view as to which approach is proper. This instruction also may be modified to exclude certain items that were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law.

4. In some cases, the defendant asserts some independent post-discharge reason - such as a plant closing or sweeping reduction in force - as to why the plaintiff would have been terminated in any event before trial. *See, e.g., Cleverly v. Western Elec. Co.*, 450 F. Supp. 507, 511 (W.D. Mo. 1978), *aff’d*, 594 F.2d 638 (8th Cir. 1979); *see also Milhauser v. Minco Prods., Inc.*, 855 F. Supp. 2d 885, 903 (D. Minn. 2012) (noting, in the context of a USERRA claim, that “[t]here is substantial case law indicating that a reduction in force that reasonably would have included the plaintiff constitutes a circumstance making reemployment unreasonable.”). In those cases, this instruction must be modified to submit this issue for the jury’s determination.

5. The trial court may decide to set a time limit beyond which an award of future damages would be impermissibly speculative. *See Hybert v. Hearst Corp.*, 900 F.2d 1050, 1056-57 (7th Cir. 1990).

6. Front pay is essentially an equitable remedy “in lieu of” reinstatement. *Dollar v. Smithway Motor Express, Inc.*, 710 F.3d 798, 809 (8th Cir. 2013). Front pay is an issue for the court, not the jury. *Nassar v. Jackson*, 779 F.3d 547, 553 (8th Cir. 2015) (“Front pay, however, may be awarded only by a court, not by a jury. . . . [I]t was error for the court to allow the jury to award it.”). If front pay is awarded, it should be excluded from the statutory limit on compensatory damages provided for in 42 U.S.C. § 1981a(b)(3). *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 854 (2001) (“Because front pay is a remedy authorized under § 706(g), Congress did not limit the availability of such awards in § 1981a.”).

7. A prevailing plaintiff may recover damages for mental anguish and other personal injuries including “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.” 42 U.S.C. § 1981a(b)(3).

8. This paragraph is designed to submit the issue of “mitigation of damages” in appropriate cases. *See Wages v. Stuart Mgmt. Corp.*, 798 F.3d 675, 682 (8th Cir. 2015) (“For

example, a jury should have determine[d] whether [plaintiff] mitigated damages (and to what extent) . . . .”); *Canny v. Dr. Pepper/Seven-Up Bottling Grp., Inc.*, 439 F.3d 894, 905 (8th Cir. 2006) (noting district court’s issuance of jury instruction on mitigation of damages).

9. This paragraph may be given at the trial court’s discretion.

### **Committee Comments**

This instruction is designed to submit the standard back pay formula of lost wages and benefits reduced by interim earnings and benefits. *See Hartley v. Dillard’s, Inc.*, 310 F.3d 1054, 1062 (8th Cir. 2002). This instruction may be modified to articulate the types of interim earnings that should be offset against the plaintiff’s back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *See, e.g., Rhodes v. Guiberson Oil Tools*, 82 F.3d 615, 620 (5th Cir. 1996) (offsetting severance pay); *Krause v. Dresser Indus.*, 910 F.2d 674, 680 (10th Cir. 1990). Unemployment compensation, Social Security benefits, pension benefits, and workers’ compensation benefits ordinarily are not offset against a back pay award. *See Moysis v. DTG Datanet*, 278 F.3d 819, 828 (8th Cir. 2002) (classifying unemployment and workers’ compensation benefits as “collateral sources” that cannot be offset); *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104, 1112 (8th Cir. 1994) (“[M]ost courts have refused to deduct such benefits as social security and unemployment compensation . . . .”); *Doyme v. Union Electric Co.*, 953 F.2d 447, 451-52 (8th Cir. 1992) (holding that pension benefits are a “collateral source benefit”).

Damages other than backpay and interest on backpay are subject to limits based on the size of the employer. *See* 42 U.S.C. § 1981a(b)(3). The jury is not to be informed of the damage limits. 42 U.S.C. § 1981a(c). Instead, the trial court will simply reduce the verdict by the amount of any excess. Because the law imposes a limit on general compensatory damages but does not limit the recovery of back pay and lost benefits, the Committee believes that these types of damages must be considered and assessed separately by the jury. Otherwise, if the jury awarded a single dollar amount, it would be impossible to identify the portion of the award that was attributable to back pay and the portion that was attributable to “general damages.” As a result, the trial court would not be able to determine whether the jury’s award exceeded the statutory limit.

In some cases, a discrimination plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy “in lieu of” reinstatement, this remedy traditionally has been viewed as an issue for the court, not the jury. *Nassar v. Jackson*, 779 F.3d 547, 553 (8th Cir. 2015) (“Front pay, however, may be awarded only by a court, not by a jury. . . . [I]t was error for the court to allow the jury to award it.”); *Dollar v. Smithway Motor Express, Inc.*, 710 F.3d 798, 809 (8th Cir. 2013).

In *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 854 (2001), the Supreme Court ruled that front pay is not subject to the statutory limit on compensatory damages provided for in 42 U.S.C. § 1981a(b)(3).

## 5.71 DAMAGES: NOMINAL

If you find in favor of the plaintiff under Instruction \_\_\_\_\_<sup>1</sup> and if you answer “no” in response to Instruction \_\_\_\_\_<sup>2</sup>, but you find that the plaintiff’s damages have no monetary value, then you must return a verdict for the plaintiff in the nominal amount of One Dollar (\$1.00).<sup>3</sup>

### Notes on Use

1. Insert the number of the “elements of claim” instruction.
2. Insert the number of the “same decision” instruction.
3. One Dollar (\$1.00) arguably is the required amount in cases in which nominal damages are appropriate. *Corpus v. Bennett*, 430 F.3d 912, 917 (8th Cir. 2005). Nominal damages are appropriate when the jury is unable to place a monetary value on the harm that the plaintiff suffered from the violation of his rights. *See Bailey v. Runyon*, 220 F.3d 879, 882 (8th Cir. 2000) (Title VII) (citing *Parton v. GTE North Inc.*, 971 F.2d 150, 154 (8th Cir. 1992)); *cf. Corpus*, 430 F.3d at 917 (in Section 1983 action, nominal damages are appropriate where the jury cannot place a monetary value on the harm suffered by the plaintiff).

### Committee Comments

Most employment discrimination cases involve lost wages and benefits. In some cases, however, the jury may be permitted to return a verdict for only nominal damages. For example, if the plaintiff was given severance pay and was able to secure a better paying job, the evidence may not support an award of back pay, but may support an award of compensatory damages. This instruction is designed to submit the issue of nominal damages in appropriate cases.

## 5.72 DAMAGES: PUNITIVE

In addition to the damages mentioned in other instructions, the law permits the jury under certain circumstances to award punitive damages.

If you find in favor of the plaintiff under Instruction(s) \_\_\_\_\_,<sup>1</sup> and if you answer “no” in response to Instruction \_\_\_\_\_,<sup>2</sup> then you must decide whether the defendant acted with malice or reckless indifference to the plaintiff’s right not to be discriminated against<sup>3</sup> on the basis of [(his) (her)] (sex).<sup>4</sup> The defendant acted with malice or reckless indifference if:

it has been proved<sup>5</sup> that [insert the name(s) of the defendant or manager<sup>6</sup> who terminated the plaintiff]<sup>6</sup> knew that the (termination)<sup>7</sup> was in violation of the law prohibiting (sex) discrimination, or acted with reckless disregard of that law.<sup>8</sup>

[However, you may not award punitive damages if it has been proved that the defendant made a good-faith effort to comply with the law prohibiting (sex) discrimination]<sup>9</sup>.

If you find that the defendant acted with malice or reckless indifference to the plaintiff’s rights [and did not make a good-faith effort to comply with the law], then, in addition to any other damages to which you find the plaintiff entitled, you may, but are not required to, award the plaintiff an additional amount as punitive damages for the purposes of punishing the defendant for engaging in such misconduct and deterring the defendant and others from engaging in such misconduct in the future. You should presume that a plaintiff has been made whole for [his or her] injuries by the damages awarded under Instruction \_\_\_\_\_.<sup>10</sup>

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. How reprehensible the defendant’s conduct was.<sup>11</sup> In this regard, you may consider [whether the harm suffered by the plaintiff was physical or economic or both;

whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether the defendant's conduct that harmed the plaintiff also posed a risk of harm to others; whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed the plaintiff].<sup>12</sup>

2. How much harm the defendant's wrongful conduct caused the plaintiff [and could cause the plaintiff in the future].<sup>13</sup> [You may not consider harm to others in deciding the amount of punitive damages to award.]<sup>14</sup>

3. What amount of punitive damages, in addition to the other damages already awarded, is needed, considering the defendant's financial condition, to punish the defendant for [his, her, its] wrongful conduct toward the plaintiff and to deter the defendant and others from similar wrongful conduct in the future.

4. [The amount of fines and civil penalties applicable to similar conduct].<sup>15</sup>

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to the plaintiff.<sup>16</sup>

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.]<sup>17</sup>

[You may not award punitive damages against the defendant[s] for conduct in other states.]<sup>18</sup>

#### **Notes on Use**

1. Insert the number or title of the "elements of claim" instruction.
2. Insert the number or title of the "same decision" instruction.
3. Although a finding of discrimination ordinarily subsumes a finding of intentional misconduct, this language is included to emphasize the threshold for recovery of punitive

damages. The standard for punitive damages is whether the defendant acted “with malice or with reckless indifference to the [plaintiff’s] federally protected rights.” 42 U.S.C. § 1981a(b)(1).

4. Use the protected classification at issue (race, color, religion, sex, or national origin).

5. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

6. Use the name of the defendant, the manager who took the action, or other descriptive phrase such as “the manager who fired the plaintiff.”

7. This language is designed for use in a discharge case. In a “failure to hire,” “failure to promote,” “demotion,” or “constructive discharge” case, the language must be modified.

8. See *Kolstad v. American Dental Ass’n*, 527 U.S. 526, 535, 536 (1999) (holding that “‘malice’ or ‘reckless indifference’ pertain to the employer’s knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination” and that “an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages”); *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 903 (2006) (citing *Kolstad* and observing that an award of punitive damages may be inappropriate when the underlying theory of discrimination is novel or poorly recognized or “when the employer (1) is unaware federal law prohibits the relevant conduct, (2) believes the discriminatory conduct is lawful, or (3) reasonably believes there is a bona fide occupational qualification defense for the discriminatory conduct”).

9. Use this phrase only if the good faith of the defendant is to be presented to the jury. This two-part test was articulated by the United States Supreme Court in *Kolstad v. American Dental Ass’n*, 527 U.S. 526 (1999). For a discussion of the case, see the Committee Comments.

10. Insert the number of the actual damages or nominal damages instruction.

11. The word “reprehensible” is used in the same sense as it is used in common parlance. “Punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” *Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827, 832 (8th Cir. 2004) (quoting *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003)). In *Philip Morris USA v. Williams*, 549 U.S. 346, 355, (2007), the Supreme Court held that, while harm to persons other than the plaintiff may be considered in determining reprehensibility, a jury may not punish for the harm caused to persons other than the plaintiff. The Court stated that procedures were necessary to assure “that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.” *Id.* at 355. See also *Haynes v. Stephenson*, 588 F.3d 1152, 1159 n. 4 (8th Cir. 2009) (the “Due Process Clause forbids using a punitive damages award ‘to punish a defendant for injury that it inflicts upon nonparties’”); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004) (“[i]n assessing reprehensibility, however, it is crucial that a court focus on the conduct related to the plaintiff’s claim rather than the conduct of the defendant in general.”).

12. Any item not supported by the evidence should be excluded.

13. This sentence may be used if there is evidence of future harm to the plaintiff.

14. A paragraph instructing the jury that any punitive damages award should not include an amount for harm suffered by persons who are not parties to the case may be necessary if evidence concerning harm suffered by nonparties has been introduced. *See Philip Morris USA v. Williams*, 549 U.S. at 355; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-24 (2003); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004).

15. Insert this phrase only if evidence has been introduced, or the court has taken judicial notice, of fines and penalties for similar conduct. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996), noting “civil penalties authorized in comparable cases” as a guidepost to be considered. *See also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003).

16. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (stating that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process” and observing that: “Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1 . . . or, in this case, of 145 to 1.”).

17. The bracketed language is available for use if punitive damages claims are submitted against more than one defendant.

18. If evidence has been introduced concerning conduct by the defendant that was legal in the state where it was committed, the jury must be told that they cannot award punitive damages against the defendant for such conduct. *See State Farm Mut. Auto. Inc. Co. v. Campbell*, 538 U.S. 408, 422 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572-73 (1996); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004). This issue normally will not come up in cases under federal law. In any case in which evidence is admitted for some purposes but may not be considered by the jury in awarding punitive damages, the court should give an appropriate limiting instruction.

### **Committee Comments**

A Title VII plaintiff may recover punitive damages by showing that the defendant engaged in discrimination “with malice or with reckless indifference to [his or her] federally protected rights.” *See* 42 U.S.C. § 1981a(b)(1). In 1999, the United States Supreme Court explained that the terms “malice” and “reckless” ultimately focus on the actor’s state of mind. *Kolstad v. American Dental Ass’n*, 527 U.S. 526, 535 (1999). The Court added that the terms pertain to the employer’s knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. *Id.* To be liable for punitive damages, the employer must at least discriminate in the face of a perceived risk that its actions will violate federal law. *Id.* at 536. Rejecting the conclusion of the lower court that punitive damages were limited to cases involving intentional discrimination of an “egregious” nature, the Court held that a plaintiff is not required to show egregious or outrageous discrimination independent of the employer’s state of mind. *Id.* at 546.

The *Kolstad* case also established a good-faith defense to place limits on an employer's vicarious liability for punitive damages. Recognizing that Title VII is an effort to promote prevention of discrimination as well as remediation, the Court held that an employer may not be vicariously liable for the discriminatory decisions of managerial agents where those decisions are contrary to the employer's good-faith efforts to comply with Title VII. *Id.* at 545. The *Kolstad* Court did not specify which party has the burden of proof on the issue of good faith. The Eighth Circuit has issued decisions suggesting that the burden is on the employer-defendant to prove the good faith defense. See *EEOC v. Siouxland Oral Maxillofacial Surgery Associates, L.L.P.*, 578 F.3d 921, 925 (8th Cir. 2009) ("An employer may avoid liability for punitive damages, however, if it shows that the employees' actions 'are contrary to the employer's good-faith efforts to comply with Title VII.'") (emphasis added); *Dominic v. DeVilbiss Air Power Co.*, 493 F.3d 968, 976 (8th Cir. 2007) (finding it was error for trial court to submit punitive damages to the jury where "the company demonstrated good faith efforts to respond to Dominic's complaints, to prevent sexual harassment and retaliation, and to fulfill its obligations under Title VII.") (emphasis added); *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1010 (8th Cir. 2000) (following jury trial at which defendant presented evidence of its written sexual harassment policy and policy of encouraging employees with grievances to contact the home office, holding that "'such evidence does not suffice, as a matter of law,' to establish 'good faith efforts' in the face of substantial evidence that the company 'minimized' Ogden's complaints; performed a cursory investigation which focused on Ogden's performance, rather than [the alleged harasser] Hudson's conduct; and forced Ogden to resign while imposing no discipline on Hudson for his behavior.") (citation omitted). See also *Zimmermann v. Associates First Capital Corp.*, 251 F.3d 376, 385 (10th Cir. 2001) ("This defense requires an employer to establish both that it had an antidiscrimination policy and made good faith effort to enforce it.") (emphasis added); *Romano v. U-Haul Intl.*, 233 F.3d 655, 670 (1st Cir. 2000) ("Although *Kolstad* does not state specifically which party must put forth such evidence, the good-faith aspect of *Kolstad* has subsequently been characterized as an affirmative defense, see *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 516 (9th Cir. 2000); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 286 (5th Cir. 1999), [additional citations omitted]. We agree with these characterizations. The defendant, therefore, is responsible for showing good faith efforts to comply with the requirements of Title VII.").

This instruction attempts to incorporate the constitutionally relevant principles set forth by the Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). In *State Farm*, 538 U.S. at 417, the Court observed: "We have admonished that '[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and 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 Motor*, 512 U.S. at 432). See *Baker v. John Morrell & Co.*, 266 F. Supp. 2d 909, 961 (N.D. Iowa 2003), *aff'd*, 382 F.3d 816 (8th Cir. 2004), and *In Re Exxon Valdez*, 296 F. Supp. 2d 1071, 1080 (D. Alaska 2004), for examples of punitive damages instructions in which the court attempted to incorporate constitutional standards.

The last paragraph is based on *State Farm*, 538 U.S. at 421, in which the Court held that: “A state cannot punish a defendant for conduct that may have been lawful where it occurred. . . . Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.” The Court specifically mandated that: “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.” *State Farm*, 538 U.S. at 422.

## 5.80 GENERAL VERDICT FORM

### VERDICT

**Note:** Complete the following paragraph by writing in the name required by your verdict.

On the [(sex)<sup>1</sup> discrimination]<sup>2</sup> claim of plaintiff [Jane Doe], [as submitted in Instruction \_\_\_\_\_]<sup>3</sup>, we find in favor of:

---

(Plaintiff Jane Doe) or (Defendant XYZ, Inc.)

**Note:** Answer the next question only if the above finding is in favor of the plaintiff. If the above finding is in favor of the defendant, have your foreperson sign and date this form because you have completed your deliberations on this claim.

[Has it been proved<sup>4</sup> that the defendant would have [discharged] the plaintiff regardless of [(his) (her)] (sex)?

\_\_\_\_\_Yes                      \_\_\_\_\_No

(Mark an "X" in the appropriate space)

**Note:** Complete the following paragraphs only if your answer to the preceding question is "no." If you answered "yes" to the preceding question, have your foreperson sign and date this form because you have completed your deliberations on this claim.]<sup>5</sup>

We find the plaintiff's lost wages and benefits through the date of this verdict to be:

\$ \_\_\_\_\_ (stating the amount or, if none, write the word "none").

We find the plaintiff's other damages, excluding lost wages and benefits, to be:

\$ \_\_\_\_\_ (stating the amount [or, if you find that the plaintiff's damages do not have a monetary value, write in the nominal amount of One Dollar (\$1.00)]).

[We assess punitive damages against the defendant, as submitted in Instruction \_\_\_\_\_, as follows:

\$ \_\_\_\_\_ (stating the amount or, if none, write the word "none").]<sup>6</sup>

---

Foreperson

Dated: \_\_\_\_\_

#### Notes on Use

1. Use the protected classification at issue (race, color, religion, sex, or national origin).
2. The bracketed phrase should be submitted when the plaintiff submits multiple claims to the jury.
3. The number of the "elements of claim" instruction may be inserted here. *See* Model Instruction 5.40.
4. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.
5. This question should be used to submit the "same decision" issue to the jury. *See* Model Instruction 5.01.
6. This paragraph should be included if the evidence is sufficient to support an award of punitive damages. *See* Model Instruction 5.72.

## 5.81 GENERAL VERDICT FORM-AFTER-ACQUIRED EVIDENCE

**Note:** Complete the following paragraph by writing in the name required by your verdict.

On the [(sex)<sup>1</sup> discrimination]<sup>2</sup> claim of plaintiff [Jane Doe], [as submitted in Instruction \_\_\_\_]<sup>3</sup>, we find in favor of:

---

(Plaintiff Jane Doe) or (Defendant XYZ, Inc.)

**Note:** Answer the next question only if the above finding is in favor of the plaintiff. If the above finding is in favor of the defendant, have your foreperson sign and date this form because you have completed your deliberations on this claim.

[Question No. 1<sup>4</sup>: Has it been proved<sup>5</sup> that the defendant would have [discharged] the plaintiff on [date when the plaintiff was discharged] regardless of [(his) (her)] (sex)?

\_\_\_\_\_Yes                      \_\_\_\_\_No

(Mark an "X" in the appropriate space)

**Note:** Complete the following paragraphs only if your answer to the preceding question is "no." If you answered "yes" to the preceding question, have your foreperson sign and date this form because you have completed your deliberations on this claim.]

Question No. [2]<sup>6</sup>: Has it been proved that, even if the plaintiff had not been terminated on [insert termination date], the defendant would have terminated the plaintiff's employment on [insert date of discovery of after-acquired evidence] because [insert brief explanation of the defendant's after-acquired reason for termination.]?

\_\_\_\_\_Yes                      \_\_\_\_\_No

(Mark an "X" in the appropriate space)

**Note:** Continue on to the following paragraphs regardless of how you answered Question No. [2].

We assess the plaintiff's damages as follows:

A. Lost wages and benefits from [date of actual termination] through [date of discovery of after-acquired evidence]<sup>7</sup>:

\$ \_\_\_\_\_ (stating the amount [or, if none, write the word "none"])

B. Lost wages and benefits from [date of discovery of after-acquired evidence] through the date of your verdict:

\$ \_\_\_\_\_ (stating the amount [or, if none, write the word "none"])

C. The plaintiff's other damages, excluding past and future lost wages and benefits:

\$ \_\_\_\_\_ (stating the amount [or, if you find that the plaintiff's damages do not have a monetary value, write in the nominal amount of One Dollar (\$1.00)]).

[We assess punitive damages against the defendant, as submitted in Instruction \_\_\_\_\_, as follows:

\$ \_\_\_\_\_ (stating the amount or, if none, write the word "none").]<sup>8</sup>

\_\_\_\_\_  
Foreperson

Dated: \_\_\_\_\_

### Notes on Use

1. Use the protected classification at issue (race, color, religion, sex, or national origin).
2. The bracketed phrase should be submitted when the plaintiff submits multiple claims to the jury.
3. The number of the “elements of claim” instruction may be inserted here. *See* Model Instruction 5.40.
4. Question 1 may be used to submit the “same decision” issue to the jury. *See* Model Instruction 5.01.
5. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.
6. Question 2 should be used to submit the “after-acquired evidence” issue to the jury. *See* Model Instruction 5.22 and Overview 5.00.
7. Although the after-acquired evidence defense would bar recovery of economic damages accruing after the date of discovery of the after-acquired basis for termination, Subparagraphs A and B are designed to elicit findings in the event the after-acquired evidence defense is overruled as a matter of law via post-trial motions or appeal. Front pay is an equitable issue for the judge to decide. *Excel Corp. v. Bosley*, 165 F.3d 635, 639 (8th Cir. 1999) (Title VII case).
8. This paragraph should be included if the evidence is sufficient to support an award of punitive damages. *See* Model Instruction 5.72.

### Committee Comments

This verdict form is intended for use where the after-acquired evidence defense is submitted. *See* Overview 5.00 and Model Instruction 5.22.

## 6. AGE DISCRIMINATION IN EMPLOYMENT ACT CASES

### 6.00 OVERVIEW

The following instructions are designed for use in jury trials under the Age Discrimination in Employment Act (“ADEA”). In enacting the ADEA, Congress stated that its purpose is “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment.” 29 U.S.C. § 621(b). The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630(b)

#### **Establishing Age Discrimination**

“The ADEA prohibits discrimination against employees, age 40 and over, because of their age.” *Rahlf v. Mo-Tech Corp., Inc.*, 642 F.3d 633, 637 (8th Cir. 2011); 29 U.S.C. §§ 623, 631(a). “In order to establish a prima facie case of age discrimination under the Age Discrimination in Employment Act (“ADEA”) a plaintiff must show: (1) she is over 40; (2) she was qualified for the position; (3) she suffered an adverse employment action; and (4) substantially younger, similarly situated employees were treated more favorably.” *Faulkner v. Douglas County Nebraska*, 906 F.3d 728, 734 (8th Cir. 2018). *See also Haggemiller v. ABM Parking Services, Inc.*, 837 F.3d 879, 884 (8th Cir. 2016) (without direct evidence of age discrimination, plaintiff “must establish a prima facie case by demonstrating: (1) she is a member of a protected group; (2) she was qualified for the position; (3) she was discharged; and (4) the discharge occurred under circumstances giving rise to an inference of discrimination”) (inner quotation marks omitted); *Rahlf v. Mo-Tech Corp., Inc.*, 642 F.3d at 637 (“To establish a prima facie case of age discrimination in a reduction-in-force, a plaintiff must show that (1) he is over 40 years old, (2) he met the applicable job qualifications, (3) he suffered an adverse employment action, and (4) there is some additional evidence that age was a factor in the employer’s termination decision.”).

Where the employee claims that the employer’s facially neutral employment practices have a disparate impact on persons age 40 or over, the employee makes a prima facie case by “identifying a specific employment practice and then presenting statistical evidence of a kind and degree sufficient to show that the practice in question caused the plaintiff to suffer adverse employment action because of his or her membership in a protected group.” *Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948, 953 (8th Cir. 2001). *See also Eggers v. Wells Fargo Bank, N.A.*, 899 F.3d 629, 633 (8th Cir. 2018).

An employee must prove that age was the “but for” cause of the employer’s adverse decision, regardless of whether there is direct or circumstantial evidence of age discrimination. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176-78 (2009).

Once an employee makes a prima facie case of discrimination, the employer has the burden of producing evidence to articulate a legitimate, nondiscriminatory reason for its adverse employment action. *Rahlf v. Mo-Tech Corp., Inc.*, 642 F.3d at 637. If the employer does so, the employee must show that the employer’s proffered reason was a pretext for discrimination. *Id.* At all times, however, the employee retains the burden of persuasion to prove that age was the

“but-for” cause of the adverse employment action. *See Gross*, 557 U.S. at 180 (“The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.”); *Rahlf v. Mo-Tech Corp., Inc.*, 642 F.3d at 637 (citing *Gross*). Although the employee need not prove that age was the only factor in the employer’s decision-making process, the employee must show that “as among several factors, age was the factor that made a difference.” *Tramp v. Associated Underwriters*, 768 F.3d 793, 801 (8th Cir. 2014). “There can be no discrimination under the ADEA ‘[w]hen the employer’s decision is wholly motivated by factors other than age ... even if the motivating factor is correlated with age,’ at least when age is analytically distinct from the motivating factor.” *Id.* (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993)).

When an employee has produced evidence of pretext, the issue is generally one for the jury. *See Hilde v. City of Eveleth*, 777 F.3d 998, 1006-08 (8th Cir. 2015) (there were genuine issues of material fact as to whether employer discriminated against employee because of age where there was evidence that commissioners altered employee’s scores because of concern that he was retirement eligible and awarded position to younger employee who would not be retirement eligible for seven years); *Tramp v. Associated Underwriters, Inc.*, 768 F.3d at 802-03 (there were fact issues as to whether employer’s expressed concern about health care costs was a proxy for concern about employees’ age; employer told health insurer that it expected rate decrease after losing its “oldest and sickest employees”).

An employer’s substantially varying statements of reasons for employment decision may be evidence that its reasons were pretextual. *See Jones v. National American University*, 608 F.3d 1039, 1048 (8th Cir. 2010) (jury could find employer’s reasons were pretextual where reasons shifted over time, selected candidate lacked plaintiff’s extensive management experience and age-related comments had been made); *Baker v. Silver Oak Senior Living Management Co., L.C.*, 581 F.3d 684, 689 (8th Cir. 2009) (whether employer’s proffered reasons were pretextual was a jury issue when shifting reasons were combined with evidence from which a jury could find that management “harbored a discriminatory attitude toward older employees and desired to displace them in favor of a younger workforce”). *Cf. Bone v. G4S Youth Services, LLC*, 686 F.3d 948, 958-59 (8th Cir. 2012) (plaintiff did not establish pretext where her “allegations of shifting explanations amounted to ‘nothing more than a semantic dispute’ as to whether G4S’ ultimatum to resign or be fired was a resignation or a termination”).

### **Constructive Discharge**

An employee who claims constructive discharge must show that a reasonable person would have found the working conditions intolerable and that either the employer intended to make the employee resign or that resignation was reasonably foreseeable given the conditions under which the employee was working. *Betz v. Chertoff*, 578 F.3d 929, 936 (8th Cir. 2009). Whether working conditions were intolerable is an objective standard. In various cases, the Eighth Circuit has held that “such things as loss of supervisory responsibilities, a feeling of being unfairly criticized, dissatisfaction with work assignments, and loss of pay are insufficient to constitute a constructive discharge.” *Tatom v. Georgia-Pacific Corp.*, 228 F.3d 926, 932 (8th Cir. 2000) (collecting cases). *See also Blake v. MJ Optical, Inc.*, 870 F.3d 820, 827 (8th Cir. 2017) (plaintiff did not show that her resignation was reasonable where she did not alert her employer

to what she perceived to be age discrimination and did not provide her employer with a reasonable chance to fix the problem before she quit); *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 890 (8th Cir. 1998) (an employee “has an obligation not to assume the worst and jump to conclusions too quickly”). *But see Tadlock v. Powell*, 291 F.3d 541, 545, 547 (8th Cir. 2002) (affirming decision that longtime supervisory employee was constructively discharged where he was transferred to a non-supervisory position in a different state, his supervisor knew he was anxious to return to his prior position and told him a decision would be made shortly, although the supervisor knew the employee would not be permitted to return, and after nine months the supervisor made the transfer permanent; it was reasonably foreseeable that the permanent transfer would cause the employee to leave the agency; retirement and involuntary separation were the only options he was given to accepting the permanent transfer).

### **Damages**

The damages recoverable under the ADEA are those made recoverable under section 216 of the Fair Labor Standards Act. *See* 29 U.S.C. 626(b), 216. The plaintiff is entitled to “the most complete relief possible” and typically is awarded back pay, defined as “the difference between the value of the compensation the plaintiff would have been entitled to had he remained employed by the defendant and whatever wages he earned during the relevant period.” *Hartley v. Dillard’s, Inc.*, 310 F.3d 1054, 1061-62 (8th Cir. 2002). The value of plaintiff’s compensation includes the value of lost benefits, such as employer-subsidized health, life, disability and other insurance, employer contributions to retirement, and accrued vacation. *Id.* at 1062; *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1111 (8th Cir. 1994) (affirming back pay award that included insurance replacement costs and lost 401(k) contributions). The “relevant period” generally runs from the date of termination to the date of reinstatement or judgment. *Clark v. Matthews Intern. Corp.*, 639 F.3d 391, 396 (8th Cir. 2011). Unemployment compensation, Social Security benefits and pension benefits received by the plaintiff are considered “collateral source” payments and generally are not offset against a back pay award. *Gaworski*, 17 F.3d at 1113; *Doyne v. Union Electric Co.*, 953 F.2d 447, 451-52 (8th Cir. 1992).

In some cases, a plaintiff may be eligible for front pay, that is, future lost income and benefits. *Hartley*, 310 F.3d at 1062-63. Because front pay is an equitable remedy in lieu of reinstatement, front pay is an issue for the court, not the jury. *See Newhouse v. McCormick & Co.*, 110 F.3d 635, 643 (8th Cir. 1997).

The ADEA does not permit the recovery of damages for pain and suffering. *Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 810 (8th Cir. 1982). Punitive damages are not recoverable under the ADEA but liquidated damages, in an amount equal to the actual damages awarded, are recoverable when the jury finds that the employer’s conduct was willful, that is, when the employer knew its employment decision violated the ADEA or when it acted with reckless disregard for whether its conduct was prohibited by statute. 29 U.S.C. §§ 626(b), 216. *See Christensen v. Titan Distribution, Inc.*, 481 F.3d 1085, 1097-98 (8th Cir. 2007) (jury could find willfulness where employer replaced plaintiff with a younger worker, did not argue that economic conditions required it to do so, and refused to identify who made the decision); *Spencer v. Stuart Hall Co., Inc.*, 173 F.3d 1124, 1130 (8th Cir. 1999) (it was for jury to determine whether discussion of whether laying off older worker would create Equal Employment Opportunity problem indicated that employer “took steps to hide its true intent,

knowing, or at least recklessly disregarding, that its actions violated the ADEA”); *Maschka v. Genuine Parts Co.*, 122 F.3d 566, 572 (8th Cir. 1997) (jury could find from employer’s manual describing policies against discrimination that employer knew it generally could not make employment decisions based on age and that its actions were willful where the employer presented no evidence that it acted under an erroneous belief that it was entitled to an exception to the ADEA provisions).

## CHAPTER 6 INSTRUCTIONS AND VERDICT FORM

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## 6.20 DEFINITION: WILLFULNESS

If you find in favor of the plaintiff under Instruction \_\_\_\_\_,<sup>1</sup> then you must decide whether the conduct of the defendant was “willful.” You must find the defendant’s conduct was willful if it has been proved<sup>2</sup> that, when the defendant [discharged]<sup>3</sup> the plaintiff, the defendant knew [the discharge] was in violation of the federal law prohibiting age discrimination or acted with reckless disregard of that law.

### Notes on Use

1. Insert the number or title of the “essential elements” instruction here.
2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.
3. This instruction is designed for use in a discharge case. In a “failure to hire,” “failure to promote,” or “demotion” case, or where the plaintiff resigned but claims he or she was “constructively discharged,” the instruction must be modified.

### Committee Comments

The standard set forth in the instruction is consistent with that mandated by *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). For a further discussion of the evidence necessary to justify a submission on the issue of willfulness, see *Maschka v. Genuine Parts Co.*, 122 F.3d 566 (8th Cir. 1997); *Spencer v. Stuart Hall Co., Inc.*, 173 F.3d 1124 (8th Cir. 1999); and *Christensen v. Titan Distribution, Inc.*, 481 F.3d 1085, 1097-98 (8th Cir. 2007).

## 6.40 ELEMENTS OF CLAIM

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on plaintiff's claim [generally describe claim] if all the following elements have been proved <sup>1</sup> :

*First*, the defendant [discharged] <sup>2</sup> the plaintiff; and

*Second*, the defendant would not have [discharged] the plaintiff but for <sup>3</sup> the plaintiff's age.

If any of the above elements has not been proved, your verdict must be for the defendant.

“But for” does not require that age was the only reason for the decision made by the defendant. [You may find that the defendant would not have discharged the plaintiff “but for” the plaintiff's age if it has been proved that the defendant's stated reason(s) for its decision(s) [(is) (are)] not the real reason(s), but [(is) (are)] a pretext to hide age discrimination]. <sup>4</sup>

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that an element is proved only if the jury finds the element is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. This first element is designed for use in a discharge case. In a failure to hire, failure to promote, or demotion case, the instruction must be modified. Where the plaintiff resigned but claims a constructive discharge, this instruction should be modified. *See* Model Instruction 5.41, *supra*.

3. To establish a disparate-treatment claim under the ADEA, a plaintiff must prove that age was the “but for” cause of the employer's adverse decision. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176-77 (2009); *see also* *Gross v. FBL Financial Services, Inc.*, 588 F.3d 614 (8th Cir. 2009). Under the ADEA, the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision. *Gross*, 557 U.S. at 180.

4. This sentence may be added, if appropriate. *See* Model Instruction 5.20, *supra*, and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states

“[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.”

### **Committee Comments**

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Supreme Court held that an age discrimination plaintiff may create a submissible issue by showing that the defendant's stated reason for its decision was pretextual. Evidence that the employer's reason for the employment decision has changed substantially over time may be used to show pretext. *Jones v. National American University*, 608 F.3d 1039, 1048 (8th Cir. 2010). *Cf. Bone v. G4S Youth Services, LLC*, 686 F.3d 948, 958-59 (8th Cir. 2012) (plaintiff did not establish pretext where her “allegations of shifting explanations amounted to ‘nothing more than a semantic dispute’ as to whether G4S’ ultimatum to resign or be fired was a resignation or a termination”).

## 6.41 ELEMENTS OF CLAIM: CONSTRUCTIVE DISCHARGE

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on plaintiff's claim [generally describe claim] if all the following elements have been proved <sup>1</sup> :

*First*, the defendant engaged in action that made the plaintiff's working conditions intolerable, and

*Second*, but for the plaintiff's age, defendant would not have taken those actions, and

*Third*, [the defendant acted with the intent of forcing the plaintiff to quit] or [the plaintiff's resignation was a reasonably foreseeable result of the defendant's actions] <sup>2</sup>.

Working conditions are intolerable if a reasonable person in the plaintiff's situation would have deemed resignation the only reasonable alternative. <sup>3</sup>

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that an element is proved only if the jury finds the element is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Select the appropriate phrase or, in some cases both phrases separated by "or" depending on the evidence. *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 n.13 (8th Cir. 2000) ("To establish her constructive discharge, Ogden needed to show that a reasonable person would have found the conditions of her employ intolerable *and that the employer either intended to force her to resign or could have reasonably foreseen she would do so as a result of its actions*".) (Emphasis added.)

3. This paragraph aids the jury by providing a definition of what constitutes intolerable working conditions and explains that the standard is an objective one. *See Blake v. MJ Optical, Inc.*, 870 F.3d 820, 827 (8th Cir. 2017) (plaintiff did not show that her resignation was reasonable where she did not alert her employer to what she perceived to be age discrimination and did not provide her employer with a reasonable chance to fix the problem before she quit); *see also Phillips v. Taco Bell Corp.*, 156 F.3d 884, 890 (8th Cir. 1998) (an employee "has an obligation not to assume the worst and jump to conclusions too quickly.").

### Committee Comments

This instruction is designed for use in connection with the essential elements instruction in cases where the plaintiff resigned but claims that the employer's discriminatory actions forced him or her to do so. *See Barrett v. Omaha National Bank*, 726 F.2d 424, 428 (8th Cir. 1984) (“[a]n employee is constructively discharged when he or she involuntarily resigns to escape intolerable and illegal employment requirements”); *Hukkanen v. International Union of Operating Engineers, Hoisting & Portable Local No.101*, 3 F.3d 281, 285 (8th Cir. 1993) (“[c]onstructive discharge plaintiffs thus satisfy *Bunny Breads*' intent requirement by showing their resignation was a reasonably foreseeable consequence of their employer's discriminatory actions,” thus, adding an alternative method of meeting the standard announced in *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981) (employer's actions “must have been taken with the intention of forcing the employee to quit”). *See also Betz v. Chertoff*, 578 F.3d 929, 936 (8th Cir. 2009) (“To make out a case of constructive discharge, Ms. Betz had to show that a reasonable person would have found her working conditions intolerable, and that Mr. Cangemi intended to make her resign or, at a minimum, that her resignation was reasonably foreseeable, given the conditions under which she was working.”); *Tatom v. Georgia-Pacific Corp.*, 228 F.3d 926, 932 (8th Cir. 2000) (holding that “such things as loss of supervisory responsibilities, feelings of being unfairly criticized, dissatisfaction with work assignments, and loss of pay are insufficient to constitute a constructive discharge”). This instruction should be used in lieu of the first and second elements in the essential-elements instruction. *See* Model Instruction 6.40 (ADEA).

## 6.70 DAMAGES: ACTUAL

If you find in favor of the plaintiff [under Instruction \_\_\_\_\_],<sup>1</sup> then you must award the plaintiff an amount of money that you find will fairly and justly compensate the plaintiff for any wages and fringe benefits you find the plaintiff would have earned in [(his) (her)] employment with the defendant if [(he) (she)] had not been discharged on [fill in date of discharge], through the date of your verdict, *minus* the amount of earnings and benefits from other employment received by the plaintiff during that time.<sup>2</sup>

[You are also instructed that the plaintiff has a duty under the law to use reasonable efforts to minimize [(his) (her)] damages. If it has been proved<sup>3</sup> that the plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [(him) (her)], you must reduce [(his) (her)] damages by the amount of the wages and fringe benefits [(he) (she)] reasonably would have earned if [(he) (she)] had sought out or taken advantage of such an opportunity.]<sup>4</sup>

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.]<sup>5</sup>

### Notes on Use

1. Insert the number or title of the “essential elements” instruction here.
2. The formula for “back pay” is “the difference between the value of compensation the plaintiff would have been entitled to had he remained employed by the defendant and whatever wages he earned during the relevant period.” *Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1062 (8th Cir. 2002). The value of lost benefits, such as employer-subsidized health, life, disability and other forms of insurance, contributions to retirement, accrued vacation, etc. are recoverable under the ADEA. *Hartley*, 310 F.3d at 1062 (collecting cases); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1110-14 (8th Cir. 1994) (allowing insurance replacement costs, lost 401(k) contributions). This instruction also may be modified to exclude certain items that were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law.
3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. This paragraph is designed to submit the issue of “mitigation of damages” in appropriate cases. *See Hartley v. Dillard’s, Inc.*, 310 F.3d 1054, 1061-62 (8th Cir. 2002). The burden is on the employer to plead and prove the plaintiff’s failure to mitigate. *Id.*

5. This paragraph may be given at the trial court’s discretion.

### **Committee Comments**

The goal of a damages award in an age discrimination case is to put the plaintiff in the same economic position he or she would have been in but for the unlawful employment decision. This instruction is designed to submit the standard back pay formula of lost wages and benefits *minus* interim earnings and benefits through the date of verdict. *See Hartley v. Dillard’s, Inc.*, 310 F.3d 1054, 1061-62 (8th Cir. 2002) (the plaintiff entitled to “most complete relief possible”); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1110-14 (8th Cir. 1994).

This instruction may be modified to articulate the types of interim earnings that should be offset against the plaintiff’s back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *Gaworski*, 17 F.3d at 1110-14. However, unemployment compensation, Social Security benefits, and pension benefits received by the plaintiff are considered “collateral source” benefits that are not offset against a back pay award. *See Hartley*, 310 F.3d at 1062; *Doyne v. Union Electric Co.*, 953 F.2d 447, 451-52 (8th Cir. 1992) (holding that pension benefits are a “collateral source benefit”); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1110-14 (8th Cir. 1994) (unemployment benefits, moonlighting income also not deductible).

In some cases, a discrimination plaintiff may be eligible for future lost income and benefits (“front pay”). *Hartley*, 310 F.3d 1062-63. Because front pay is an equitable remedy “in lieu of reinstatement,” front pay is an issue for the court, not the jury. *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999). *See also Newhouse v. McCormick & Co.*, 110 F.3d 635, 641 (8th Cir. 1997) (front pay is an issue for the court, not the jury, in ADEA cases).

## 6.71 DAMAGES: NOMINAL

**[Nominal damages normally are not appropriate in ADEA cases.]<sup>1</sup>**

### Notes on Use

1. If a nominal damages instruction is deemed appropriate, *see supra* Model Instruction 5.71.

### Committee Comments

Recoverable damages in ADEA cases normally are limited to lost wages and benefits and in most ADEA cases, it will be undisputed that the plaintiff has some actual damages. The Eighth Circuit has not addressed the question whether nominal damages may be awarded in ADEA cases. Nominal damages have been awarded in some other circuits, usually by the court, but occasionally by a jury. *See Berg v. Auto Nation Inc.*, 212 Fed.Appx. 668, 669 (9th Cir. 2006) (affirming award of nominal damages and attorney fees); *Drez v. E.R. Squibb & Sons, Inc.*, 674 F.Supp. 1432, 1438 (D. Kan. 1987) (jury found willful retaliation for plaintiff's filing charge of age discrimination with EEOC but awarded no damages; court perceived "no legally significant difference between a \$1.00 nominal damage award and the award of no damages in the present case"); *Grimes v. City of Fort Valley*, 773 F.Supp. 1536, 1538-39 (M.D. Ga. 1991) (court awarded nominal damages and attorney's fees, finding award "consistent with the purposes of the ADEA in this unusual case"); *Poland v. Chertoff*, 559 F.Supp.2d 1127, 1132 (D. Ore. 2008) (court awarded nominal damages of \$1.00 for retaliation in violation of ADEA, finding that "the vindication of his right to be free from such discrimination justifies an award of nominal damages"); *Petrunch v. Sun Bldg. Systems, Inc.*, 625 F.Supp.2d 199, 204 n. 4 (M.D. Pa. 2008) (court awarded nominal damages of \$1.00 and rejected as "meritless" the defendants' contention that nominal damages are unavailable in ADEA cases). *But see Meyers v. I.B.M. Corp.*, 335 F.Supp.2d 405, 412 (S.D. N.Y. 2004) (holding that ADEA claim was moot because "the Plaintiff has not suffered any economic damage").

Several courts have held that nominal damages do not qualify as "amounts owing" under 29 U.S.C. § 626(c)(2), entitling one to a jury trial in an action for recovery of "amounts owing" as a result of a violation of the ADEA. *See McLaren v. Emory University*, 705 F.Supp. 563, 567 (N.D. Ga. 1988) (striking jury demand and holding: "Plaintiff's argument that he would be entitled to nominal damages and that such would qualify as 'amounts owing' under the Act is misplaced. The Court has found no authority under the ADEA sanctioning such a result."); *Younger v. District of Columbia Public Schools*, 325 F.Supp.3d 59, 62 (D. D.C. 2018) (holding that, because plaintiff was not owed any amount of back pay, she was not entitled to a jury trial but that the court would permit an award of nominal damages if plaintiff prevailed after a bench trial).

If a nominal damage instruction is deemed to be appropriate, Model Instruction 5.71, *supra*, should be used.

**6.80 GENERAL VERDICT FORM**

**VERDICT**

**Note:** Complete this form by writing in the names required by your verdict.

On the [age discrimination]<sup>1</sup> claim of plaintiff [John Doe], [as submitted in Instruction \_\_\_\_]<sup>2</sup>, we find in favor of

---

**(Plaintiff Jane Doe) or (Defendant XYZ, Inc.)**

**Note:** Complete the following paragraphs only if the above finding is in favor of the plaintiff. If the above finding is in favor of the defendant, have your foreperson sign and date this form because you have completed your deliberation on this claim.

We find the plaintiff's damages to be:

\$ \_\_\_\_\_ (stating the amount or, if none, write the word "none").<sup>3</sup>

Was the defendant's conduct "willful" as that term is defined in Instruction \_\_\_\_\_?<sup>4</sup>

Yes \_\_\_\_\_ No \_\_\_\_\_

**(Place an "X" in the appropriate space.)**

---

Foreperson

Dated: \_\_\_\_\_

### Notes on Use

1. The bracketed language should be included when the plaintiff submits multiple claims to the jury.
2. The number or title of the “essential elements” instruction should be inserted here.
3. This paragraph must be modified if the issue of nominal damages is submitted. *But see supra* Committee Comments, Model Instruction 6.70.
4. The number or title of the instruction defining “willfulness” should be inserted. *See* Model Instruction 6.20, *supra*.

## 7. EQUAL PAY ACT CASES

### 7.00 OVERVIEW

The Equal Pay Act, 29 U.S.C. § 206(d), with certain exceptions, prohibits employers from discriminating against employees on the basis of sex with respect to wages paid for equal work performed under similar working conditions. The Equal Pay Act, which is part of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, provides:

No employer having employees subject to [the minimum wage provisions of the Fair Labor Standards Act] shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .

29 U.S.C. § 206(d)(1).

These instructions are designed for use in cases brought pursuant to the Equal Pay Act. It is important to note that a plaintiff may bring a federal claim for wage discrimination on the basis of sex under either the Equal Pay Act or Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. § 2000e *et seq.* See *Simmons v. New Pub. Sch. Dist. No. 8*, 251 F.3d 1210, 1215 (8th Cir. 2001); *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 669 (8th Cir. 1992). If the plaintiff is claiming wage discrimination under Title VII and not the Equal Pay Act, these instructions should not be used.

### Statute of Limitations

Equal Pay Act claims must be brought within two years unless it is proven that the employer “willfully” violated the law; if the employer willfully violated the law, the statute of limitations is extended to three years. See 29 U.S.C. § 255(a). A violation is “willful” where “the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.” *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). The recovery period is calculated backward from the date that the lawsuit is filed or from the date a consent to join form is filed on behalf of an opt-in plaintiff in a collective action pursuant to 29 U.S.C. § 216(b). The question of willfulness is a question for the jury. See *Broadus*, 226 F.3d at 944. The jury’s decision on “willfulness” is distinct from the district court’s decision to award liquidated damages. See *id.*

### Defenses

*Seniority system.* A bona fide seniority system is a valid defense to the application of different standards of compensation. *Dindinger v. Allsteel, Inc.*, 853 F.3d 414, 422 (8th Cir.

2017) “A ‘bona fide’ seniority system has been defined as ‘one that was created for legitimate purposes, rather than for the purpose of discrimination.’ *Boersig v. Union Elec. Co.*, 219 F.3d 816, 821 (8th Cir. 2000). It is proper to give a jury instruction defining a valid seniority system as simply a “bona fide seniority system,” as opposed to defining the specific seniority system involved. *See Bjerke v. Nash Finch Co.*, No. Civ. A3-98-134, 2000 WL 33146937, at \*3 (D. N.D. Dec. 4, 2000).

*Merit system.* If a plaintiff’s salary is marginally different from comparable employees and legitimate factors are used to base salary differentials after evaluations, there is no violation of the Equal Pay Act. *See Brouard-Norcross v. Augustana College Ass’n*, 935 F.2d 974, 979 (8th Cir. 1991).

*System that measures earnings by quantity or quality of production.* “There is no discrimination if two employees receive the same pay rate, but one receives more total compensation because he or she produces more.” *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1029 (6th Cir. 1983). Similarly, an employee who generates more profits for the employer can be paid more than an employee of the opposite sex who generates less. *See, e.g., Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589, 597 (3d Cir. 1973) (employer demonstrated salespersons in men’s clothing department generated more profits than those in women’s clothing department).

*Factor other than sex.* The Equal Pay Act’s broad exemption for employers who pay different wages to different sexes based upon any “factor other than sex” indicates that the Act is intended to address the same kind of “purposeful gender discrimination” prohibited by the Constitution. *See Varner v. Illinois State Univ.*, 226 F.3d 927, 934 (7th Cir. 2000). The broad exemption allows an employer to provide a neutral explanation for a disparity in pay. *See id.*

A difference in the job performance between a male and female employee in the same position can be a “factor other than sex” sufficient to justify a disparity in pay. *See EEOC Cherry-Burrell Corp.*, 35 F.3d 356, 362 (8th Cir. 1994) (“[P]erforming ‘similar’ duties does not bring about an inference that all Buyers did ‘identical’ work or even that objectively measured, they performed the Buyer’s role equally.”). Education or experience may be factors sufficient to justify a disparity in pay. *See Hutchins v. Int’l Bhd. of Teamsters*, 177 F.3d 1076, 1081 (8th Cir. 1999); *Clymore v. Far-Mar-Co., Inc.*, 709 F.2d 499, 503 (8th Cir. 1983). An employer’s salary retention policy, maintaining a skilled employee’s salary upon temporary change of position, may be a factor “other than sex” that justifies a salary differential. *Taylor v. White*, 321 F.3d 710, 720 (8th Cir. 2003). Reliance on prior salary may be a factor “other than sex” under appropriate circumstances. *Id. Cf. Drum v. Lesson Elec. Corp.*, 565 F.3d 1071 (8th Cir. 2009) (prior salary must not be based on prohibited “market force theory”); *see also Ewald v. Royal Norwegian Embassy*, 82 F.Supp.3d 871, 948 (D. Minn. 2014).

Payment of different wages because an employee of one sex is more likely to enter into “management training programs,” however, is not a valid justification, where such programs appear to be available to only one sex. *See Hodgson v. Security National Bank of Sioux City*, 460 F.2d 57, 61 (8th Cir. 1972). Unequal wages due to alleged employee “flexibility” necessitates an inquiry into the frequency and the manner in which the additional flexibility is actually utilized. *See Peltier v. City of Fargo*, 533 F.2d 374, 377 (8th Cir. 1976).

If an employer has a legitimate fiscal reason, such as letting an employee work overtime instead of calling in a new employee to complete the additional duties, a wage differential to compensate for the overtime worked is justifiable. *See Fyfe v. Fort Wayne*, 241 F.3d 597, 600-01 (7th Cir. 2001). Additionally, paying an employee more in order to avoid harming the public, such as paying an employee overtime for spraying a greenhouse with harmful pesticides after hours instead of during normal working hours, is allowable. *See id.*

### **Damages**

Backpay damages are calculated as the difference between what the employee should have been paid had the employer complied with the Equal Pay Act and the amount the employee actually was compensated. In addition, liquidated damages in an amount equal to the amount of backpay will be awarded unless the employer proves that it acted in good faith and had reasonable grounds for believing that it was not in violation of the Equal Pay Act. 29 U.S.C. § 216(b); 29 U.S.C. § 260; *Simpson v. Merchants & Planters Bank*, 441 F.3d 572, 579 (8th Cir. 2006). The burden is on the employer to prove it acted in good faith. *Broadus v. O.K. Industries, Inc.*, 226 F.3d 937, 944 (8th Cir. 2000). The determination of “good faith” is made by the court. *Id.*, see also *Brown v. Fred's, Inc.*, 494 F.3d 736, 743 (8th Cir. 2007).

Although the jury’s decision on “willfulness” for statute of limitations purposes is distinct from the district court’s decision to award liquidated damages, “it is hard to mount a serious argument . . . that an employer who has acted in reckless disregard of its obligations has nonetheless acted in good faith.” *Jarrett v. ERC Properties, Inc.*, 211 F.3d 1078, 1084 (8th Cir. 2000); see also *Braswell v. City of El Dorado*, 187 F.3d 954, 957 (8th Cir. 1999).

## **CHAPTER 7 INSTRUCTIONS AND VERDICT FORMS**

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## 7.20 DEFINITION: “SUBSTANTIALLY EQUAL”

“Substantially equal” means equal or nearly equal in the essential aspects of the job. In considering whether two jobs are substantially equal, you should compare the skill, effort, and responsibility required in performing the jobs. You should consider the actual job requirements, as opposed to job classifications, job descriptions, or job titles. In addition, you should consider the jobs overall, as opposed to individual segments of the jobs. You may disregard any superficial differences required to perform the jobs.

### Committee Comments

Determining whether two jobs are substantially equal requires “practical judgment on the basis of all the facts and circumstances of a particular case.” *Bearden v. International Paper Co.*, 628 F.Supp.2d 984, 997 (E.D. Ark. 2007) (citing *Buettner v. Arch Coal Sales Co., Inc.*, 216 F.3d 707, 719 (8th Cir. 2000)). A plaintiff is not required to show that the jobs are identical. *See Hill v. City of Pine Bluff, Arkansas*, 696 F.3d 709712, (8th Cir. 2012); *Simpson v. Merchants & Planters Bank*, 441 F.3d 572, 577-78 (8th Cir. 2006). Comparability, however, is not enough. *See Hill*, 696 F.3d. at 712. The inquiry centers around whether the performance of the jobs requires substantially equal skill, effort and responsibility under similar working conditions. *Simpson*, 441 F.3d at 578 (quoting *EEOC v. Universal Underwriters Ins. Co.*, 653 F.2d 1243, 1245 (8th Cir. 1981)). This may involve a comparison of the seniority and background experience of the employees performing the jobs, *see Buettner*, 216 F.3d at 719, and a comparison of the predecessor and successor employees to the jobs (both immediate and non-immediate), *see Broadus v. O.K. Indus.*, 226 F.3d 937, 942 (8th Cir. 2000). The actual job requirements and performance, as opposed to the job classifications or titles, are to be considered. *See Hunt v. Nebraska Pub. Power Dist.*, 282 F.3d 1021, 1029 (8th Cir. 2002) (citing *Orahood v. Board of Trustees of the Univ. of Arkansas*, 645 F.2d 651, 654 (8th Cir. 1981)). Moreover, the overall jobs, and not merely the individual segments of the jobs, are to be considered. *See Broadus*, 226 F.3d at 942. Two jobs requiring an insubstantial or minor difference in the degree or amount of skill, or effort, or responsibility may be “substantially equal.” *See Hunt*, 282 F.3d at 1030.

## **7.21 DEFINITION: WILLFULNESS**

If you find in favor of the plaintiff under Instruction \_\_\_\_\_,<sup>1</sup> [and you find against defendant under Instruction No. \_\_\_\_\_],<sup>2</sup> then you must decide whether the conduct of the defendant was “willful.” You must find the defendant’s conduct was willful if it has been proved<sup>3</sup> that the defendant either knew it was violating the Equal Pay Act or acted with reckless disregard of its obligations under the Equal Pay Act.

### **Notes on Use**

1. Insert the number or title of the elements of claim instruction here.
2. Insert the number of the affirmative defense instruction(s), if submitted.
3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

### **Committee Comments**

For a discussion of the evidence necessary to justify a submission on the issue of willfulness, see *Simpson v. Merchants & Planters Bank*, 441 F.3d 572, 580 (8th Cir. 2006).

## **7.22 DEFINITION: “SIMILAR WORKING CONDITIONS”**

“Similar working conditions” means similar surroundings and hazards, not the shift or time of day worked. Surroundings measures the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity, and their frequency. Hazards takes into account the physical hazards regularly encountered, their frequency, and the severity of injury they can cause.

### **Committee Comments**

For a discussion of “similar working conditions,” see *Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974).

## 7.40 ELEMENTS OF CLAIM

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on plaintiff's Equal Pay Act claim if all of the following elements have been proved <sup>1</sup>:

*First*, the defendant employed the plaintiff and one or more members of the opposite sex in positions requiring substantially equal skill, effort, and responsibility; and

*Second*, the plaintiff and one or more members of the opposite sex performed their positions under similar working conditions; and

*Third*, the plaintiff was paid a lower wage than [the] member[s] of the opposite sex who [(was) (were)] performing substantially equal work under similar working conditions.

If any of the above elements has not been proved, [or if it has been proved that the difference in pay was based on (describe affirmative defense(s) raised by the evidence) in Instruction \_\_\_\_\_<sup>2</sup>,] your verdict must be for the defendant and you need not proceed further in considering this claim.

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that an element is proved only if the jury finds the element is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Insert the number of the affirmative defense instruction(s), if submitted.

### Committee Comments

To establish a violation under the Act, a plaintiff must prove that the defendant paid different wages to employees of different sexes for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions. *Dindinger v. Allsteel, Inc.*, 853 F.3d 414, 421-22(8th Cir. 2017) ; (quoting *Hunt v. Nebraska Pub. Power Dist.*, 282 F.3d 1021, 1029 (8th Cir. 2002) (holding the plaintiff must prove that (1) he or she was paid less than one or more members of the opposite sex employed in the same establishment, (2) for equal work on jobs requiring equal skill, effort, and responsibility, (3) that were performed under similar working conditions)).

Once the plaintiff has met his or her burden, the employer may avoid liability only by proving that the disparity in pay was based on a bona fide seniority system, a merit system, a system that measures earnings by quantity or quality of production, any other factor other than sex. *Dindinger*, 853 F.3d at 422 (quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974)).

## 7.60 ELEMENTS OF DEFENSES<sup>1</sup>

Your verdict must be for defendant [insert name] if it has been proved<sup>2</sup> that the difference in pay was the result of:

- (1) a bona fide seniority system; or
- (2) a merit system; or
- (3) a system that measures earnings by quantity or quality of production; or
- (4) [any factor other than sex].<sup>3</sup>

### Notes on Use

1. This instruction should be used when the defendant is submitting an affirmative defense. It should be tailored to include only those affirmative defenses asserted.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. Insert language that describes the factor other than sex upon which the defendant relies (e.g., “job performance,” “education,” “prior salary,” or “experience”).

### Committee Comments

The Equal Pay Act specifically provides that a defendant is not liable under the Act when a disparity in pay between males and females is based on (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on any factor other than sex. *See* 29 U.S.C. § 206(d)(1). “The employer bears a heavy burden in establishing one of the four defenses, because the statutory exemptions are narrowly construed.” *Ewald v. Royal Norwegian Embassy*, 82 F. Supp. 3d 871, 944 (D. Minn. 2014) (citing *Ryduchowski v. Port Auth. of N.Y. & N.J.*, 203 F.3d 135, 143 (2d Cir.2000)) (internal quotation marks omitted). “A defendant cannot escape liability merely by articulating a legitimate non-discriminatory reason for the employment action; it must prove that the pay differential was based on a factor other than sex.” *Price v. N. States Power Co.*, 664 F.3d 1186, 1191 (8th Cir. 2011) (cleaned up).

## 7.70 DAMAGES: ACTUAL

If you find in favor of the plaintiff under Instruction \_\_\_\_\_,<sup>1</sup> [and you find against the defendant in Instruction \_\_\_\_\_,<sup>2</sup>]<sup>3</sup> you must award the plaintiff such sum as you find will compensate the plaintiff for the difference between what the plaintiff was paid and what [the]<sup>4</sup> member[s]<sup>4</sup> of the opposite sex [(was) (were)]<sup>4</sup> paid.

The verdict form will give you further guidance on this issue. [Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture, and you must not award damages by way of punishment or through sympathy.]<sup>5</sup>

### Notes on Use

1. Insert the number of the Instruction setting forth the essential elements for the plaintiff's claim.
2. Insert the number of the Instruction setting forth the affirmative defenses.
3. This language should be used when the defendant is submitting an affirmative defense.
4. Select the proper singular or plural form.
5. This paragraph may be given at the trial court's discretion.

### Committee Comments

There is no need to instruct the jury on the issue of liquidated damages, as the amount is simply double the amount awarded for unpaid wages. *Simpson v. Merchants & Planters Bank*, 441 F.3d 572, 579 (8th Cir. 2006) (“The Equal Pay Act's penalties include liquidated damages in an amount equal to actual damages.” (citing 29 U.S.C. § 216(b))).

Title VII awards may subsume part or all of Equal Pay Act claims. *See EEOC v. Cherry-Burrell Corp.*, 35 F.3d 356, 358 (8th Cir. 1994). “[A plaintiff] is entitled only to one compensatory damage award if liability is found on any or all of the theories involved.” *Id.* (quoting *Greenwood Ranches, Inc. v. Skie Constr. Co.*, 629 F.2d 518, 521 (8th Cir. 1980)).

## 7.80 GENERAL VERDICT FORM

### VERDICT

**Note:** Complete the following paragraph by writing in the name required by your verdict.

1. On the [Equal Pay Act]<sup>1</sup> claim of plaintiff [\_\_\_\_\_] <sup>2</sup> against defendant [\_\_\_\_\_] <sup>3</sup> we find in favor of:

---

(Plaintiff Jane Doe) or (Defendant XYZ, Inc.)

**Note:** Answer question 2 only if the above finding is in favor of plaintiff [\_\_\_\_\_] <sup>2</sup>. If the above finding is in favor of defendant [\_\_\_\_\_] <sup>3</sup>, have your foreperson sign and date the form because you have completed your deliberations on this claim.

[2. Was the defendant's conduct "willful" as that term is defined in Instruction \_\_\_\_\_? <sup>4</sup>

\_\_\_\_\_ Yes                      \_\_\_\_\_ No

**Note:** If you answered yes to question 2, you should award the plaintiff damages in the amount of wages [he/she] would have earned from [\_\_\_\_\_ to \_\_\_\_\_] <sup>5</sup> if [he/she] had been paid at the same rate as [male/females] performing comparable work minus the amount of earnings and benefits that the plaintiff actually earned between those dates.

If you answered no to question 2, you should award the plaintiff damages in the amount of wages [he/she] would have earned from [\_\_\_\_\_ to

\_\_\_\_\_] <sup>6</sup> if [he/she] had been paid at the same rate as [male/females] performing comparable work minus the amount of earnings and benefits that the plaintiff actually earned between those dates.] <sup>7</sup>

3. We find that the plaintiff should be awarded damages in the amount of:

\$ \_\_\_\_\_

\_\_\_\_\_  
Foreperson

Dated: \_\_\_\_\_

#### Notes on Use

1. This phrase should be used when the plaintiff submits multiple claims to the jury.
2. Insert the name of the plaintiff.
3. Insert the name of the defendant.
4. The number or title of the instruction defining “willfulness” should be inserted. *See* Model Instruction 7.21.
5. Insert the date on which the plaintiff’s cause of action accrued, or the date three years prior to the date on which the plaintiff filed his or her complaint, whichever is later. Insert the date the instructions are submitted to the jury as the final date.
6. Insert the date on which the plaintiff’s cause of action accrued, or the date two years prior to the date on which the plaintiff filed his or her complaint, whichever is later. Insert the date the instructions are submitted to the jury as the final date.
7. This question is used when the parties dispute the “willfulness” of the defendant’s actions. When the parties do not dispute “willfulness,” question 2 may be eliminated. Question 3 should become question 2 with the following recommended language:

Based on the wages the plaintiff earned from \_\_\_\_\_ to \_\_\_\_\_, we find that the plaintiff should be awarded damages in the amount of:

\$ \_\_\_\_\_.

## 7.81 SPECIAL VERDICT FORM

### VERDICT

**Note:** Complete the following paragraph by writing in the name required by your verdict.

With respect to plaintiff [\_\_\_\_\_] <sup>1</sup>'s [Equal Pay Act] <sup>2</sup>claim against defendant [\_\_\_\_\_] <sup>3</sup>, we find, by a preponderance of the evidence, as follows:

1. That plaintiff and [\_\_\_\_\_] <sup>4</sup>were employed by defendant in jobs requiring substantially equal skill, effort, and responsibility?

\_\_\_\_\_Yes                      \_\_\_\_\_No

2. That the two jobs are performed under similar working conditions?

\_\_\_\_\_Yes                      \_\_\_\_\_No

3. That plaintiff was paid a lower wage than a member of the opposite sex doing equal work?

\_\_\_\_\_Yes                      \_\_\_\_\_No

**Note:** If you answered “no” to any of the preceding three questions you need not answer either of the remaining questions. If you answered “yes” to each of the three preceding questions, then answer the next question.

4. That the difference in pay between plaintiff’s job and [\_\_\_\_\_] <sup>5</sup>'s job was the result of factors other than sex, such as those listed in Instruction [\_\_\_\_\_]. <sup>6</sup>

**Note:** If you answered “yes” to the preceding question, you need not answer the remaining question, but if you answered “no,” you should answer the following question[s].

[5. That the defendant's conduct was "willful" of that term is defined in Instruction [\_\_\_\_\_]??

\_\_\_\_ Yes                      \_\_\_\_ No

**Note:** If you answered "yes" to the preceding question, in the amount of wages [he/she] would have earned from [\_\_\_\_\_ to \_\_\_\_\_]<sup>8</sup> if [he/she] had been paid at the same rate as [\_\_\_\_\_] <sup>9</sup> minus the amount of earnings and benefits that the plaintiff actually earned between those dates.

If you answered no to question 2, you should award the plaintiff damages in the amount of wages [he/she] would have earned from [\_\_\_\_\_ to \_\_\_\_\_]<sup>10</sup> if [he/she] had been paid at the same rate as [\_\_\_\_\_] <sup>11</sup> minus the amount of earnings and benefits that the plaintiff actually earned between those dates.]<sup>12</sup>

6. We find that the plaintiff should be awarded damages in the amount of:

\$ \_\_\_\_\_

\_\_\_\_\_  
Foreperson

Dated: \_\_\_\_\_

**Notes on Use**

1. Insert the name of the plaintiff.
2. This phrase should be used when the plaintiff submits multiple claims to the jury.
3. Insert the name of the defendant.
4. Insert the name of the co-worker of the opposite sex that plaintiff alleges performed equal work under similar working conditions for a greater rate of pay.
5. Insert the name of the co-worker of the opposite sex that plaintiff alleges performed equal work under similar working conditions for a greater rate of pay.

6. The number or title of the “elements of defenses” instruction should be inserted. *See* Model Instruction 7.60.

7. The number or title of the instruction defining “willfulness” should be inserted. *See* Model Instruction 7.21.

8. Insert the date on which the plaintiff’s cause of action accrued, or the date three years prior to the date on which the plaintiff filed his or her complaint, whichever is later. Insert the date the instructions are submitted to the jury as the final date.

9. Insert the name of the co-worker of the opposite sex that plaintiff alleges performed equal work under similar working conditions for a greater rate of pay.

10. Insert the date on which the plaintiff’s cause of action accrued, or the date two years prior to the date on which the plaintiff filed his or her complaint, whichever is later. Insert the date the instructions are submitted to the jury as the final date.

11. Insert the name of the co-worker of the opposite sex that plaintiff alleges performed equal work under similar working conditions for a greater rate of pay.

12. This question is used when the parties dispute the “willfulness” of the defendant’s actions. When the parties do not dispute “willfulness,” question 5 may be eliminated. Question 6 should become question 5 with the following recommended language:

Based on the wages the plaintiff earned from \_\_\_\_\_ to \_\_\_\_\_, we find that the plaintiff should be awarded damages in the amount of:

\$ \_\_\_\_\_.

## 8. HARASSMENT CASES UNDER TITLE VII, SECTIONS 1981 AND 1983, ADA, AND ADEA

### 8.00 OVERVIEW

The following instructions are designed for use in harassment cases. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986), the United States Supreme Court held that sexual harassment is “a form of sex discrimination prohibited by Title VII.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). See also *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Tuggle v. Mangan*, 348 F.3d 714 (8th Cir. 2003); *Duncan v. General Motors Corp.*, 300 F.3d 928 (8th Cir. 2002). Same-sex sexual harassment is also actionable under Title VII. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). Harassment on the basis of race, color, national origin, religion, age and disability is actionable if it involves a hostile working environment. Harassment on the basis of sex, race, color, national origin or religion is prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). See, e.g., *Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862 (8th Cir. 1999) (Title VII). Harassment on the basis of age is prohibited by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 623(a)(1), 631(a). See, e.g., *Williams v. City of Kansas City, MO*, 223 F.3d 749 (8th Cir. 2000); *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151 (8th Cir. 1999) (ADEA). Harassment cases can also be brought under 42 U.S.C. § 1981, *Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041 (8th Cir. 2002) (race and 1981); and under 42 U.S.C. § 1983, *Moring v. Arkansas Dep’t of Corr.*, 243 F.3d 452 (8th Cir. 2001) (sex and 1983). Harassment on the basis of disability under the Americans with Disabilities Act (ADA) is actionable. *Shaver v. Independent Stave Co.*, 350 F.3d 716 (8th Cir. 2003).

According to guidelines promulgated by the Equal Employment Opportunity Commission (EEOC), sexual harassment includes “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.” 29 C.F.R. § 1604.11(a). Two theories of sexual harassment have been recognized by the courts--“quid pro quo” and “hostile work environment” harassment. Those cases in which the plaintiff claims that a tangible employment action resulted from a refusal to submit to a supervisor’s sexual demands are generally referred to as “quid pro quo” cases, as distinguished from cases based on “bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment.” See *Burlington Indus.*, 524 U.S. at 751.

The Supreme Court has stated that the “quid pro quo” and “hostile work environment” labels are not controlling for purposes of establishing employer liability. However, the terms--to the extent they illustrate the distinction between cases involving a threat that is carried out and offensive conduct in general--are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. See *Burlington Indus.*, 524 U.S. at 752; accord *Newton v. Cadwell Lab.*, 156 F.3d 880, 883 (8th Cir. 1998) (recognizing Supreme Court’s statement that “quid pro quo” and “hostile work environment” labels are no longer controlling for purposes of establishing employer liability).

In *Faragher* and *Burlington Industries*, the Supreme Court held that employers are vicariously liable for the discriminatory actions of their supervisory personnel. *Faragher*, 524 U.S. at 777-78; *Burlington Indus.*, 524 U.S. at 744; accord *Rorie v. United Parcel Serv., Inc.*, 151

F.3d 757, 762 (8th Cir. 1998) (citing *Faragher* and *Burlington Industries*). To establish liability, however, the Supreme Court differentiated between cases in which an employee suffers an adverse “tangible employment action” as a result of the supervisor’s harassment and those cases in which an employee does not suffer a tangible employment action, but suffers the intangible harm flowing from the indignity and humiliation of sexual harassment. *See Newton*, 156 F.3d at 883 (recognizing distinction between cases in which harassment results in a tangible employment action and cases in which no tangible employment action occurs).

When an employee suffers a tangible employment action resulting from a supervisor’s harassment the employer’s liability is established by proof of harassment and the resulting adverse tangible employment action taken by the supervisor. *See Faragher*, 524 U.S. at 805-07; *Burlington Indus.*, 524 U.S. at 763. *See also Newton*, 156 F.3d at 883. No affirmative defense, as described below, is available to the employer in those cases. *See Phillips v. Taco Bell Corp.*, 156 F.3d 884, 889 n.6 (8th Cir. 1998) (citing *Faragher*, 524 U.S. 775; *Burlington Indus.*, 524 U.S. at 763. A constructive discharge is a tangible employment action. *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004).

In cases where no tangible employment action has been taken by the supervisor, the defending employer may interpose an affirmative defense to defeat liability or damages. That affirmative defense “comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any illegal 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.” *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at 765, 118 S. Ct. at 2270. *See also Taco Bell*, 156 F.3d at 887-88 (quoting *Faragher* and *Burlington Industries*); *Rorie*, 151 F.3d at 762 (quoting same). Both elements may not always be required. *See McCurdy v. Arkansas State Police*, 375 F.3d 762 (8th Cir. 2004). This Title VII analysis has generally been applied in other areas. *See, e.g., Knutson Brownstein*, 87 FEP 1771, 2001 WL 1661929 (S.D.N.Y. Dec. 27, 2001) (ADEA harassment - affirmative defense.)

Whether an individual is a “supervisor” for purposes of vicarious liability under *Faragher* and *Burlington Industries* may be a contested issue. *See, e.g., Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1057 (8th Cir. 2004) (supervisor “must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties”). *See also Joens v. John Morrell & Co.*, 354 F.3d 938 (8th Cir. 2004).

In light of the new guidance from the Supreme Court, the Committee has drafted instructions for use in three types of cases: (1) those cases in which the plaintiff alleges that he or she suffered a tangible employment action resulting from a refusal to submit to a supervisor’s sexual demands (Model Instruction 8.40, *infra*); (2) those cases in which the plaintiff did not suffer any tangible employment action, but claims that he or she was subjected to illegal harassment by a supervisor sufficiently severe or pervasive to create a hostile working environment (Model Instruction 8.41, *infra*); and (3) those cases in which the plaintiff did not suffer any tangible employment action, but claims that he or she was subjected to illegal harassment by non-supervisors sufficiently severe or pervasive to create a hostile working environment (Model Instruction 8.42, *infra*).

## CHAPTER 8 INSTRUCTIONS AND VERDICT FORMS

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## **8.01 EXPLANATORY: “SAME DECISION”**

If you find in favor of the plaintiff under Instruction \_\_\_\_\_<sup>1</sup> then you must answer the following question in the verdict form[s]: Has it been proved<sup>2</sup> that the defendant [would have discharged]<sup>3</sup> the plaintiff regardless of [(his) (her)] [(rejection of) (failure to submit to)]<sup>4</sup> the defendant’s conduct?

### **Notes on Use**

1. Fill in the number or title of the essential elements instruction here.
2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.
3. This instruction is designed for use in a discharge case. In a “failure to hire,” “failure to promote” or “demotion” case, the language within the brackets must be modified.
4. Use the same phrase used in the essential elements instruction. The practical effect of a decision in favor of the plaintiff under Model Instruction 8.40, but in favor of the defendant on this question under Title VII, is a judgment for the plaintiff and eligibility for an award of attorney fees but no actual damages. The Committee takes no position on whether the judge should advise the jury or allow the attorneys to argue to the jury the effect of a decision in favor of the defendant on the question set out in this instruction.

### **Committee Comments**

If a plaintiff prevails on the issue of liability by showing that discrimination was a “motivating factor,” the defendant nevertheless may avoid an award of damages or reinstatement by showing that it would have taken the same action “in the absence of the impermissible motivating factor.” See CRA of 91, § 107 (codified at 42 U.S.C. § 2000e-5(g)(2)(B) (1994)). This instruction is designed to submit this “same decision” issue to the jury.

## **8.20 DEFINITION: SUPERVISORY LIABILITY**

If the (describe alleged conduct or conditions giving rise to the plaintiff's claim) was allegedly done by (name of individual(s) or "a person(s)") who was empowered to make a significant change in the employment status of Plaintiff's employment, such as hiring, firing, failing to promote, reassigning to a position with significantly different responsibilities or causing a significant change in benefits, then you should use Instructions \_\_\_\_\_ through \_\_\_\_\_ in determining your verdict. However, if (name of individual(s) or "the person(s)") who allegedly (describe alleged conduct or conditions giving rise to the plaintiff's claim) was not empowered to make a significant change in the employment status of Plaintiff's employment, then you should use Instructions \_\_\_\_\_ through \_\_\_\_\_ in determining your verdict.

**8.40 ELEMENTS OF CLAIM: HARASSMENT  
(By Supervisor with Tangible Employment Action)**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim of sexual harassment if all of the following elements have been proved<sup>1</sup>:

*First*, the plaintiff was subjected to (describe alleged conduct giving rise to the plaintiff's claim)<sup>2</sup>; and

*Second*, such conduct was unwelcome<sup>3</sup>; and

*Third*, such conduct was based on the plaintiff's [(sex) (gender)]<sup>4</sup>; and

*Fourth*, the defendant (specify action(s) taken with respect to the plaintiff)<sup>5</sup>; and

*Fifth*, the plaintiff's [(rejection of) (failure to submit to)]<sup>6</sup> such conduct [was a motivating factor]<sup>7</sup> [played a part]<sup>8</sup> in the decision to (specify action(s) taken with respect to the plaintiff).

If any of the above elements has not been proved, your verdict must be for the defendant and you need not proceed further in considering this claim.<sup>9</sup> [You may find that the plaintiff's [(rejection of) (failure to submit to)] such conduct [was a motivating factor] [played a part] in the defendant's (decision)<sup>10</sup> if it has been proved the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.]<sup>11</sup>

**Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. The conduct or conditions forming the basis for the plaintiff's sexual harassment claim (e.g., requests for sexual relations by his or her supervisor) should be described here. Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216 (8th Cir. 1997). It is appropriate to focus the jury's attention on the essential or ultimate facts that the plaintiff contends constitutes the conditions that make the environment hostile. Open-ended

words such as “etc.” should be avoided. Commenting on the evidence, for example, by telling the jury that certain evidence should be considered with caution, or suggesting the judge does believe or does not believe, or is skeptical about some evidence, is inadvisable. A brief listing of the essential facts or circumstances that the plaintiff must prove is not normally deemed to be a comment on the evidence. Placing undue emphasis on a particular theory of the plaintiff’s or the defendant’s case should also be avoided. *See Tyler v. Hot Springs Sch. Dist. No. 6*, 827 F.2d 1227, 1231 (8th Cir. 1987).

3. If the court wants to define this term, the following should be considered: “Conduct is ‘unwelcome’ if the plaintiff did not solicit or invite the conduct and regarded the conduct as undesirable or offensive.” This definition is taken from *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986).

4. Because quid pro quo harassment usually involves conduct that is clearly sexual in nature, this element ordinarily may be omitted from the instruction. If it is based on something else, this sentence must be modified.

5. Insert the appropriate language depending on the nature of the case (*e.g.*, “discharged,” “failed to hire,” “failed to promote,” or “demoted”). Where the plaintiff resigned but claims a “constructive discharge,” this instruction should be modified. *See supra* Model Instruction 5.41 (Title VII); 6.41 (ADEA). *See infra* 9.43 (ADA); 11.41 (§1981); 12.42 (§1983).

6. This instruction is designed for use in sexual harassment cases where the plaintiff alleges that he or she suffered a tangible employment action resulting from a refusal to submit to a supervisor’s sexual demands. If the plaintiff submitted to the supervisor’s sexual advances, and the court allows the plaintiff to pursue such a claim under this instruction rather than requiring the plaintiff to submit such a claim under Model Instruction 8.41, *infra*, this instruction must be modified or, alternatively, the trial court may use special interrogatories to build a record on all of the potentially dispositive issues. *See, e.g., Karibian v. Columbia University*, 14 F.3d 773, 778 (2d Cir. 1994).

7. Most, if not all of these cases will arise under Title VII. “Motivating factor” is the correct phrase to use in all Title VII harassment cases. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). The substantive law in other areas should be consulted concerning the proper term to be used in such cases. The Committee recommends that the definition of “motivating factor” set forth in Model Instruction 5.21, *supra*, be given.

8. *See supra* Model Instruction 5.21, which defines “motivating factor” in terms of whether the characteristic “played a part or a role” in the defendant’s decision. The phrase “motivating factor” need not be defined if the definition itself is used in the element instruction.

9. Because this instruction is designed for use in cases in which tangible employment action has been taken, the plaintiff’s claim may be analyzed under the “motivating factor/same decision” format used in other Title VII cases. *See supra* Model Instruction 5.10. For damages instructions and a verdict form, Model Instructions 5.70 through 5.72 and 5.80, *supra*, may be used.

10. This instruction makes references to the defendant’s “decision.” It may be modified if another term--such as “actions” or “conduct”--would be more appropriate.

11. This sentence may be added, if appropriate. *See supra* Model Instruction 5.20 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states “[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.”

### **Committee Comments**

This instruction is designed primarily for use in sexual harassment cases where the plaintiff alleges that he or she suffered a tangible employment action resulting from a refusal to submit to a supervisor’s sexual demands. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor’s sexual demands, he or she established that the employment decision itself constitutes a change in the terms or conditions of employment that is actionable under Title VII. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753 (1998). These cases (i.e., cases based on threats that are carried out) are “referred to often as quid pro quo cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment.” *Id.* at 751.

### The “Unwelcome” Requirement

In sexual harassment cases, the offending conduct must be “unwelcome.” *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986). In the Eighth Circuit, “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.” *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986); *see also Burns v. McGregor Elec. Indus., Inc. [Burns I]*, 955 F.2d 559, 565 (8th Cir. 1992). In the typical quid pro quo case, where the plaintiff asserts a causal connection between a refusal to submit to sexual advances and a tangible employment action, the “unwelcome” requirement will be met if the jury finds that the plaintiff in fact refused to submit to a supervisor’s sexual advances. However, if the court allows a plaintiff to pursue a quid pro quo claim despite his or her submission to the supervisor’s sexual advances, the “unwelcome” element is likely to be disputed and must be included.

### Conduct Based on Sex

In general, the plaintiff must establish that harassment was “based on sex” in order to prevail on a sexual harassment claim. *See, e.g., Burns v. McGregor Elec. Indus., Inc. [Burns II]*, 989 F.2d 959, 964 (8th Cir. 1993). Because quid pro quo harassment involves behavior that is sexual in nature, there typically will not be a dispute as to whether the objectionable behavior was based on sex. As the Eighth Circuit has stated, “sexual behavior directed at a woman raises the inference that the harassment is based on her sex.” *Burns I*, 955 F.2d 559, 564 (8th Cir. 1992).

The Supreme Court has ruled that same-sex sexual harassment is actionable under Title VII. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *accord Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996); *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996).

### Employer Liability

As noted in the Introductory Comment, the Supreme Court has held that an employer is “vicariously liable” when its supervisor’s discriminatory act results in a tangible employment action. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S. Ct. 2257, 2269 (1998) (“A tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer.”). No affirmative defense is available in such cases. *Id.* at 2270.

### Tangible Employment Action

According to the Supreme Court, a “tangible employment action” for purposes of the vicarious liability issue means “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.” *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (citations omitted). In most cases, a tangible employment action “inflicts direct economic harm.” *Id.* at 762.

**8.41 ELEMENTS OF CLAIM: HARASSMENT  
(By Supervisor With No Tangible Employment Action)**

Your verdict must be for plaintiff [insert name] and against defendant \_\_\_\_\_ [insert name] on the plaintiff's claim of [sex/gender] [racial] [color] [national origin] [religious] [age] [disability] harassment if all of the following elements have been proved<sup>1</sup>:

*First*, the plaintiff was subjected to (describe alleged conduct or conditions giving rise to the plaintiff's claim)<sup>2</sup>; and

*Second*, such conduct was unwelcome<sup>3</sup>; and

*Third*, such conduct was based on the plaintiff's [(sex/gender) (race) (color) (national origin) (religion) (age) (disability)]<sup>4</sup>; and

*Fourth*, such conduct was sufficiently severe or pervasive that a reasonable person in the plaintiff's position would find the plaintiff's work environment to be [(hostile) (abusive)]<sup>5</sup>; and

*Fifth*, at the time such conduct occurred and as a result of such conduct, the plaintiff believed [(his) (her)] work environment to be [(hostile) (abusive)].

If any of the above elements has not been proved, [or if the defendant is entitled to a verdict under Instruction \_\_\_\_\_,]<sup>6</sup> your verdict must be for the defendant and you need not proceed further in considering this claim.

**Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. The conduct or conditions forming the basis for the plaintiff's harassment claim should be described here. Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216 (8th Cir. 1997). It is appropriate to focus the jury's attention on the essential or

ultimate facts that the plaintiff contends constitutes the conditions that make the environment hostile. Open-ended words such as “etc.” should be avoided. Commenting on the evidence, for example, by telling the jury that certain evidence should be considered with caution, or suggesting the judge does believe or does not believe, or is skeptical about some evidence, is inadvisable. A brief listing of the essential facts or circumstances that the plaintiff must prove is not normally deemed to be a comment on the evidence. Placing undue emphasis on a particular theory of the plaintiff’s or the defendant’s case should also be avoided. *See Tyler v. Hot Springs Sch. Dist. No. 6*, 827 F.2d 1227, 1231 (8th Cir. 1987).

3. The term “unwelcome” may be of such common usage that it need not be defined. If the court wants to define this term, the following should be considered: “Conduct is ‘unwelcome’ if the plaintiff did not solicit or invite the conduct and regarded the conduct as undesirable or offensive.” This definition is taken from *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986).

4. As noted in the Committee Comments, there are a number of subsidiary issues that can arise in connection with the requirement that actionable harassment must be “based on sex” or other prohibited category. If the allegedly offensive conduct clearly was directed at the plaintiff because of his or her gender, age or race, it is not necessary to include this element. However, if there is a dispute as to whether the offensive conduct was discriminatory--for example, if the offending conduct may have been equally abusive to both men and women or if men and women participated equally in creating a “raunchy workplace”--it may be necessary to modify this element to properly frame the issue.

5. Select the word that best describes the plaintiff’s theory. Both words may be appropriate. This element sets forth the “objective test” for a hostile work environment. As discussed in the Committee Comments, it is the Committee’s position that the appropriate perspective is that of a “reasonable person.” In addition, it may be appropriate to include the factors set forth in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993), and reiterated in *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88, 118 S. Ct. 2275, 2283 (1998), to aid in determining whether a plaintiff’s work environment was hostile or abusive. For example:

In determining whether a reasonable person in the plaintiff’s circumstances would find the plaintiff’s work environment to be hostile or abusive, you must look at all the circumstances. The circumstances may include the frequency of the conduct complained of; its severity; whether it was physically threatening or humiliating, or merely offensive; whether it unreasonably interfered with the plaintiff’s work performance; and the effect on the plaintiff’s psychological well-being. No single factor is required in order to find a work environment hostile or abusive.

6. Because this instruction is designed for cases in which no tangible employment action is taken, the defendant may defend against liability or damages by proving an affirmative defense “of reasonable oversight and of the employee’s unreasonable failure to take advantage of corrective opportunities.” *Nichols v. American Nat’l Ins. Co.*, 154 F.3d 875, 887 (8th Cir. 1998) (citing *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at 765, 118 S. Ct. at 2270). The bracketed language should be used when the defendant is submitting the affirmative defense. *See infra* Model Instruction 8.60.

## Committee Comments

This instruction is designed for use in harassment cases where the plaintiff did not suffer any “tangible” employment action such as discharge or demotion, but rather suffered “intangible” harm flowing from a supervisor’s harassment that is “sufficiently severe or pervasive to create a hostile work environment.” See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998).

It is impossible to compile an exhaustive list of the types of conduct that may give rise to a hostile environment harassment claim under Title VII and other statutes. Some examples of this kind of conduct include: verbal abuse of a sexual, racial or religious nature; graphic verbal commentaries about an individual’s body, sexual prowess, or sexual deficiencies; or age; sexually degrading or vulgar words to describe an individual; pinching, groping, and fondling; suggestive, insulting, or obscene comments or gestures; the display in the workplace of sexually suggestive objects, pictures, posters or cartoons; asking questions about sexual conduct; and unwelcome sexual advances. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316 (8th Cir. 1994); *Hukkanen v. International Union of Operating Eng’rs Local No. 101*, 3 F.3d 281 (8th Cir. 1993); *Burns v. McGregor Elec. Indus., Inc. [Burns II]*, 989 F.2d 959 (8th Cir. 1993); *Burns v. McGregor Elec. Indus., Inc. [Burns I]*, 955 F.2d 559 (8th Cir. 1992); *Jones v. Wesco Invs., Inc.*, 846 F.2d 1154 (8th Cir. 1988); *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988).

### Conduct Based on Sex or Gender

In general, in a sex discrimination case, the plaintiff must establish that the alleged offensive conduct was “based on sex.” *Burns II*, 989 F.2d at 964. Despite its apparent simplicity, this requirement raises a host of interesting issues. For example, in an historically male-dominated work environment, it may be commonplace to have sexually suggestive calendars on display and provocative banter among the male employees. While the continuation of this conduct may not be directed at a new female employee, it nevertheless may be actionable on the theory that sexual behavior at work raises an inference of discrimination against women. See *Burns I*, 955 F.2d at 564; see also *Stacks v. Southwestern Bell*, 27 F.3d 1316 (8th Cir. 1994) (sexual conduct directed by male employees toward women other than the plaintiff was considered part of a hostile work environment).

The Eighth Circuit also has indicated that conduct that is not sexual in nature but is directed at a woman because of her gender can form the basis of a hostile environment claim. See, e.g., *Gillming v. Simmons Indus.*, 91 F.3d 1168, 1171 (8th Cir. 1996) (jury instruction need not require a finding that acts were explicitly sexual in nature); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (calling a female employee “herpes” and urinating in her gas tank, although not conduct of an explicit sexual nature, was properly considered in determining if a hostile work environment existed); see also *Stacks*, 27 F.3d at 1326 (differential treatment based on gender in connection with disciplinary action supported a female employee’s hostile work environment claim); *Shope v. Board of Sup’rs*, 14 F.3d 596 (table), 1993 WL 525598 (4th Cir. Dec. 20, 1993) (rude, disparaging, and “almost physically abusive” conduct based on gender supported a hostile environment claim).

The Eighth Circuit has not directly addressed the issue of whether vulgar or abusive conduct that is directed equally toward men and women can constitute a violation of Title VII. Because sexual harassment is a variety of sex discrimination, some courts have suggested that it is not a violation of Title VII if a manager is equally abusive to male and female employees. For example, in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), *abrogated on other grounds*, 510 U.S. 178 (1993), the court suggested that sexual harassment of all employees by a bisexual supervisor would not violate Title VII. In a similar vein, the district court in *Kopp v. Samaritan Health System, Inc.*, 13 F.3d 264 (8th Cir. 1993), granted the employer's motion for summary judgment on the theory that the offending supervisor was abusive toward all employees. Although the Eighth Circuit reversed because the plaintiff had offered evidence that the abuse directed toward female employees was more frequent and more severe than the abuse directed at male employees, *Kopp* suggests that the "equal opportunity harassment" defense can present a question of fact for the jury. *But see Chiapuzio v. BLT Operating Corp.*, 826 F.Supp. 1334 (D. Wyo. 1993) (holding that "equal opportunity harassment" of employees of both genders can violate Title VII).

The Supreme Court has ruled that same-sex sexual harassment is actionable under Title VII. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *accord Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996); *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996). *See Pedroza v. Cintas Corporation No. 2*, 397 F.3d 1063 (8th Cir. 2005), for a discussion of the possible evidentiary routes for proving sexual harassment in same-sex cases.

#### Hostile or Abusive Environment

In order for hostile environment harassment to be actionable, it must be "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982))); *accord Parton v. GTE North, Inc.*, 971 F.2d 150, 154 (8th Cir. 1992); *Burns v. McGregor Elec. Indus., Inc. [Burns I]*, 955 F.2d 559, 564 (8th Cir. 1992); *Staton v. Maries County*, 868 F.2d 996, 998 (8th Cir. 1989); *Minteer v. Auger*, 844 F.2d 569 (8th Cir. 1988). In *Moylan v. Maries County*, 792 F.2d 746 (8th Cir. 1986), the court explained:

The harassment must be "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." *Henson v. City of Dundee*, 682 F.2d at 904. The plaintiff must show a practice or pattern of harassment against her or him; a single incident or isolated incidents generally will not be sufficient. The plaintiff must generally show that the harassment is sustained and nontrivial.

*Id.* at 749-50; *see Faragher*, 524 U.S. at 788 ("'[S]imple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"). *Compare Henthorn v. Capitol Communications, Inc.*, 359 F.3d 752 (8th Cir. 2004) and *Duncan v. General Motors Co.*, 300 F.3d 928, 933 (8th Cir. 2002) with *Eich v. Board of Regents for Central Missouri State University*, 350 F.3d 752 (8th Cir. 2004).

“[I]n assessing the hostility of an environment, a court must look to the totality of the circumstances.” *Stacks*, 27 F.3d at 1327 (citation omitted). In *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993), the Court held that a hostile environment claim may be actionable without a showing that the plaintiff suffered psychological injury. In determining whether an environment is hostile or abusive, the relevant factors include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance. *Harris*, 510 U.S. at 23. See also *Faragher*, 524 U.S. at 787-88, 118 S. Ct. at 2283 (reiterating relevant factors set forth in *Harris*); accord *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 889 (8th Cir. 1998) (citing *Harris*).

These same factors have generally been required in all types of harassment/hostile environment cases. See *supra* the cases cited in section 8.00.

### Objective and Subjective Requirement

In *Harris*, the Supreme Court explained that “a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.” *Faragher*, 524 U.S. at 787 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993) (“[I]f the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.”)); accord *Rorie v. United Parcel Serv., Inc.*, 151 F.3d 757, 761 (8th Cir. 1998).

### Employer Liability

As noted in the Introductory Comment, the Supreme Court has held that 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.” *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Unlike those cases in which the plaintiff suffers a tangible employment action, however, in cases where no tangible employment action has been taken by the supervisor, the employer may raise an affirmative defense to liability or damages. *Id.* See *infra* Model Instruction 8.60 and Committee Comments.

## **8.42 ELEMENTS OF CLAIM: HARASSMENT (By Nonsupervisor)**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim of [sex/gender] [racial] [color] [national origin] [religious] [age] [disability] harassment if all of the following elements have been proved<sup>1</sup>:

*First*, the plaintiff was subjected to (describe alleged conduct or conditions giving rise to the plaintiff's claim)<sup>2</sup>; and

*Second*, such conduct was unwelcome<sup>3</sup>; and

*Third*, such conduct was based on the plaintiff's [(sex/gender) (race) (color) (national origin) (religion) (age) (disability)]<sup>4</sup>; and

*Fourth*, such conduct was sufficiently severe or pervasive that a reasonable person in the plaintiff's position would find the plaintiff's work environment to be [(hostile) (abusive)]<sup>5</sup>; and

*Fifth*, at the time such conduct occurred and as a result of such conduct, the plaintiff believed [(his) (her)] work environment to be [(hostile) (abusive)]; and

*Sixth*, the defendant knew or should have known of the (describe alleged conduct or conditions giving rise to the plaintiff's claim)<sup>6</sup>; and

*Seventh*, the defendant failed to take prompt and appropriate corrective action to end the harassment.<sup>7</sup>

If any of the above elements has not been proved, your verdict must be for the defendant and you need not proceed further in considering this claim.<sup>8</sup>

### **Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. The conduct or conditions forming the basis for the plaintiff's harassment claim should be described here. Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1222 (8th Cir. 1997). It is appropriate to focus the jury's attention on the essential or ultimate facts that the plaintiff contends constitutes the conditions that make the environment hostile. Open-ended words such as "etc." should be avoided. Commenting on the evidence, for example, by telling the jury that certain evidence should be considered with caution, or suggesting the judge does believe or does not believe, or is skeptical about some evidence, is inadvisable. A brief listing of the essential facts or circumstances that the plaintiff must prove is not normally deemed to be a comment on the evidence. Placing undue emphasis on a particular theory of the plaintiff's or the defendant's case should also be avoided. *See Tyler v. Hot Springs Sch. Dist. No. 6*, 827 F.2d 1227, 1231 (8th Cir. 1987).

3. The term "unwelcome" may be of such common usage that it need not be defined. If the court wants to define this term, the following should be considered: "[Conduct is 'unwelcome'] if the employee did not solicit or invite it and the employee regarded the conduct as undesirable or offensive." This definition is taken from *Moylean v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986).

4. As noted in the Committee Comments, there are a number of subsidiary issues that can arise in connection with the requirement that actionable harassment must be "based on sex" or other prohibited category. If the allegedly offensive conduct clearly was directed at the plaintiff because of his or her gender, age or race, it is not necessary to include this element. However, if there is a dispute as to whether the offensive conduct was discriminatory--for example, if the offending conduct may have been equally abusive to both men and women or if men and women participated equally in creating a "raunchy workplace"--it may be necessary to modify this element to properly frame the issue.

5. Select the word that best describes the plaintiff's theory. Both words may be appropriate. This element sets forth the "objective test" for a hostile work environment. As discussed in the Committee Comments, it is the Committee's position that the appropriate perspective is that of a "reasonable person." In addition, it may be appropriate to include the factors set forth in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993), and reiterated in *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998), to aid in determining whether a plaintiff's work environment was hostile or abusive. For example:

In determining whether a reasonable person in the plaintiff's circumstances would find the plaintiff's work environment to be hostile or abusive, you must look at all the circumstances. The circumstances may include the frequency of the conduct complained of; its severity; whether it was physically threatening or humiliating, or merely offensive; whether it unreasonably interfered with the plaintiff's work performance; and the effect on plaintiff's psychological well-being. No single factor is required in order to find a work environment hostile or abusive.

6. As noted in the Committee Comments, there are generally two requirements for establishing employer liability in sexual harassment cases where the plaintiff claims harassment by his or her coworkers rather than by supervisory personnel: (1) the plaintiff must show that the

employer knew or should have known of the harassment; and (2) the plaintiff must show that the employer failed to take appropriate action to end the harassment. This element sets forth the first half of the test. As a practical matter, it is unlikely that the defendant will seriously contest both issues: if the employer claims it never knew of the harassment, the question of whether its response was appropriate would be moot; conversely, if the employer's primary defense is that it took appropriate remedial action, the "knew or should have known" element may be moot.

7. As discussed in the Introductory Comment, the Supreme Court's opinions with respect to employer liability in sexual harassment cases address only those situations where a supervisor (as opposed to a non-supervisor) sexually harasses a subordinate. In cases where the plaintiff alleges sexual harassment by a nonsupervisor, the issue of whether courts will leave the burden on the plaintiff to prove that the defendant failed to take prompt and appropriate corrective action or whether courts will place the burden on the defendant to prove an affirmative defense that it took prompt and appropriate corrective action as in *Faragher* and *Burlington Industries* is an open question. See, e.g., *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1366 (11th Cir. 1999) (Barkett, concurring).

8. Because this instruction is designed for use in cases in which no tangible employment action has been taken, the plaintiff's claim should not be analyzed under the "motivating factor/same decision" format used in other Title VII cases. See *Stacks v. Southwestern Bell*, 27 F.3d 1316 (8th Cir. 1994). For damages instructions and a verdict form, Model Instructions 5.70 through 5.72 and 5.80, *supra*, should be used in a modified format. For a sample constructive discharge instruction, see *infra* Model Instructions 5.41 (Title VII); 6.41 (ADEA); 9.43 (ADA); 11.41 (§1981); and 12.42 (§1983).

### **Committee Comments**

This instruction is designed for use in cases where the plaintiff did not suffer any tangible employment action, but claims that he or she was subjected to sexual or other harassment by non-supervisors (as opposed to supervisory personnel) sufficiently severe or pervasive to create a hostile working environment. In such cases (*i.e.*, cases not involving vicarious liability), "[e]mployees have some obligation to inform their employers, either directly or otherwise, of behavior that they find objectionable before employer can be held responsible for failing to correct that behavior, at least ordinarily." *Whitmore v. O'Connor Management, Inc.*, 156 F.3d 796, 800 (8th Cir. 1998) (decided after the Supreme Court's opinions in *Burlington Industries* and *Faragher*). Although no Eighth Circuit cases clearly decide this issue, the Committee believes it is likely the court will follow this approach in all harassment claims, not just in Title VII cases.

## **8.60 ELEMENTS OF DEFENSE: AFFIRMATIVE DEFENSE (For Use in Supervisor Cases with No Tangible Employment Action)**

Your verdict must be for defendant [insert name] on plaintiff [insert name]’s claim of harassment if it has been proved<sup>1</sup> that (a) defendant exercised reasonable care to prevent and correct promptly any harassing behavior; and (b) that the plaintiff unreasonably failed to take advantage of (specify the preventive or corrective opportunities provided by the defendant of which the plaintiff allegedly failed to take advantage or how the plaintiff allegedly failed to avoid harm otherwise).<sup>2</sup>

### **Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. According to the Supreme Court, a defendant asserting this affirmative defense must prove not only that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, but also that “the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by defendant or to avoid harm otherwise.” *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at 763. For purposes of instructing the jury, however, the Committee recommends that the specific preventive or corrective opportunities of which the plaintiff allegedly failed to take advantage or the particular manner in which the plaintiff allegedly failed to avoid harm be identified.

### **Committee Comments**

The United States Supreme Court held that “[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by [the employee’s] supervisor.” *Rorie v. United Parcel Serv., Inc.*, 151 F.3d 757, 762 (8th Cir. 1998) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 745 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 777 (1998)). When “no tangible employment action, such as discharge, demotion, or undesirable reassignment” is taken, however, an employer may defend against liability or damages “by proving an affirmative defense of reasonable oversight and of the employee’s unreasonable failure to take advantage of corrective opportunities.” *Nichols v. American Nat’l Ins. Co.*, 154 F.3d 875, 887 (8th Cir. 1998) (citing *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at 763); *accord Phillips v. Taco Bell Corp.*, 156 F.3d 884, 888 (8th Cir. 1998) (citing same); *Newton v. Cadwell Laboratories*, 156 F.3d 880, 883 (8th Cir. 1998) (citing same). The language of the affirmative defense is taken verbatim from the Supreme Court’s decisions in *Burlington Industries* and *Faragher*. Both elements may not always be required. *See McCurdy v. Arkansas State Police*, 375 F.3d 762 (8th Cir. 2004). Although no Eighth Circuit cases so hold, this affirmative defense has been held applicable to harassment claims made under ADEA, *Lacher v. West*, 147 F. Supp. 2d 538 (N.D. Tex. 2001); claims under the ADA, *Silk v. City of Chicago*, 194 F.3d 788 (7th Cir. 1999) (assumes harassment actionable under the ADA); under

42 U.S.C. § 1983; *Molnar v. Booth*, 229 F.3d 593 (7th Cir. 2000); and under 42 U.S.C. § 1981, *Jackson v. Quanex Corp.*, 191 F.3d 647 (6th Cir. 1999).

## **8.70 ACTUAL DAMAGES**

Actual damages for harassment are generally governed by the same statute that prohibits the discrimination itself. Thus,

5.70 should be reviewed for drafting an instruction dealing with actual damages in sexual harassment or other harassment cases under Title VII;

6.70 should be reviewed for drafting an instruction dealing with actual damages in age harassment cases under the ADEA;

9.70 should be reviewed for drafting an instruction dealing with actual damages in harassment cases under the ADA;

11.70 should be reviewed for drafting an instruction dealing with actual damages in harassment cases under 42 U.S.C. § 1981;

12.70 should be reviewed for drafting an instruction dealing with actual damages in harassment cases under 42 U.S.C. § 1983.

## **8.71 NOMINAL DAMAGES**

Nominal damages for harassment are generally governed by the same statute that prohibits the discrimination itself. Thus,

5.71 should be reviewed for drafting an instruction dealing with nominal damages in sexual harassment or other harassment cases under Title VII;

6.71 should be reviewed for drafting an instruction dealing with nominal damages in age harassment cases under the ADEA;

9.71 should be reviewed for drafting an instruction dealing with nominal damages in harassment cases under the ADA;

11.71 should be reviewed for drafting an instruction dealing with nominal damages in harassment cases under 42 U.S.C. § 1981;

12.71 should be reviewed for drafting an instruction dealing with nominal damages in harassment cases under 42 U.S.C. § 1983.

## **8.72 PUNITIVE DAMAGES**

Punitive damages for harassment are generally governed by the same statute that prohibits the discrimination itself. Thus,

5.72 should be reviewed for drafting an instruction dealing with punitive damages in sexual harassment or other harassment cases under Title VII;

6.20 should be reviewed for drafting an instruction dealing with liquidated damages in age harassment cases under the ADEA;

9.72 should be reviewed for drafting an instruction dealing with punitive damages in harassment cases under the ADA;

11.72 should be reviewed for drafting an instruction dealing with punitive damages in harassment cases under 42 U.S.C. § 1981;

12.72 should be reviewed for drafting an instruction dealing with punitive damages in harassment cases under 42 U.S.C. § 1983.

## 8.80 GENERAL VERDICT FORM

### VERDICT

**Note:** Complete the following paragraph by writing in the name required by your verdict.

On the [(sexual)<sup>1</sup> harassment]<sup>2</sup> claim of plaintiff [Jane Doe], [as submitted in Instruction \_\_\_\_\_]<sup>3</sup>, we find in favor of:

---

(Plaintiff Jane Doe)                      or                      (Defendant XYZ, Inc.)

**Note:** Complete the following paragraphs only if the above finding is in favor of the plaintiff. If the above finding is in favor of the defendant, have your foreperson sign and date this form because you have completed your deliberations on this claim.

We find the plaintiff's lost wages and benefits through the date of this verdict to be:

\$ \_\_\_\_\_ (stating the amount or, if none, write the word "none").

We find the plaintiff's other damages, excluding lost wages and benefits, to be:

\$ \_\_\_\_\_ (stating the amount [or, if you find that the plaintiff's damages do not have a monetary value, write in the nominal amount of One Dollar (\$1.00)]).

[We assess punitive damages against the defendant, as submitted in Instruction \_\_\_\_\_, as follows:

\$ \_\_\_\_\_ (stating the amount or, if none, write the word "none").]<sup>4</sup>

---

Foreperson

Dated: \_\_\_\_\_

#### **Notes on Use**

1. This verdict form is designed for use in a sexual harassment case. It must be modified if the plaintiff is claiming harassment based on race, religion, or some other prohibited factor.
2. The bracketed phrase should be submitted when the plaintiff submits multiple claims to the jury.
3. The number or title of the “essential elements” instruction may be inserted here. *See* Model Instruction 8.40.
4. This paragraph should be included if the evidence is sufficient to support an award of punitive damages. *See* Model Instruction 8.72.

#### **Committee Comments**

This verdict form is intended for use with Model Instructions 8.41 (claim of harassment by supervisor with no tangible employment action) and 8.42 (claim of harassment by nonsupervisory) and with Model Instruction 8.40 (claim of harassment by supervisor with tangible employment action) in those cases in which the issue of “same decision” is not submitted.

## 8.81 GENERAL VERDICT FORM

### VERDICT

**Note:** Complete the following paragraph by writing in the name required by your verdict.

On the [(sexual)<sup>1</sup> harassment]<sup>2</sup> claim of plaintiff [Jane Doe], [as submitted in Instruction \_\_\_\_\_]<sup>3</sup>, we find in favor of:

---

(Plaintiff Jane Doe)                      or                      (Defendant XYZ, Inc.)

**Note:** Complete the following paragraphs only if the above finding is in favor of the plaintiff. If the above finding is in favor of the defendant, have your foreperson sign and date this form because you have completed your deliberations on this claim.

Has it been proved<sup>4</sup> that the defendant would have discharged<sup>5</sup> the plaintiff on [date when the plaintiff was discharged] regardless of [(his) (her)] [(rejection of) (failure to submit to)] defendant's conduct?<sup>6</sup>

\_\_\_\_\_ Yes                      \_\_\_\_\_ No  
(Mark an "X" in the appropriate space)

**Note:** Complete the following paragraphs only if your answer to the preceding question is "no." If you answered "yes" to the preceding question, have your foreperson sign and date this form because you have completed your deliberations on this claim.

We find the plaintiff's lost wages and benefits through the date of this verdict to be:

\$ \_\_\_\_\_ (stating the amount or, if none, write the word "none").

We find the plaintiff's other damages, excluding lost wages and benefits, to be:

\$ \_\_\_\_\_ (stating the amount [or, if you find that the plaintiff's damages do not have a monetary value, write in the nominal amount of One Dollar (\$1.00)]).

[We assess punitive damages against the defendant, as submitted in Instruction\_\_\_\_\_, as follows:

\$ \_\_\_\_\_ (stating the amount or, if none, write the word "none").]<sup>7</sup>

---

Foreperson

Dated: \_\_\_\_\_

#### Notes on Use

1. This verdict form is designed for use in a sexual harassment case. It must be modified if the plaintiff is claiming discrimination based on race, religion, or some other prohibited factor.
2. The bracketed phrase should be submitted when the plaintiff submits multiple claims to the jury.
3. The number or title of the "essential elements" instruction may be inserted here. *See* Model Instruction 8.40.
4. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.
5. This verdict form is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, this phrase must be modified.
6. This question submits the "same decision" issue to the jury. *See* Model Instruction 8.01.
7. This paragraph should be included if the evidence is sufficient to support an award of punitive damages. *See* Model Instruction 8.72.

### **Committee Comments**

This verdict form is intended for use with Model Instruction 8.40 (claim of harassment by supervisor with tangible employment action) in those cases in which the issue of “same decision” is submitted.

## 9. AMERICANS WITH DISABILITIES ACT

### 9.00 OVERVIEW

The following instructions are designed for use in disability cases under the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101, *et seq.* For instructions for use in cases of retaliation for participating in an investigation, proceeding or hearing under the ADA or opposing an act or practice made unlawful by the ADA, see Chapter 10.

These instructions are not intended to cover cases with respect to public accommodations or public services under the ADA. Rather, these instructions are intended to cover only those cases arising under the employment provisions of the ADA. The ADA was amended significantly, effective January 1, 2009, by the ADA Amendments Act of 2008 (the “ADAAA”). *See Nyrop v. Independent School Dist. No. 11*, 616 F.3d 728, 735, n. 4 (8th Cir. 2010) (the amendments are not retroactive).

To establish a prima facie case under the ADA, an aggrieved employee must establish that he or she has a disability as defined in 42 U.S.C. § 12102(2); that he or she is qualified to perform the essential functions of the job, with or without reasonable accommodation; and that he or she has suffered adverse employment action on the basis of disability. 42 U.S.C. § 12112(a). An increased workload that materially changes an employee’s duties may be an adverse employment action, as may a transfer to a new position that the employee cannot perform due to disability. *Kelleher v. Wal-Mart Stores, Inc.*, 817 F.3d 624, 632 (8th Cir. 2016). But a transfer to another position, with less physically strenuous duties, at an increased wage, in an effort to accommodate the employee, was not an adverse employment action, despite employee’s apprehension concerning responsibilities of the new position. *Id.*

#### Background

When the Committee began drafting model civil instructions in 1987, jury trials were not available in Title VII cases; the ADA and FMLA did not exist; and the standard for liability in ADEA cases was whether the plaintiff’s age was a “determining factor” in the challenged employment decision. Over the years, a number of developments have changed the legal landscape:

1. In *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), the Supreme Court ruled that the standard for liability in Title VII discrimination cases under 42 U.S.C. §2000e-2(m) is whether the plaintiff’s protected status was a “motivating factor” in the challenged employment decision, regardless of whether the plaintiff is relying on direct or circumstantial evidence.

2. The Supreme Court’s decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), ruled that mixed-motive instructions are never proper in ADEA cases and that the standard for liability in ADEA cases is whether the plaintiff’s age was a “but for” cause of the challenged employment decision.

3. The Supreme Court’s decision in *University of Texas Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 133 S. Ct. 2517 (2013), held that the standard for liability in Title VII

retaliation cases is whether the plaintiff's protected activity was a but for cause of the adverse employment action in question.

In light of these Supreme Court cases, the standards for liability in Title VII and ADEA discrimination cases are clear. However, in cases arising under the Americans with Disabilities Act, the standard for liability is not as clear. The Second, Third, Fourth, Sixth, Seventh and Ninth Circuits have held that the standard for liability in an action for discrimination under the ADA is the but-for standard. *See Natofsky v. City of New York*, 921 F.3d 337, 349-50 (2d Cir. 2019); *Furgess v. Pennsylvania Dept. of Corrections*, 933 F.3d 285, 291 n. 25 (3d Cir. 2019); *Gentry v. East West Partners Club Management Co., Inc.*, 816 F.3d 228, 235-36 (4th Cir. 2016); *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312, 321 (6th Cir. 2012); *McCann v. Badger Mining Corp.*, 965 F.3d 578, 588-89 (7th Cir. 2020); *Murray v. Mayo Clinic*, 934 F.3d 1101, 1105 (9th Cir. 2019).

The Eighth Circuit, however, declined to decide whether the motivating factor standard or but for causation applies in cases of discrimination under the ADA in *Oehmke v. Medtronic, Inc.*, 844 F.3d 748, 757 n. 6 (8th Cir. 2016). *But see Canning v. Creighton University*, 995 F.3d 603, 610 (8th Cir. 2021) (“As the district court stated, ADEA, ADA and NFEPA [Nebraska Fair Employment Practices Act] claims for age and disability discrimination ‘share a common analysis,’ all requiring but-for causation.” *Canning*, 2019 WL 4671180, at \*6 n.1, \*9 n.3.”).

Accordingly, trial courts and lawyers should be careful to consider the correct approach depending on the particular facts of the case and the statute at issue and, if the proper standard for liability is “clearly unclear,” the trial court can cover all bases by eliciting findings under the “determining factor” and “motivating factor/same decision” standards with, for example, special interrogatories set forth at Model Instruction 11.90. *See, e.g., Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1059-60 (8th Cir. 2002) (approving use of special interrogatories).

### **A “Disability” Under the ADA**

Under the ADA, a “disability” is defined as “(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) being regarded as having such an impairment.” 42 U.S.C. § 12102(1). This definition “shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.” 42 U.S.C. § 12102(4)(A). Not every physical condition, however, is an impairment. *See Morriss v. BNSF Ry. Co.*, 817 F.3d 1104, 1108 (8th Cir. 2016) (“an individual’s weight is generally a physical characteristic that qualifies as a physical impairment only if it falls outside the normal range and it occurs as the result of a physiological disorder”) (emphasis in original).

### **“Major Life Activities”**

As amended, effective January 1, 2009, the ADA defines “major life activities” as including, but 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. 42 U.S.C. § 12102(2)(A). 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. 42 U.S.C. § 12102(2)(B). The implementing regulations note that the operation of a “major bodily function” includes the operation of an individual organ within a body system. 29 C.F.R. § 1630.2(i)(1)(ii).

Citing the ADAAA’s Findings and Purposes, the implementing regulations provide that, in determining other examples of major life activities, “the term ‘major’ shall not be interpreted strictly to create a demanding standard for disability.” In addition, “[w]hether an activity is a ‘major life activity’ is not determined by reference to whether it is of ‘central importance to daily life.’” 29 C.F.R. § 1630.2(i)(2).

#### “Substantially Limits”

The term “substantially limits” is to be construed broadly in favor of expansive coverage and is not intended to be a demanding standard. 29 C.F.R. § 1630.2(j)(1)(i). “An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.” 29 C.F.R. § 1630.2(j)(1)(ii). The regulations expressly provide, however, that not every impairment will constitute a disability. *Id.*

The regulations note that a comparison between the way the individual performs a major life activity and the way most people in the general population perform it may be useful in determining whether an individual is substantially limited in a major life activity. 29 C.F.R. §§ 1630.2(j)(1)(i), (ii), (v). Matters to be considered may include the conditions under which the individual performs the major life activity, the manner he or she performs it, and/or the duration of time it takes the individual to perform it, or the length of time the individual can perform it. 29 C.F.R. § 1630.2(j)(4)(i). This may include consideration of the difficulty, effort, or time required to perform a major life activity, pain experienced when performing a major life activity, the length of time a major life activity can be performed, and/or the way an impairment affects the operation of a major bodily function. Things such as negative side effects of medication or burdens associated with following a particular treatment regimen may also be considered when determining whether an individual’s impairment substantially limits a major life activity. 29 C.F.R. § 1630.2(j)(4)(ii).

The regulations also clarify that the focus, in determining whether an individual has an actual disability or has a record of disability, is on “how a major life activity is substantially limited, and not on what outcomes an individual can achieve.” As an example, the regulations note that someone with a learning disability may achieve a high level of academic success “but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.” 29 C.F.R. § 1630.2(4)(iii).

The regulations also note that the primary “object of attention” in ADA cases should be whether covered entities have complied with their obligations and whether discrimination has occurred, “not whether an individual’s impairment substantially limits a major life activity.” The regulations advise that “the threshold issue of whether an impairment ‘substantially limits’ a major life activity should not demand extensive analysis.” 29 C.F.R. § 1630.2(j)(1)(iii).

Scientific, medical or statistical analysis usually is not required, although it is not prohibited, where appropriate. 29 C.F.R. § 1630.2(j)(1)(v).

The regulations note that certain types of impairments will virtually always be found to impose a substantial limitation on a major life activity, 29 C.F.R. § 1630.2(j)(3)(iii), and provide the following examples:

Deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function.

29 C.F.R. § 1630.2(j)(3)(iii).

#### “Physical or Mental Impairment”

The regulations define “physical or mental impairment” as:

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h).

An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. 42 U.S.C. § 12102(4)(C). An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. 42 U.S.C. § 12102(4)(D). The ADA specifically directs that the determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures, such as:

- I. medication, medical supplies, equipment or appliances, low-vision devices (not including ordinary eyeglasses or contact lenses), prosthetics 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 (e.g., interpreters, readers, or acquisition or modification of devices);
- IV. learned behavioral or adaptive neurological modifications.

42 U.S.C. § 12102(4)(E)(I).

#### “Record of Such an Impairment”

An individual has a record of an impairment “if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.” 29 C.F.R. §1630.2(k)(1). An individual with a record of a substantially limiting impairment may be entitled to a reasonable accommodation if needed and related to past disability, such as leave or a schedule change to enable attendance at follow-up or monitoring appointments with a health care provider. 29 C.F.R. § 1630.2(k)(3).

#### “Being Regarded as Having Such an Impairment”

An individual meets the requirement of being regarded as having such an impairment “if the individual establishes that he or she has been subjected to an action prohibited under this Act 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.” 42 U.S.C. § 12102(3)(A). However, 42 U.S.C. § 12102(1)(C), the provision that includes “being regarded as having such an impairment” in the definition of disability, does not apply to impairments that are transitory (having an actual or expected duration of 6 months or less) and minor. 42 U.S.C. § 12102(3)(B). Pursuant to 29 C.F.R. § 1630.15(f), whether an impairment is or would be transitory and minor is to be determined objectively. An employer does not defeat “regarded as” coverage simply by demonstrating that it subjectively believed the impairment was transitory and minor; it must demonstrate that an actual impairment is or a perceived impairment would be both transitory and minor. *Id.*

Examples of prohibited actions include refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment. 29 C.F.R. § 1630.2(l)(1).

#### Knowledge of the Disability

Unlike in other discrimination cases, the protected characteristic of the employee in a disability discrimination case may not always be immediately obvious to the employer. As the Seventh Circuit has stated, “It is true that an employer will automatically know of many disabilities. For example, an employer would know that a person in a wheelchair, or with some other obvious physical limitation, had a disability.” *Hedberg v. Indiana Bell Tele. Co.*, 47 F.3d 928, 932 (7th Cir. 1995). Furthermore, it may be that some symptoms are so obviously manifestations of an underlying disability that it would be reasonable to infer that an employer actually knew of the disability (e.g., an employee who suffers frequent seizures at work likely has some disability). *Id.* at 934. Finally, an employer may actually know of disabilities that are

not immediately obvious, such as when an employee asks for an accommodation under the ADA and submits supporting medical documentation. *See id.* at 932; *Kowitz v. Trinity Health*, 839 F.3d 742, 747 (8th Cir. 2016) (employer was aware of plaintiff's disability based on her prior FMLA leave for neck surgery and information provided by plaintiff in a return to work form).

An employer's mere knowledge of the disability's effects, far removed from the disability itself and with no obvious link to the disability, is generally insufficient to create liability. As one court has aptly stated, "[t]he ADA does not require clairvoyance." *See Hedberg*, 47 F.3d at 934.

A number of Eighth Circuit decisions suggest that an employer must have actual knowledge of an employee's disability before the employer may be exposed to liability. *See, e.g., Miller v. Nat'l Cas. Co.*, 61 F.3d 627, 629-30 (8th Cir. 1995) (employee's complaints of stress insufficient to put employer on notice of any disability when it had not been informed about a diagnosis of manic depression; to extent symptoms were known, they were not "so obviously manifestations of an underlying disability that it would be reasonable to infer that [her] employer actually knew of the disability" (quoting *Hedberg*, 47 F.3d at 934)); *Webb v. Mercy Hosp.*, 102 F.3d 958, 960 (8th Cir. 1996) (holding that the employer did not violate the ADA when it discharged a nurse who had a history of hospitalization for depression because there was no evidence that the employer knew of her diagnosis); *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983, 990 (8th Cir. 1996) (upholding summary judgment for the employer where the plaintiff concealed the severity of his disabling condition even though the employer had some awareness of the plaintiff's health problems).

#### A "Qualified" Individual with a Disability

In order to be protected by the ADA, an individual must be a "qualified individual with a disability." To be a qualified individual, one must be able to perform the essential functions of the job with or without reasonable accommodations. 42 U.S.C. § 12111(8). *See Duello v. Buchanan County Bd. of Supervisors*, 628 F.3d 968, 972-73 (8th Cir. 2010) (plaintiff was not qualified where, at the time he was terminated, he was unable to drive or work around machinery, essential functions of his job); *cf. Willnerd v. First Nat'l Neb., Inc.*, 558 F.3d 770, 782 (8th Cir. 2009) (reversing summary judgment where plaintiff presented sufficient evidence that he was a qualified individual to present a jury issue). *See also Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1016 (8th Cir. 2000) (determination of qualification involves two-fold inquiry: whether the person meets the necessary prerequisites for the job, such as education, experience and training, and whether the individual can perform the essential job functions with or without reasonable accommodation); *Treanor v. MCI Telecomm. Corp.*, 200 F.3d 570, 574-76 (8th Cir. 2000) (in order for a court to assess whether the plaintiff is "qualified" within the meaning of the ADA, the plaintiff must identify particular job sought or desired).

#### Essential Functions of the Job

The phrase "essential functions" means the fundamental job duties of the employment position the plaintiff holds or for which the plaintiff has applied. *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 787 (8th Cir. 1998). "Essential functions" does not include the marginal functions of the position. *Id.* (citing 29 C.F.R. § 1630.2(n)(1)). The EEOC regulations suggest the

following may be considered in determining the essential functions of an employment position: (1) The employer's judgment as to what functions of the job are essential; (2) written job descriptions prepared for advertising or used when interviewing applicants for the job; (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 if one exists; (6) the work experience of persons who have held the job in the past; and/or (7) the current work experience of persons in similar jobs. 29 C.F.R. § 1630.2(n)(3); *Moritz*, 147 F.3d at 787. See also *McNeil v. Union Pacific Railroad Co.*, 936 F.3d 786, 790 (8th Cir. 2019) (ability to work mandatory overtime was an essential function of the job); *Lipp v. Cargill Meat Sols. Corp.*, 911 F.3d 537, 544-45 (8th Cir. 2018) (noting that regular and reliable attendance is an essential function in most jobs); *Scruggs v. Pulaski County, Ark.*, 817 F.3d 1087, 1093 (8th Cir. 2016) (the ability to lift at least 40 pounds was an essential function of a juvenile detention officer where the county considered it essential, the lifting requirement was included in the job description, all other current staff members were able to lift 40 pounds, and plaintiff conceded that the job sometimes required her to lift detainees off the ground and to restrain juveniles, all of whom weighed more than 40 pounds); *Minnihan v. Mediacom Communications Corp.*, 779 F.3d 803, 812 (8th Cir. 2015) (driving was an essential function of technical operations supervisor where employer considered it essential, job description required valid driver's license with good driving, and many of the responsibilities set out in the job description could be performed only on location in customers' homes); *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445-46 (8th Cir. 1998) ("An employer's identification of a position's "essential functions" is given some deference under the ADA."); *Alexander v. The Northland Inn*, 321 F.3d 723, 727 (8th Cir. 2003) (vacuuming was an essential function of housekeeping supervisor position; the plaintiff, whose physician said she could do no vacuuming, was not a qualified individual); *Rehrs v. The Iams Co.*, 486 F.3d 353, 357 (8th Cir. 2007) (shift rotation was an essential function of plaintiff's job, where all technician positions were on rotating shifts). A temporary accommodation exempting an employee from certain job requirements does not demonstrate that those job functions are non-essential. *Id.* at 358.

Resolving a conflict among the courts of appeals, the United States Supreme Court held that an ADA plaintiff's application for or receipt of benefits under the Social Security Disability Insurance program neither automatically estops the plaintiff from pursuing his or her ADA claim nor erects a strong presumption against the plaintiff's success under the ADA. *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 797 (1999). Nonetheless, to survive a motion for summary judgment, the plaintiff must explain why his or her claim for disability benefits is consistent with the claim that he or she could perform the essential functions of his or her previous job with or without reasonable accommodation. *Id.*; *accord Hill v. Kansas City Area Transp. Auth.*, 181 F.3d 891, 893 (8th Cir. 1999). See *Finan v. Good Earth Tools, Inc.*, 565 F.3d 1076, 1079 (8th Cir. 2009) (affirming judgment on jury verdict for plaintiff who "sufficiently explained any apparent contradiction between his Social Security and ADA claims"). Cf. *Lloyd v. Hardin County, Iowa*, 207 F.3d 1080, 1084-85 (8th Cir. 2000) (affirming grant of summary judgment to employer in part because the plaintiff failed to overcome presumption, created by prior allegation of total disability, that he or she is not a qualified individual within the meaning of the ADA); *Gilmore v. AT&T*, 319 F.3d 1042 (8th Cir. 2003) (affirming summary judgment for employer where the plaintiff failed to provide any evidence to reconcile her ADA claim with her assertion, in application for Social Security Disability, that she was unable to perform essential functions of her job).

### “Reasonable Accommodation”

The ADA requires employers to make reasonable accommodations to allow disabled individuals to perform the essential functions of their positions. *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999). Reasonable accommodations must be made for otherwise qualified individuals who are actually disabled or have a record of impairment. 29 C.F.R. § 1630.2(o)(4). A refusal to provide a reasonable accommodation can amount to a constructive demotion. *See Fenney v. Dakota, Minn. & E. R.R. Co.*, 327 F.3d 707, 717-18 (8th Cir. 2003).

But an employer is not required to provide a reasonable accommodation to an individual who is merely “regarded as” disabled. 29 C.F.R. § 1630.2(o)(4). *See also Duello v. Buchanan County Bd. of Supervisors*, 628 F.3d 968, 972 (8th Cir. 2010) (“‘regarded as’ plaintiffs are not entitled to reasonable accommodations because the ADA was not intended to grant reasonable accommodations to those who are not actually disabled”); *Moses v. Dassault Falcon Jet-Wilmington Corp.*, 894 F.3d 911, 923-24 (8th Cir. 2018) (explaining a disabled plaintiff was not a “qualified individual,” as he was unable to perform essential job functions and “no known modifications” of such functions existed for his job) (internal marks omitted).

Although there is no precise test for determining what constitutes a reasonable accommodation, the ADA does not require an accommodation “that would cause other employees to work harder, longer, or be deprived of opportunities.” *Rehrs*, 486 F.3d at 357. *See also Gardea v. JBS USA, LLC*, 915 F.3d 537, 542 (8th Cir. 2019) (neither assistance from other mechanics nor lift-assisting devices was a reasonable accommodation for mechanic in pork processing facility); *Higgins v. Union Pacific Railroad Co.*, 931 F.3d 664, 671 (8th Cir. 2019) (railroad engineer’s request to lay off as necessary and receive 24 hours of rest between shifts was unreasonable accommodation that would require railroad to reassign other locomotive engineers “to shifts that they would not have otherwise been scheduled to work”). An accommodation is unreasonable if it imposes undue financial or administrative burdens or if it otherwise imposes an undue hardship on the operation of the employer’s business. 42 U.S.C. § 12112(b)(5)(A); *Buckles v. First Data Res., Inc.*, 176 F.3d 1098, 1101 (8th Cir. 1999). The “undue hardship” defense is discussed below.

The ADA provides that the concept of “reasonable accommodation” may include: “(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications or examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.” 42 U.S.C. § 12111(9). *See also Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112-14 (8th Cir. 1995) (discussing “reasonable accommodations” and relevant EEOC regulations).

An employer is not required to provide an indefinite leave of absence as an accommodation. *See Peyton v. Fred’s Stores of Arkansas, Inc.*, 561 F.3d 900, 903 (8th Cir. 2009) (“Courts recognize that employers should not be burdened with guess-work regarding an employee’s return to work after an illness.”). *See also Brannon v. Luco Mop Co.*, 521 F.3d 843, 849 (8th Cir. 2008) (employer is not required to provide unlimited absentee policy).

Although part-time work and job restructuring may be considered reasonable accommodations, “[t]his does not mean an employer is required to offer those accommodations in every case.” *Treanor*, 200 F.3d at 575. Moreover, although job restructuring is a possible accommodation under the ADA, an employer need not reallocate the essential functions of a job. *Id.*; *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 950 (8th Cir. 1999); *Lloyd*, 207 F.3d at 1084; *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 788 (8th Cir. 1998); *Benson*, 62 F.3d at 1112-13 (citing 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii)). In addition, an employer is not obligated to hire additional employees or reassign existing workers to assist an employee. *Fjellestad*, 188 F.3d at 950 (citing *Moritz*, 124 F.3d at 788).

Reassignment to a vacant position is another possible accommodation under the ADA. *Benson*, 62 F.3d at 1114 (citing 42 U.S.C. § 12111(9)(B)); 29 C.F.R. § 1630.2(o)(2)(ii)); *see also Fjellestad*, 188 F.3d at 950-51 (the plaintiff created genuine issue of material fact as to whether employer could have reassigned her to a specific, vacant position). In fact, the Eighth Circuit has recognized that, in certain circumstances, reassignment to a vacant position may be “necessary” as a reasonable accommodation. *See Cravens*, 214 F.3d at 1018. The scope of the reassignment duty is limited, however. *Id.* at 1019. For example, reassignment is an accommodation of “last resort”; that is, the “very prospect of reassignment does not even arise unless accommodation within the individual’s current position would pose an undue hardship.” *Id.* Moreover, the ADA does not require an employer to create a new position as an accommodation. *Id.*; *see also Treanor*, 200 F.3d at 575 (“[T]he ADA does not require an employer to create a new part-time position where none previously existed.”); *Fjellestad*, 188 F.3d at 950 (employer not required to create new position or to create permanent position out of a temporary one). An employer who has an established policy of filling vacant positions with the most qualified applicant is not required to assign the vacant position to a disabled employee who, although qualified, is not the most qualified applicant. *Huber v. Wal-Mart Stores*, 486 F.3d 480, 483-84 (8th Cir. 2007). In addition, an employer is not required to “bump” another employee in order to reassign a disabled employee to that position. *Cravens*, 214 F.3d at 1019. Promotion is not required. *Id.* Finally, the employee must be “otherwise qualified” for the reassignment position. *Id.* *See also Faidley v. United Parcel Service*, 889 F.3d 933, 941 (8th Cir. 2018) (employee was not qualified for alternate position that required working for up to 9.5 hours per day where doctor permanently restricted him from working more than 8 hours per day).

An employer is not obligated to provide an employee the accommodation he or she requests or prefers. *See, e.g., Cravens*, 214 F.3d at 1019. *See also Lora v. Dean*, 595 F.3d 831, 835 (8th Cir. 2010) (defendants were not required to employ plaintiff in team leader position, even if he could maintain better control of his diabetes in that position). The employer need only provide some reasonable accommodation. *Hennenfent v. Mid Dakota Clinic, P.C.*, 164 F.3d 419, 422 n.2 (8th Cir. 1998); *accord Kiel*, 169 F.3d at 1137 (“If more than one accommodation would allow the individual to perform the essential functions of the position, ‘the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.’”).

An employer’s showing that the requested accommodation would violate the rules of an existing seniority system is ordinarily enough to show that the accommodation is not “reasonable” and to entitle the employer to summary judgment. *US Airways, Inc. v. Barnett*, 535

U.S. 391, 394, 406 (2002); *see also Faulkner v. Douglas County*, 906 F.3d 728, 732-34 (8th Cir. 2018) (employer not obligated to violate a collective bargaining agreement to create a reasonable job accommodation). The employee may defeat summary judgment by presenting evidence of special circumstances that make an exception to a seniority rule “reasonable” in the particular case. *US Airways*, 535 U.S. at 394, 404-06. Examples of special circumstances are the employer’s fairly frequent exercise of a right to change the seniority system unilaterally and a seniority system containing exceptions such that one further exception is unlikely to matter. *Id.* at 404-06.

The ADA does not require the preferential treatment of individuals with disabilities in terms of job qualifications as a reasonable accommodation. *See Harris v. Polk County*, 103 F.3d 696, 697 (8th Cir. 1996) (employer lawfully denied job to disabled applicant on basis of criminal record that allegedly had resulted from prior psychological problems because “an employer may hold disabled employees to the same standard of law-abiding conduct as all other employees”).

For more discussion of “reasonable accommodations” under the ADA, *see infra* Model Instruction 9.42 and Committee Comments.

### The Interactive Process

Before an employer must make an accommodation for the physical or mental limitation of an employee, the employer must have knowledge that such a limitation exists. *Miller v. Nat’l Cas. Co.*, 61 F.3d 627, 629 (8th Cir. 1995); *accord Walz v. Ameriprise Financial, Inc.*, 779 F.3d 842, 846 (8th Cir. 2015). Thus, it is generally the responsibility of the plaintiff to request the provision of a reasonable accommodation. *Miller*, 61 F.3d at 630 (citing 29 C.F.R. § 1630 App., § 1630.9); *accord Peyton*, 561 F.3d at 903 (8th Cir. 2009) (recognizing that “ordinarily it is the plaintiff employee, rather than the defendant employer, who must initiate the interactive process”); *Buckles*, 176 F.3d at 1101 (The burden remains with the plaintiff “to show that a reasonable accommodation, allowing him to perform the essential functions of his job, is possible.”); *Mole v. Buckhorn Rubber Prods., Inc.*, 165 F. 3d 1212, 1218 (8th Cir. 1999) (affirming grant of summary judgment for the defendant where “only [the plaintiff] could accurately identify the need for accommodations specific to her job and workplace” and she failed to do so); *Wallin v. Minnesota Dep’t of Corr.*, 153 F.3d 681, 689 (8th Cir. 1998) (“Where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee . . . to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations.” (citation omitted)). *See also Walz*, 779 F.3d at 846 (process analyst who never requested any accommodation and never informed her employer that bipolar disorder was the reason for her erratic, rude and disruptive behavior and unintelligible communications failed to make a prima facie case of wrongful termination); *cf. EEOC v. Convergys Customer Mgmt. Group, Inc.*, 491 F.3d 790 (8th Cir. 2007) (call center employee, who used a wheelchair, made sufficient request for accommodation by asking for a grace period of a few extra minutes to return from lunch).

Once the plaintiff has made such a request, the ADA and its implementing regulations require that the parties engage in an “interactive process” to determine what precise accommodations are necessary. *See* 29 C.F.R. § 1630.2(o)(3) & § 1630 App., § 1630.9; *accord*

*Fjellestad*, 188 F.3d at 951. This means that the employer “should first analyze the relevant job and the specific limitations imposed by the disability and then, in consultation with the individual, identify potential effective accommodations.” See *Cannice*, 189 F.3d 723, 727 (8th Cir. 1999). In essence, the employer and the employee must work together in good faith to help each other determine what accommodation is necessary. *Id.*; see also *Sharbono v. Northern States Power Co.*, 902 F.3d 891, 894 (8th Cir. 2018) (interactive process was properly terminated when no legally compliant work boot could be manufactured for a power line worker to fit his surgically reconstructed foot).

The Eighth Circuit has recognized that although an employer will not be held liable under the ADA for failing to engage in an interactive process if no reasonable accommodation was possible, the failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith. See *Minnihan*, 779 F.3d at 813; *Fjellestad*, 188 F.3d at 952; *Cravens*, 214 F.3d at 1021 (“To establish that an employer failed to participate in an interactive process, a disabled employee must show: (1) the employer knew about the disability; (2) the employee requested accommodation or assistance for his or her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodation; and (4) the employee could have been reasonably accommodated but for the employer’s lack of good faith.”). Accordingly, the Eighth Circuit has held that summary judgment is typically precluded when there is a genuine dispute as to whether the employer acted in good faith and engaged in the interactive process of seeking reasonable accommodations. See *Cravens*, 214 F.3d at 1022; *Fjellestad*, 188 F.3d at 953; *accord Deane v. Pocono Med. Ctr.*, 142 F.3d 138 (3d Cir. 1998) (single telephone conversation between the plaintiff and employer “hardly satisfies our standard that the employer make reasonable efforts to assist the employee [and] to communicate with him in good faith.”).

On the other hand, summary judgment may be appropriate where the employee fails to engage in the interactive process. See, e.g., *Treanor*, 200 F.3d at 575 (the plaintiff failed to create a genuine question of fact in dispute on issue of interactive process where the plaintiff requested part-time work, the defendant indicated that no such position existed, the plaintiff failed to identify any particular “suitable” position and there was no evidence that the defendant acted in bad faith by failing to investigate further the existence of a reasonable accommodation); *Powley v. Rail Crew Xpress, LLC*, 25 F.4th 610, 612-13 (8th Cir. 2022) (affirming summary judgment for employer, which had accommodated employee on several occasions, where employee did not submit a doctor’s note or otherwise indicate that her final request – for a return to a driving position – was based on medical needs); *Gerdes v. Swift-Eckrich, Inc.*, 949 F. Supp. 1386 (N.D. Iowa 1996) (summary judgment for employer appropriate where responsibility for causing the breakdown of the interactive process rested plainly on the plaintiff), *aff’d*, 125 F.3d 634 (8th Cir. 1997).

Similarly, summary judgment may be appropriate in the absence of evidence that the employer failed to make a good faith effort to arrive at a reasonable accommodation for the plaintiff. See, e.g., *Minnihan*, 779 F.3d at 814 (no ADA liability where employee declined to accept employer’s offer of transfer to another position and failed to request leave time); *Mole*, 165 F.3d at 1218 (affirming grant of summary judgment for employer where “there is no evidence [the employer] failed to make a good faith reasonable effort to help [the plaintiff] determine if other accommodations might be needed.”); *Mobley v. St. Luke’s Health System*,

*Inc.*, 53 F.4th 452, 457 (8th Cir. 2022) (affirming summary judgment for employer which, while declining to approve a blanket request to work from home during flare-ups, approved permission to work from home on a case-by-case basis and denied only one of the plaintiff's work from home requests); *Ehlers v. University of Minnesota*, 34 F.4th 655, 662 (8th Cir. 2022) (affirming summary judgment for employer, which had accommodated a number of the employee's requests, offered to help her find a new job, had someone in its job center schedule a meeting, which the employee cancelled, and worked with the employee and her attorney to develop a questionnaire, which it forwarded to hiring supervisors, in an attempt to find a job the employee could perform; in addition, although the employee expressed interest in eight positions, she did not show that she was qualified for any of them).

### **Statutory Defenses**

The ADA specifically provides for the following defenses: (1) undue hardship (42 U.S.C. § 12112(b)(5)(A)); (2) direct threat to the health or safety of others in the workplace (42 U.S.C. § 12113(b)); (3) employment qualification standard, test or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)); (4) religious entity (42 U.S.C. § 12113(d)(1)); (5) infectious or communicable disease (42 U.S.C. § 12113(e)(2)); and illegal use of drugs (42 U.S.C. § 12114(a)). The statutory defenses most likely to lead to instruction issues are undue hardship and direct threat. *See infra* Model Instructions 9.60 and 9.61. The burden of pleading and proving these defenses is on the defendant. *See EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571-72 (8th Cir. 2007) (holding that the employer bears the burden of proving direct threat “as the direct threat defense is an affirmative defense”).

### **Undue Hardship**

As set forth above, the ADA provides that an employer need not provide a reasonable accommodation if it can prove that the accommodation would impose an undue hardship on the operation of its business. The term “undue hardship” is defined as “an action requiring significant difficulty or expense,” that is to be considered in light of the following factors: (i) the nature and cost of the accommodation; (ii) the employer's financial resources at the facility in question; (iii) the employer's overall financial resources; and (iv) the fiscal relationship of the facility in question with the employer's overall business. 42 U.S.C. § 12111(10). *See also Gardea v. JBS USA, LLC*, 915 F.3d at 542 (mechanic's request for lift-assisting devices was “not reasonable on its face and would impose an undue hardship” on employer's business, where not all areas of the plant had the overhead beams necessary for such devices, use of the devices was impractical in tight quarters, and some of the devices required employees to first lift an object by hand onto the device); *LeBlanc v. McDonough*, 39 F.4th 1071, 1075-76 (8th Cir. 2022) (holding, in Rehabilitation Act case, that request for day shifts only would impose undue hardship on department and would have violated collective bargaining agreement that required shifts to be rotated fairly and equitably among affected employees).

### **Direct Threat**

The ADA specifically permits employers to reject applicants and terminate employees who pose a “direct threat” to the health or safety of others in the workplace if such direct threat cannot be eliminated by reasonable accommodation. 42 U.S.C. § 12113(b); *see Wood v. Omaha*

*Sch. Dist.*, 25 F.3d 667 (8th Cir. 1994) (insulin-dependent individuals with poorly controlled diabetes were not qualified to serve as school bus drivers); *cf. Wal-Mart*, 477 F.3d at 571-72 (reversing summary judgment for employer that failed to establish that use of a wheelchair or other reasonable accommodation would pose a direct threat to the safety of job applicant or others).

The courts also have used the “direct threat” doctrine to support the terminations of individuals who assault or threaten coworkers. For example, in *Williams v. Widnall*, 79 F.3d 1003 (10th Cir. 1996), the court upheld the termination of an alcoholic employee who threatened his supervisor. *See also Crawford v. Runyon*, 79 F.3d 743 (8th Cir. 1996) (upholding district court’s finding of no pretext in termination of postal worker who threatened to kill his supervisor); *Fenton v. Pritchard Corp.*, 926 F. Supp. 1437 (D. Kan. 1996) (upholding termination of disgruntled employee who threatened to “go postal”).

The Supreme Court, in *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 78 (2002), held that the statutory reference to threats to “other individuals in the workplace” did not preclude the EEOC from adopting a regulation that, in the Court’s words, “carries the defense one step further,” by allowing an employer to adopt a qualification standard requiring that an individual not pose a direct threat to the individual’s own health or safety, as well as the health or safety of others. 29 C.F.R. § 1630.15(b)(2). *See also* 29 C.F.R. § 1630.2(r).

### **Procedures and Remedies**

Pursuant to 42 U.S.C. § 12117, ADA cases generally adopt the procedures and remedy schemes from Title VII cases. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 285 (2002). Accordingly, an EEOC charge and right-to-sue notice typically will be necessary preconditions to an ADA claim. *See* 42 U.S.C. § 2000e-5. By virtue of the Civil Rights Act of 1991, damages under the ADA generally are the same as those available under Title VII. Thus, potential remedies in ADA cases include backpay, compensatory damages, punitive damages, and attorneys’ fees. *See* 42 U.S.C. § 1981a.

In *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995), the Eighth Circuit held that an employee is entitled to some relief under the ADA if the employee proves that his or her disability was a “motivating factor” in the employer’s decision. In two more recent decisions, the Eighth Circuit has questioned the continued viability of the “motivating factor” standard in ADA cases in light of the Supreme Court’s decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) (holding that but-for causation is the standard in an ADEA case). *See Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1002 (8th Cir. 2012) (expressing “doubts about the vitality of the pre-Gross precedent” but reserving the issue for a case in which it is briefed); *Oehmke v. Medtronic, Inc.*, 844 F.3d 748, 757, n. 6 (8th Cir. 2016) (noting Medtronic’s argument that ADA discrimination claims require a but-for standard of causation but declining “to address this important issue at this time” because the issue was only “cursorily briefed” and because it held that summary judgment for Medtronic was properly granted “even under the less restrictive mixed-motive causation standard”). *See also Canning v. Creighton University*, 995 F.3d 603, 610 (8th Cir. 2021) (agreeing with the district court that “ADEA, ADA and NFEPA [Nebraska Fair Employment Practices Act] claims for age and disability discrimination ‘share a common analysis,’ all requiring but-for causation” but affirming

summary judgment for the defendant on the ground that the plaintiff failed to show that the defendant regarded her as disabled when it terminated her). But see *Gruttemeyer v. Transit Authority*, 31 F.4th 638, 646-48 (8th Cir. 2022), in which the Eighth Circuit noted that the jury had been instructed on motivating factor / same decision, and the court held that the record supported a conclusion that the plaintiff’s disability or record of disability was one motivating factor in his employer’s decision to terminate him and that his employer would not have made the same decision absent his disability.

Given the lack of clarity, in an ADA discrimination case, the court may want to elicit findings under the “but-for” and “motivating factor/same decision” standards with, for example, special interrogatories set forth at Model Instruction 11.90. See, e.g., *Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1059-60 (8th Cir. 2002) (approving use of special interrogatories).

In cases in which the employee has alleged failure to accommodate, the Eighth Circuit has held that one of the elements the employee must show to establish that the employer failed to participate in an interactive process is that “the employee could have been reasonably accommodated but for the employer’s lack of good faith.” *Ehlers v. University of Minnesota*, 34 F.4th 655, 661, (8th Cir. 2022) (quoting *Cravens v. Blue Cross & Blue Shield of Kan. City*, 214 F.3d 1011, 1021 (8th Cir. 2000) and describing this element as “but-for causation”).

The ADA provides a “good faith” defense if an employer “demonstrates good faith efforts” to find a reasonable accommodation with the plaintiff. See 42 U.S.C. § 1981a(a)(3) and Model Instruction 9.62, *infra*. If the jury finds that the employer has made such efforts, the plaintiff cannot recover compensatory or punitive damages. See 42 U.S.C. § 1981a(a)(3).

## **CHAPTER 9 INSTRUCTIONS AND VERDICT FORMS**

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## 9.01 EXPLANATORY: DISPARATE TREATMENT “SAME DECISION”

If you find in favor of the plaintiff under Instruction \_\_\_\_\_,<sup>1</sup> then you must answer the following question in the verdict form[s]: Has it been proved<sup>2</sup> that the defendant would have (specify action taken with respect to the plaintiff) even if the defendant had not considered the plaintiff’s (specify alleged impairment)?

### Notes on Use

1. Fill in the number or title of the essential elements instruction here.
2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

### Committee Comments

If a plaintiff prevails on the issue of liability by showing that discrimination was a “motivating factor,” the defendant nevertheless may avoid an award of damages or reinstatement by showing that it would have taken the same action “in the absence of the impermissible motivating factor.” See 42 U.S.C. § 2000e-5(g)(2)(B). This instruction is designed to submit this “same decision” issue to the jury. See *Belk v. Southwestern Bell Telephone Co.*, 194 F.3d 946, 949 (8th Cir. 1999) (discussing remedies available in “mixed motive” case under ADA); *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995) (same). See also *Pedigo v. P.A.M. Transp., Inc.*, 98 F.3d 396, 396-97 (8th Cir. 1996) (discussing “prevailing party” for purposes of awarding attorneys’ fees).

## **9.02 EXPLANATORY: BUSINESS JUDGMENT**

You may not return a verdict for the plaintiff just because you might disagree with the defendant's (decision)<sup>1</sup> or believe it to be harsh or unreasonable.

### **Notes on Use**

1. This instruction makes reference to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--is more appropriate.

### **Committee Comments**

In *Walker v. AT&T Technologies*, 995 F.2d 846 (8th Cir. 1993), the Eighth Circuit ruled that it is reversible error to deny a defendant's request for an instruction that explains that an employer has the right to make subjective personnel decisions for any reason that is not discriminatory. This instruction is based on sample language cited in the Eighth Circuit's opinion. See *Walker*, 995 F.2d at 849; cf. *Blake v. J.C. Penney Co.*, 894 F.2d 274, 281 (8th Cir. 1990) (upholding a different business judgment instruction as being sufficient).

## **9.20 DEFINITION: DISABILITY**

[No definition recommended.]

### **Committee Comments**

As drafted, the Model Instructions do not use the term “disability” and, thus, do not require the jury to determine whether a plaintiff has a “disability.” Rather, the instructions require the jury to find the facts that support the underlying elements of a disability under the Act.

## **9.21 DEFINITION: ESSENTIAL FUNCTIONS**

In determining whether a job function is essential, you should consider the following factors: [(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 persons who have held the job; (7) the current work experience of persons 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) (her)] expertise or ability to perform the function; and (11) (list any other relevant factors supported by the evidence)].<sup>1</sup>

No one factor is necessarily controlling. You should consider all of the evidence in deciding whether a job function is essential.

The term “essential functions” means the fundamental job duties of the employment position the plaintiff holds or for which the plaintiff has applied. The term “essential functions” does not include the marginal functions of the position.

### **Notes on Use**

1. This instruction should be modified, as appropriate, to include only those factors supported by the evidence.

### **Committee Comments**

The ADA protects only those individuals who, with or without reasonable accommodation, can perform the essential functions of the employment position that the plaintiff holds or desires. *See* 42 U.S.C. § 12111(8); *Moses v. Dassault Falcon Jet-Wilmington Corp.*, 894 F.3d 911, 921 (8th Cir. 2018); *Lloyd v. Hardin County, Iowa*, 207 F.3d 1080, 1084 (8th Cir. 2000); *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 786-87 (8th Cir. 1998). Thus, this instruction is designed for use in connection with the essential elements instruction in cases where the issue of whether a particular job requirement or task is an “essential function” of the job is in dispute. The instruction, although not technically a definition, should be used to instruct the jury in determining whether a given job duty is essential.

The instruction is based on 29 C.F.R. § 1630.2(n) and the Eighth Circuit’s opinions in *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445-46 (8th Cir. 1998) (“An employer’s identification of a position’s ‘essential functions’ is given some deference under the ADA.”); *Moritz*, 147 F.3d at 787; and *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1113 (8th Cir. 1995).

## **9.22 DEFINITION: SUBSTANTIALLY LIMITS**

In determining whether the plaintiff's impairment substantially limits the plaintiff's ability to (specify major life activity affected), you should compare the plaintiff's ability to (specify major life activity affected) with that of the average person. In doing so, you may consider the conditions under which the plaintiff performs [the major life activity], the manner in which the plaintiff performs [the major life activity], and the length of time it takes the plaintiff to perform [the major life activity]. [Temporary impairments with little or no long-term impact are not sufficient.]<sup>1</sup>

It is not the name of an impairment or a condition that matters, but rather the effect of an impairment or condition on the life of a particular person.

### **Notes on Use**

1. Use the bracketed language only if it is supported by the evidence.

### **Committee Comments**

This instruction is designed for use in connection with the essential elements instruction in cases in which the issue of whether the plaintiff has a disability under the ADA is in dispute. The language of the instruction is based on 29 C.F.R. § 1630.2(j)(4). The term "substantially limits" may be of such common usage that a definition is not required. If the Court desires to define the term, however, the Committee recommends this definition. This instruction should not be given in cases where the plaintiff claims that the defendant "regarded" the plaintiff as having an impairment.

An impairment is only a disability under the ADA if it substantially limits one or more major life activities. *See* 42 U.S.C. § 12102(1).

**9.40 ELEMENTS OF CLAIM: DISPARATE TREATMENT  
(Actual Disability)**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] if all of the following elements have been proved: <sup>1</sup>

*First*, the plaintiff had (specify alleged impairment(s));<sup>2</sup> and

*Second*, such (specify alleged impairment(s)) substantially limited the plaintiff's ability to (specify major life activity or activities affected);<sup>3</sup> and

*Third*, the defendant (specify action(s) taken with respect to the plaintiff);<sup>4</sup> and

*Fourth*, the plaintiff could have performed the essential functions<sup>5</sup> of (specify job held or position sought)<sup>6</sup> at the time the defendant (specify action(s) taken with respect to the plaintiff); and

*Fifth*, the defendant knew<sup>7</sup> of the plaintiff's (specify alleged impairment(s)) and the plaintiff's (specify alleged impairment(s)) [was a motivating factor]<sup>8</sup> [played a part]<sup>9</sup> in the defendant's decision to (specify action(s) taken with respect to the plaintiff).

If any of the above elements has not been proved, [or if the defendant is entitled to a verdict under (describe instruction),]<sup>10</sup> then your verdict must be for the defendant. [You may find that the plaintiff's (specify alleged impairment(s)) [was a motivating factor] [played a part] in the defendant's (decision)<sup>11</sup> if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.]<sup>12</sup>

**Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. In a typical case, the plaintiff will allege discrimination on the basis of an actual disability. *See* 42 U.S.C. § 12102(1)(A). In such cases, the name of the condition is not essential as long as the specified condition fits the definition of an impairment, as that term is used in the

ADA. *See Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997) (“[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual”) (quoting 29 C.F.R. § 1630 App., § 1630.2(j)). Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1222 (8th Cir. 1997) (cautioning district court to be mindful of placing “undue emphasis” on one party’s evidence).

As discussed in the Committee Comments, however, if the plaintiff contends that he or she had a record of a disability, the language of the instruction will have to be modified. *See* 42 U.S.C. § 12102(1)(B). For cases where the plaintiff alleges that he or she was regarded by the defendant as having a disability, *see infra* Model Instruction 9.41. *See id.* § 12102(1)(C).

3. This element is designed to submit the issue of whether the plaintiff’s alleged impairment constitutes a “disability” under the ADA. If necessary, the phrase “substantially limits” may be defined. *See supra* Model Instruction 9.22.

4. Insert the appropriate language depending on the nature of the case (*e.g.*, “discharge,” “failure to hire,” “failure to promote,” or “demotion” case). Where the plaintiff resigned but claims a “constructive discharge,” this instruction should be modified. *See supra* Model Instruction 5.41.

5. This element is designed to submit the issue of whether the plaintiff is a “qualified individual” under the ADA. If necessary, the phrase “essential functions” may be defined. *See supra* Model Instruction 9.21.

6. In a discharge or demotion case, specify the position held by the plaintiff. In a failure-to-hire or failure-to-promote case, specify the position for which the plaintiff applied. *See Treanor v. MCI Telecomm. Corp.*, 200 F.3d 570, 575-76 (8th Cir. 2000) (agreeing with district court’s assessment that it could not evaluate whether the plaintiff was a qualified individual within the meaning of the ADA because the plaintiff failed to identify any particular job for which she was qualified).

7. This language may need to be modified if there is a dispute whether the defendant had adequate knowledge of the plaintiff’s impairment. *See Webb v. Mercy Hosp.*, 102 F.3d 958, 960 (8th Cir. 1996) (holding that an employer did not violate the ADA when it discharged a nurse who had a history of hospitalization for depression because there was no evidence that the employer knew of her diagnosis); *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983, 990 (8th Cir. 1996) (upholding summary judgment for the employer where the plaintiff concealed the severity of her disabling condition even though the employer had some awareness of the plaintiff’s health problems). *See also Miller v. Nat’l Cas. Co.*, 61 F.3d 627, 630 (8th Cir. 1995) (employee’s complaints of stress insufficient to put employer on notice of any disability when it had not been informed about a diagnosis of manic depression; to extent symptoms were known, they were not “so obviously manifestations of an underlying disability that it would be reasonable to infer that [her] employer actually knew of the disability”) (quoting *Hedberg v. Indiana Bell Tele. Co.*, 47 F.3d 928, 934 (7th Cir. 1995)). For more discussion on this issue, *see supra* section 9.00.

8. In *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995), the Eighth Circuit held that an employee is entitled to some relief under the ADA if the employee proves that his or her disability was a “motivating factor” in the employer’s decision. In more recent decisions, the Eighth Circuit has questioned the continued viability of the “motivating factor” standard in ADA cases in light of the Supreme Court’s decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) (holding that but-for causation is the standard in an ADEA case). See *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1002 (8th Cir. 2012) and *Oehmke v. Medtronic, Inc.*, 844 F.3d 748, 757, n. 6 (8th Cir. 2016). See also *Canning v. Creighton University*, 995 F.3d 603, 610 (8th Cir. 2021) (agreeing with the district court that “ADEA, ADA and NFEPA [Nebraska Fair Employment Practices Act] claims for age and disability discrimination ‘share a common analysis,’ all requiring but-for causation” but affirming summary judgment for the defendant on the ground that the plaintiff failed to show that the defendant regarded her as disabled when it terminated her). Given the lack of clarity, the court and the parties may want to consider eliciting findings under the “but-for” and “motivating factor/same decision” standards with, for example, special interrogatories set forth at Model Instruction 11.90. The Committee recommends that, if the phrase “motivating factor” is used in any instruction, the definition set forth in Model Instruction 5.21, *supra*, be given.

9. See *supra* Model Instruction 5.21, that defines “motivating factor” in terms of whether the characteristic “played a part or a role” in the defendant’s decision. The phrase “motivating factor” need not be defined if the definition itself is used in the element instruction.

10. This language should be used when the defendant is submitting an affirmative defense. The ADA specifically provides for the following affirmative defenses: direct threat (42 U.S.C. § 12113(b)); religious entity (42 U.S.C. § 12113(d)(1)); infectious or communicable disease (42 U.S.C. § 12113(e)(2)); illegal use of drugs (42 U.S.C. § 12114(a)); undue hardship (42 U.S.C. § 12112(b)(5)(A)); and employment qualification standard, test or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)).

11. This instruction makes references to the defendant’s “decision.” It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

12. This sentence may be added, if appropriate. See *supra* Model Instruction 5.20 and *Moore v. Robertson Fire Prot. Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001) (“We do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.”).

### **Committee Comments**

This instruction is designed to submit cases where the primary issue is whether the plaintiff’s disability was a motivating factor in the employment decision. The instruction may be modified if the plaintiff alleges that he or she has a record of a disability. See 42 U.S.C. § 12102(1)(B); 29 C.F.R. § 1630.2(g). If the plaintiff alleges that he or she did not have an actual disability, but that he or she was regarded by the defendant as having a disability, see 42 U.S.C. § 12102(1)(C), the appropriate instruction for use is Model Instruction 9.41, *infra*.

The *McDonnell Douglas* burden-shifting scheme applies in analyzing claims of intentional discrimination under the ADA. See, e.g., *Oehmke v. Medtronic, Inc.*, 844 F.3d 748,

755 (8th Cir. 2016) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973)). It is unnecessary and inadvisable, however, to instruct the jury regarding the *McDonnell Douglas* analysis. *Lang v. Star Herald*, 107 F.3d 1308, 1312 (8th Cir. 1997) (“Reference to this complex analysis is not necessary . . . or even recommended.”); *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 731 (8th Cir. 1992) (“[T]he *McDonnell Douglas* ‘ritual is not well suited as a detailed instruction to the jury’ and adds little understanding to deciding the ultimate question of discrimination.”) (quoting *Grebin v. Sioux Falls Indep. Sch. Dist. No. 49-5*, 779 F.2d 18, 20 (8th Cir. 1985)). Instead, the submission to the jury should focus on the ultimate issues of whether intentional discrimination was a motivating factor in the defendant’s employment decision. See *Lang*, 107 F.3d at 1312.

**9.41 ELEMENTS OF CLAIM: DISPARATE TREATMENT  
(Perceived Disability)**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] if all of the following elements have been proved:<sup>1</sup>

*First*, [the plaintiff had or] [the defendant knew or believed plaintiff had] (specify alleged impairment(s));<sup>2</sup> and

*Second*, the defendant (specify action(s) taken with respect to the plaintiff);<sup>3</sup> and

*Third*, the plaintiff could have performed the essential functions<sup>4</sup> of (specify job held or position sought)<sup>5</sup> at the time the defendant (specify action(s) taken with respect to the plaintiff); and

*Fourth*, the defendant's belief regarding the plaintiff's (specify alleged impairment(s)) [was a motivating factor]<sup>6</sup> [played a part]<sup>7</sup> in the defendant's decision to (specify action(s) taken with respect to the plaintiff).

If any of the above elements has not been proved, [or if the defendant is entitled to a verdict under (describe instruction),]<sup>8</sup> then your verdict must be for the defendant. [You may find that the plaintiff's (specify alleged impairment(s)) [was a motivating factor] [played a part] in the defendant's (decision)<sup>9</sup> if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.]<sup>10</sup>

**Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. It may be that in the majority of "perceived disability" cases, the plaintiff has an actual impairment, although the impairment does not substantially limit any of the plaintiff's major life activities. *See* 42 U.S.C. § 12102(3)(A) (explaining that an individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under the ADA 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). An impairment that is transitory (having an actual or expected duration of six months or less) and minor does not qualify as a perceived disability. 42 U.S.C. § 12102(3)(B).

The name of the condition is not essential as long as the specified condition fits the definition of an impairment as used in the ADA. *See Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997) (“[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual”) (quoting 29 C.F.R. § 1630 App., § 1630.2(j)). Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1222 (8th Cir. 1997) (cautioning district court to be mindful of placing “undue emphasis” on one party’s evidence).

3. Insert the appropriate language depending on the nature of the case (*e.g.*, “discharge,” “failure to hire,” “failure to promote,” or “demotion” case). Where the plaintiff resigned but claims a “constructive discharge,” this instruction should be modified. *See infra* Model Instruction 9.43.

4. This element is designed to submit the issue of whether the plaintiff is a “qualified individual” under the ADA. If necessary, the phrase “essential functions” may be defined. *See supra* Model Instruction 9.21.

5. In a discharge or demotion case, specify the position held by the plaintiff. In a failure-to-hire or failure-to-promote case, specify the position for which the plaintiff applied. *See Treanor v. MCI Telecomm. Corp.*, 200 F.3d 570, 575-76 (8th Cir. 2000) (agreeing with district court’s assessment that it could not evaluate whether the plaintiff was a qualified individual within the meaning of the ADA because the plaintiff failed to identify any particular job for which she was qualified).

6. In *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995), the Eighth Circuit held that an employee is entitled to some relief under the ADA if the employee proves that his or her disability was a “motivating factor” in the employer’s decision. In two more recent decisions, the Eighth Circuit has questioned the continued viability of the “motivating factor” standard in ADA cases in light of the Supreme Court’s decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) (holding that but-for causation is the standard in an ADEA case). *See Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1002 (8th Cir. 2012) and *Oehmke v. Medtronic, Inc.*, 844 F.3d 748, 757, n. 6 (8th Cir. 2016). *See also Canning v. Creighton University*, 995 F.3d 603, 610 (8th Cir. 2021) (agreeing with the district court that “ADEA, ADA and NFEPA [Nebraska Fair Employment Practices Act] claims for age and disability discrimination ‘share a common analysis,’ all requiring but-for causation” but affirming summary judgment for the defendant on the ground that the plaintiff failed to show that the defendant regarded her as disabled when it terminated her). Given the lack of clarity, the court and the parties may want to consider eliciting findings under the “but-for” and “motivating factor/same decision” standards with, for example, special interrogatories set forth at Model Instruction 11.90. The Committee recommends that, if the phrase “motivating factor” is used in any instruction, the definition set forth in Model Instruction 5.21, *supra*, be given.

7. *See supra* Model Instruction 5.21, which defines “motivating factor” in terms of whether the characteristic “played a part or a role” in the defendant’s decision. The phrase “motivating factor” need not be defined if the definition itself is used in the element instruction.

8. This language should be used when the defendant is submitting an affirmative defense. The ADA specifically provides for the following affirmative defenses: direct threat (42 U.S.C. § 12113(b)); religious entity (42 U.S.C. § 12113(d)(1)); infectious or communicable disease (42 U.S.C. § 12113(e)(2)); illegal use of drugs (42 U.S.C. § 12114(a)); undue hardship (42 U.S.C. § 12112(b)(5)(A)); and employment qualification standard, test or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)).

9. This instruction makes references to the defendant’s “decision.” It may be modified if another term--such as “actions” or “conduct”--would be more appropriate.

10. This sentence may be added, if appropriate. *See supra* Model Instruction 5.20 and *Moore v. Robertson Fire Prot. Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001) (“We do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.”)

### **Committee Comments**

This instruction is designed to submit cases where the primary issue is whether the plaintiff’s perceived disability was a motivating factor in the employment decision. *See* 42 U.S.C. § 12102(1)(C).

The *McDonnell Douglas* burden-shifting scheme applies in analyzing claims of intentional discrimination under the ADA. *See, e.g., Oehmke v. Medtronic, Inc.*, 844 F.3d 748, 755 (8th Cir. 2016) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973)). It is unnecessary and inadvisable, however, to instruct the jury regarding the *McDonnell Douglas* analysis. *Lang v. Star Herald*, 107 F.3d 1308, 1312 (8th Cir. 1997) (“Reference to this complex analysis is not necessary . . . or even recommended.”).

**9.42 ELEMENTS OF CLAIM: REASONABLE ACCOMMODATION  
(Specific Accommodation Identified)**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] if all of the following elements have been proved:<sup>1</sup>

*First*, the plaintiff had (specify alleged impairment(s));<sup>2</sup> and

*[Second*, such (specify alleged impairment(s)) substantially limited the plaintiff's ability to (specify major life activity or activities affected); and]<sup>3</sup>

*[Third*, the defendant knew of the plaintiff's (specify alleged impairment(s)); and]<sup>4</sup>

*Fourth*, the plaintiff could have performed the essential functions<sup>5</sup> of the (specify job held or position sought) if the plaintiff had been provided with (specify accommodation(s) identified by the plaintiff);<sup>6</sup> and

*Fifth*, providing (specify accommodation(s) in question) would have been reasonable; and

*Sixth*, the defendant failed to provide (specify accommodation(s) in question) and failed to provide any other reasonable accommodation; and<sup>7</sup>

*Seventh*, as a direct result of defendant's failure to provide reasonable accommodation, [specify adverse employment decision in question – e.g., “plaintiff's employment was terminated” or “plaintiff was denied a bonus”].<sup>8</sup>

If any of the above elements has not been proved, [or if the defendant is entitled to a verdict under (describe instruction),]<sup>9</sup> then your verdict must be for the defendant.

**Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. The name of the condition is not essential as long as the specified condition fits the definition of an impairment as used in the ADA. *See Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997) (“[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual”) (quoting 29 C.F.R. § 1630 App., § 1630.2(j)). Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1222 (8th Cir. 1997) (cautioning district court to be mindful of placing “undue emphasis” on one party’s evidence).

3. This element should be omitted if it is undisputed that the plaintiff’s impairment constitutes a disability. This element is designed to submit the issue of whether the plaintiff’s alleged impairment constitutes a “disability” under the ADA. If necessary, the phrase “substantially limits” may be defined. *See supra* Model Instruction 9.22.

4. This element should be omitted if it is undisputed that the defendant knew of the plaintiff’s impairment. This language may need to be modified if there is a dispute whether the defendant had adequate knowledge of the plaintiff’s impairment. *See Webb v. Mercy Hosp.*, 102 F.3d 958, 960 (8th Cir. 1996) (holding that an employer did not violate the ADA when it discharged a nurse who had a history of hospitalization for depression because there was no evidence that the employer knew of her diagnosis); *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983, 990 (8th Cir. 1996) (upholding summary judgment for the employer where the plaintiff concealed the severity of her disabling condition even though the employer had some awareness of the plaintiff’s health problems). *See also Miller v. National Casualty Co.*, 61 F.3d 627, 630 (8th Cir. 1995) (employee’s complaints of stress insufficient to put employer on notice of any disability when it had not been informed about a diagnosis of manic depression; to extent symptoms were known, they were not “so obviously manifestations of an underlying disability that it would be reasonable to infer that [her] employer actually knew of the disability”) (quoting *Hedberg v. Indiana Bell Tele. Co.*, 47 F.3d 928, 934 (7th Cir. 1995)). For more discussion on this issue, *see supra* section 9.00.

5. This element is designed to submit the issue of whether the plaintiff is a “qualified individual” under the ADA. If necessary, the phrase “essential functions” may be defined. *See infra* Model Instruction 9.21.

6. It may be that in the majority of cases, the plaintiff requests the provision of a specific accommodation (*e.g.*, a modified work schedule). In some cases, however, the plaintiff may simply notify the employer of his or her need for an accommodation in general. *See, e.g., Kowitz v. Trinity Health*, 839 F.3d 742, 747 (8th Cir. 2016) (employee presented sufficient evidence to raise a genuine issue of material fact as to whether she requested an accommodation; “her notification to her supervisor that she could not obtain the required certification until she had completed physical therapy implied that an accommodation would be required until then”). In such cases, the language of the instruction should be modified.

7. An employer is not obligated to provide an employee the accommodation he or she requests or prefers. *See, e.g., Dick v. Dickinson State University*, 826 F.3d 1054, 1060 (8th Cir. 2016); *Cravens v. Blue Cross and Blue Shield of Kansas City*, 214 F.3d 1011, 1019 (8th Cir.

2000). The employer need only provide some reasonable accommodation. *Hennenfent v. Mid Dakota Clinic, P.C.*, 164 F.3d 419, 422 n.2 (8th Cir. 1998); accord *Kiel*, 169 F.3d at 1137 (“If more than one accommodation would allow the individual to perform the essential functions of the position, ‘the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.’”).

8. Insert the appropriate language depending on the nature of the case (e.g., “discharge,” “failure to hire,” “failure to promote,” or “demotion” case).

9. This language should be used when the defendant is submitting an affirmative defense. The ADA specifically provides for the following affirmative defenses: direct threat (42 U.S.C. § 12113(b)); religious entity (42 U.S.C. § 12113(d)(1)); infectious or communicable disease (42 U.S.C. § 12113(e)(2)); illegal use of drugs (42 U.S.C. § 12114(a)); undue hardship (42 U.S.C. § 12112(b)(5)(A)); and employment qualification standard, test or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)).

### **Committee Comments**

The ADA requires employers to make reasonable accommodations to allow disabled individuals to perform the essential functions of their positions. *Kiel*, 169 F.3d at 1136. Although many individuals with disabilities are qualified to perform the essential functions of jobs without need of any accommodation, this instruction is designed for use in cases where the nature or extent of accommodations provided to an otherwise qualified individual is in dispute. For a discussion of the “interactive process” in which employers and employees may be required to engage to determine the nature and extent of accommodations needed, *see supra* section 9.00.

The term “accommodation” means making modifications to the workplace that allows a person with a disability to perform the essential functions of the job or allows a person with a disability to enjoy the same benefits and privileges as an employee without a disability. *See Kiel*, 169 F.3d at 1136 (“A reasonable accommodation should provide the disabled individual an equal employment opportunity, including an opportunity to attain the same level of performance, benefits, and privileges that is available to similarly situated employees who are not disabled.”).

A “reasonable” accommodation is one that could reasonably be made under the circumstances and may include but is not limited to: making existing facilities used by employees readily accessible to and usable by individuals with disabilities; job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. 29 C.F.R. § 1630.2(o); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112-13 (8th Cir. 1995).

Although part-time work and job restructuring may be considered reasonable accommodations, “[t]his does not mean an employer is required to offer those accommodations in every case.” *Treanor v. MCI Telecomm. Corp.*, 200 F.3d 570, 575 (8th Cir. 2000). Moreover, although job restructuring is a possible accommodation under the ADA, an employer need not reallocate the essential functions of a job. *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 950

(8th Cir. 1999); *Lloyd v. Hardin County, Iowa*, 207 F.3d 1080, 1084 (8th Cir. 2000); *Treanor*, 200 F.3d at 575 (8th Cir. 2000); *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 788 (8th Cir. 1998); *Benson*, 62 F.3d at 1112-13 (citing 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii)). In addition, an employer is not obligated to hire additional employees or reassign existing workers to assist an employee. *Fjellestad*, 188 F.3d at 950 (citing *Moritz*, 147 F.3d at 788). The ADA does not require an accommodation “that would cause other employees to work harder, longer, or be deprived of opportunities.” *Rehrs v. The Iams Co.*, 486 F.3d 353, 357 (8th Cir. 2007).

Reassignment to a vacant position is another possible accommodation under the ADA. *Benson*, 62 F.3d at 1114 (citing 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii)); *see also Fjellestad*, 188 F.3d at 950-51 (the plaintiff created genuine issue of material fact as to whether employer could have reassigned her to a specific, vacant position). In fact, the Eighth Circuit has recognized that, in certain circumstances, reassignment to a vacant position may be “necessary” as a reasonable accommodation. *See Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1018 (8th Cir. 2000). The scope of the reassignment duty is limited, however. *Id.* at 1019. For example, reassignment is an accommodation of “last resort”; that is, the “very prospect of reassignment does not even arise unless accommodation within the individual’s current position would pose an undue hardship.” *Id.* Moreover, the ADA does not require an employer to create a new position as an accommodation. *Id.*; *see also Treanor*, 200 F.3d at 575 (“[T]he ADA does not require an employer to create a new part-time position where none previously existed.”); *Fjellestad*, 188 F.3d at 950 (employer not required to create new position or to create permanent position out of a temporary one). An employer who has an established policy of filling vacant positions with the most qualified applicant is not required to assign the vacant position to a disabled employee who, although qualified, is not the most qualified applicant. *Huber v. Wal-Mart Stores*, 486 F.3d 480, 483-84 (8th Cir. 2007). In addition, an employer is not required to “bump” another employee in order to reassign a disabled employee to that position. *Cravens*, 214 F.3d at 1019. Promotion is not required. *Id.* Finally, the employee must be “otherwise qualified” for the reassignment position. *Id.*

An employer is not obligated to provide an employee the accommodation he or she requests or prefers. *See, e.g., Cravens*, 214 F.3d at 1019. The employer need only provide some reasonable accommodation. *Hennenfent v. Mid Dakota Clinic, P.C.*, 164 F.3d 419, 422 n.2 (8th Cir. 1998); *accord Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1137 (8th Cir. 1999) (“If more than one accommodation would allow the individual to perform the essential functions of the position, ‘the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.’”).

An employer’s showing that the requested accommodation would violate the rules of an existing seniority system (*e.g.*, an employee’s request to remain at a lighter duty position in the mailroom, in disregard of more senior employees’ rights to “bid in” to that position) is ordinarily enough to show that the accommodation is not “reasonable” and to entitle the employer to summary judgment. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 394, 403-04 (2002). The employee may defeat summary judgment and create a jury question by presenting evidence of special circumstances that make an exception to a seniority rule “reasonable” in the particular case. *Id.*, 535 U.S. at 394, 405-406. Examples of special circumstances are the employer’s fairly

frequent exercise of a right to change the seniority system unilaterally and a seniority system containing exceptions such that one further exception is unlikely to matter. *Id.*, 535 U.S. at 405.

The ADA does not require the preferential treatment of individuals with disabilities in terms of job qualifications as a reasonable accommodation. *See Harris v. Polk County*, 103 F.3d 696, 697 (8th Cir. 1996) (employer lawfully denied job to disabled applicant on basis of criminal record that allegedly had resulted from prior psychological problems because “an employer may hold disabled employees to the same standard of law-abiding conduct as all other employees”).

In some cases, the timing of the plaintiff’s alleged disability is critical. If necessary, the language may be modified to incorporate the relevant time frame of the plaintiff’s alleged disability.

The *Seventh* element was added to the model instruction in response to *Hopman v. Union Pacific Railroad*, --- F.4<sup>th</sup> --- (8th Cir. May 19, 2023), in which the Eighth Circuit affirmed the District Court’s judgment as a matter of law in favor of the defendant and specifically called into question the previous version of Model Instruction 9.42:

Another issue is lurking here that we need not resolve in this case. The district court derived jury Instruction No. 10, to which no party objected, from Eighth Circuit Model Civil Jury Instruction 9.42, entitled Elements of Claim: Reasonable Accommodation. The model instruction seems to ignore our holdings in many panel decisions, endorsed by the court en banc in *Faidley*, that an ADA failure-to-accommodate claim requires proof of a prima facie case of discrimination, which in turn requires proof that the employee “suffered an adverse employment decision because of the disability.”

*Id.* at \_\_\_\_\_. *Hopman* was an unusual case in which the plaintiff wanted to bring to work his emotional support service dog (a Rottweiler) as accommodation for his PTSD. The employer denied that request and offered another accommodation – working in the railyard – but the plaintiff returned to his job as a conductor and was later promoted to freight train engineer. The plaintiff also apparently conceded that, while he found it stressful, he was “able to perform the essential functions of his conductor and engineer jobs with or without the requested service dog accommodation.” The case was submitted to the jury on the theory that he was denied modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by the employer’s other similarly situated employees without disabilities. 29 C.F.R. § 1630.2(o)(1)(iii). The Eighth Circuit agreed with the district court “that ‘benefits and privileges of employment’ (1) refers only to employer-provided services; (2) must be offered to non-disabled individuals in addition to disabled ones; and (3) does not include freedom from mental or psychological pain.” *Id.* at \_\_\_\_\_. The Eighth Circuit also emphasized that “ADA failure-to-accommodate cases are fact- and context-specific, and this opinion should be applied accordingly.” *Id.* at \_\_\_\_\_.

### 9.43 ELEMENTS OF CLAIM: CONSTRUCTIVE DISCHARGE

Your verdict must be for plaintiff [insert name] and against defendant [insert name] if all of the following elements have been proved:<sup>1</sup>

*First*, the defendant made the plaintiff's working conditions intolerable; and

*Second*, the plaintiff's [alleged impairment(s)]<sup>2</sup> was a motivating factor<sup>3</sup> in the defendant's actions; and

*Third*, [the defendant acted with the intent of forcing the plaintiff to quit] or [the plaintiff's resignation was a reasonably foreseeable result of the defendant's actions].<sup>4</sup>

Working conditions are intolerable if a reasonable person in the plaintiff's situation would have deemed resignation the only reasonable alternative.<sup>5</sup>

#### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it *is* more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Appropriate language should be chosen to reflect the alleged basis for the discrimination. Other prohibited conduct, such as retaliation against someone who has complained of discrimination, may be appropriate.

3. In *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995), the Eighth Circuit held that an employee is entitled to some relief under the ADA if the employee proves that his or her disability was a "motivating factor" in the employer's decision. In more recent decisions, the Eighth Circuit has questioned the continued viability of the "motivating factor" standard in ADA cases in light of the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) (holding that but-for causation is the standard in an ADEA case). See *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1002 (8th Cir. 2012) and *Oehmke v. Medtronic, Inc.*, 844 F.3d 748, 757, n. 6 (8th Cir. 2016). See also *Canning v. Creighton University*, 995 F.3d 603, 610 (8th Cir. 2021) (agreeing with the district court that "ADEA, ADA and NFEPA [Nebraska Fair Employment Practices Act] claims for age and disability discrimination 'share a common analysis,' all requiring but-for causation" but affirming summary judgment for the defendant on the ground that the plaintiff failed to show that the defendant regarded her as disabled when it terminated her). Given the lack of clarity, the court and the parties may want to consider eliciting findings under the "but-for" and "motivating factor/same decision" standards with, for example, special interrogatories set forth at Model

Instruction 11.90. The Committee recommends that, if the phrase “motivating factor” is used in any instruction, the definition set forth in Model Instruction 5.21, *supra*, be given.

4. Select the appropriate phrase or, in some cases both phrases separated by “or” depending on the evidence. *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 n.13 (8th Cir. 2000) (“To establish her constructive discharge, Ogden needed to show that a reasonable person would have found the conditions of her employ intolerable *and that the employer either intended to force her to resign or could have reasonably foreseen she would do so as a result of its actions*”). (Emphasis added.) *See also Thompson v. Bi-State Development Agency*, 463 F.3d 821, 825 (8th Cir. 2006) (holding, in ADA case, that a constructive discharge occurs “when an employer deliberately renders the employee’s working conditions intolerable and thus forces him to quit his job” and stating that a constructive discharge takes place “only when a reasonable person would find working conditions intolerable”).

5. This paragraph aids the jury by providing a definition of what constitutes intolerable working conditions, and explains that the standard is an objective one. *See Williams v. City of Kansas City, Missouri*, 223 F.3d 749, 753-54 (8th Cir. 2000) (Williams did not show that her resignation was objectively reasonable where she quit without giving her employer a chance to fix the problem); *see also Phillips v. Taco Bell Corp.*, 156 F.3d 884, 890 (8th Cir. 1998) (an employee “has an obligation not to assume the worst and jump to conclusions too quickly.”).

#### **Committee Comments**

This instruction is designed for use in connection with the essential elements instruction in cases where the plaintiff resigned but claims that the employer’s discriminatory actions forced him or her to do so. *See Barrett v. Omaha National Bank*, 726 F.2d 424, 428 (8th Cir. 1984) (“[a]n employee is constructively discharged when he or she involuntarily resigns to escape intolerable and illegal employment requirements”); *Hukkanen v. International Union of Operating Engineers, Hoisting & Portable Local No.101*, 3 F.3d 281, 285 (8th Cir. 1993) (“[c]onstructive discharge plaintiffs thus satisfy Bunny Breads’ intent requirement by showing their resignation was a reasonably foreseeable consequence of their employer’s discriminatory actions,” thus, adding an alternative method of meeting the standard announced in *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981) (employer’s actions “must have been taken with the intention of forcing the employee to quit”). *See also Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 n.13 (8th Cir. 2000) (“To establish her constructive discharge, Ogden needed to show that a reasonable person would have found the conditions of her employ intolerable *and that the employer either intended to force her to resign or could have reasonably foreseen she would do so as a result of its actions*.”) (Emphasis added.) This instruction should be used in lieu of the first and second elements in the essential elements instructions. *See* Model Instructions 5.40 (Title VII), 6.40 (ADEA), 11.40 and 11.41 (42 U.S.C. § 1981), 12.40 and 12.41 (42 U.S.C. § 1983).

## **9.60 ELEMENTS OF DEFENSE: “UNDUE HARDSHIP”—STATUTORY DEFENSE**

Your verdict must be in favor of defendant [insert name] and against plaintiff [insert name] if it has been proved<sup>1</sup> that providing (specify accommodation) would cause an undue hardship on the operation of the defendant’s business.

The term “undue hardship,” as used in these instructions, means an action requiring the defendant to incur significant difficulty or expense when considered in light of the following:

[(1) the nature and cost of (specify accommodation); and

(2) the overall financial resources of the facility involved in the provision of (specify accommodation), the number of persons employed at such facility and the effect on expenses and resources; and

(3) the overall financial resources of the defendant; and

(4) the overall size of the business of the defendant with respect to the number of its employees and the number, type and location of its facilities; and

(5) the type of operation of the defendant, including the composition, structure, and functions of the workforce; and

(6) the impact of (specify accommodation) on the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business; and

and (list any other relevant factors supported by the evidence)].<sup>2</sup>

### **Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. This instruction should be modified, as appropriate, to include only those factors supported by the evidence.

### **Committee Comments**

Under the ADA, an employer must provide a reasonable accommodation to the known physical limitations of a qualified applicant or employee with a disability unless it can show that the accommodation would impose an undue hardship on the business. *See* 42 U.S.C. § 12111(9), 42 U.S.C. § 12112(b)(5) and Model Instruction 9.41, *supra*, Committee Comments. Thus, this instruction should be used to submit the defense of undue hardship. *See* 42 U.S.C. § 12111(10).

Eighth Circuit case law holds that the defendant in any civil case is entitled to a specific instruction on its theory of the case, if the instruction is “legally correct, supported by the evidence and brought to the court’s attention in a timely request.” *Des Moines Bd. of Water Works Trustees v. Alvord, Burdick & Howson*, 706 F.2d 820, 823 (8th Cir. 1983).

## 9.61 ELEMENTS OF DEFENSE: “DIRECT THREAT”—STATUTORY DEFENSE

Your verdict must be in favor of defendant [insert name] and against plaintiff [insert name] if it has been proved<sup>1</sup> that:

*First*, the defendant (specify action(s) taken with respect to the plaintiff) because the plaintiff posed a direct threat to the health or safety of [(the plaintiff) (others) (the plaintiff or others)]<sup>2</sup> in the workplace; and

*Second*, such direct threat could not be eliminated<sup>3</sup> by reasonable accommodation.

A direct threat means a significant risk of substantial harm to the health or safety of the person or other persons that cannot be eliminated by reasonable accommodation. The determination that a direct threat exists must be based on an individualized assessment of the plaintiff’s present ability to safely perform the essential functions of the job.

In determining whether a person poses a direct threat, you must consider: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the likely time before the potential harm occurs.

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Select the word or phrase that best describes the defendant’s theory.

3. The term “direct threat” is defined by the ADA as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” *See* 42 U.S.C. § 12111 (3). The applicable regulations define “direct threat” as a “significant risk of substantial harm to the health or safety of *the individual* or others that cannot be eliminated *or reduced* by reasonable accommodation.” *See* 29 C.F.R. § 1630.2(r) (emphasis added).

### Committee Comments

This instruction should be used in submitting the defense of direct threat. *See* 42 U.S.C. § 12111(3); 29 C.F.R. 1630.2(r). Eighth Circuit case law holds that the defendant in any civil case is entitled to a specific instruction on its theory of the case, if the instruction is “legally correct, supported by the evidence and brought to the court’s attention in a timely request.” *Des Moines Bd. of Water Works Trustees v. Alvord, Burdick & Howson*, 706 F.2d 820, 823 (8th Cir. 1983).

Under the ADA, an employer may apply its qualification standards, tests, or selection criteria to screen out, deny a job to, or deny a benefit of employment to a disabled person, if such criteria are job-related and consistent with business necessity and if the person cannot perform the essential function of the position with reasonable accommodation. 42 U.S.C. § 12113(a); *Belk v. Southwestern Bell Telephone Co.*, 194 F.3d 946, 951, n. 5 (8th Cir. 1999).

The ADA includes within the term “qualification standards” the requirement that the employee not pose a direct threat to the health or safety of other individuals in the workplace. *See* 42 U.S.C. § 12133(b). The Supreme Court has upheld 29 C.F.R. §§ 1630.2(r) and 1630.15(b)(2), that also allow an employer to adopt a qualification standard requiring that the individual not pose a direct threat to his or her own safety. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 78 (2002). The employer must validate the test or qualification standard “for job-relatedness to the specific skills and physical requirements of the sought-after position.” *Belk*, 194 F.3d at 951.

For a discussion of the “direct threat” defense in the health care context, *see Bragdon v. Abbott*, 524 U.S. 624, 649-50 (1998) (health care professional has duty to assess risk based on objective, scientific information available to him or her and others in profession).

## **9.62 ELEMENTS OF DEFENSE: “GOOD FAITH” DEFENSE TO COMPENSATORY AND PUNITIVE DAMAGES**

If you find in favor of plaintiff [insert name] under Instruction \_\_\_\_\_,<sup>1</sup> then you must answer the following question in the verdict form(s): Has it been proved<sup>2</sup> that the defendant made a good faith effort and consulted with the plaintiff, to identify and make a reasonable accommodation?

### **Notes on Use**

1. Fill in the number or title of the “reasonable accommodation” essential elements instruction here (Model Instruction 9.42, *supra*).

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

### **Committee Comments**

This instruction is designed for use in cases where a discriminatory practice involves the provision of a reasonable accommodation. The language is derived from 42 U.S.C. § 1981a(a)(3), which provides that the plaintiff may not recover damages if the defendant “demonstrates good faith efforts” to arrive at a reasonable accommodation with the plaintiff.

If the jury answers the above interrogatory in the affirmative, the plaintiff may still be entitled to attorneys’ fees and nominal damages.

## 9.70 DAMAGES: ACTUAL

If you find in favor of the plaintiff under Instruction \_\_\_\_\_<sup>1</sup> [and if you answer “no” in response to Instruction \_\_\_\_\_,]<sup>2</sup> then you must award the plaintiff such sum as you find will fairly and justly compensate the plaintiff for any damages you find the plaintiff sustained as a direct result of [describe the defendant’s decision--e.g., “the defendant’s failure to hire the plaintiff”]. The plaintiff’s claim for damages includes distinct types of damages and you must consider them separately.

*First*, you must determine the amount of any wages and fringe benefits<sup>3</sup> the plaintiff would have earned in [(his) (her)] employment with the defendant if [(he) (she)] had not been discharged on [fill in date of discharge] through the date of your verdict,<sup>4</sup> minus the amount of earnings and benefits that the plaintiff received from other employment during that time.

*Second*, you must determine the amount of any other damages sustained by the plaintiff, such as [list damages supported by the evidence].<sup>5</sup> You must enter separate amounts for each type of damages in the verdict form and must not include the same items in more than one category.<sup>6</sup>

[You are also instructed that the plaintiff has a duty under the law to “mitigate” [(his) (her)] damages--that is, to exercise reasonable diligence under the circumstances to minimize [(his) (her)] damages. Therefore, if it has been proved<sup>7</sup> that the plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [(him) (her)], you must reduce [(his) (her)] damages by the amount [(he) (she)] reasonably could have avoided if [(he) (she)] had sought out or taken advantage of such an opportunity.]<sup>8</sup>

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.]<sup>9</sup>

## Notes on Use

1. Fill in the number or title of the essential elements instruction here.
2. Fill in the number or title of the “same decision” instruction here. Even if the jury finds that the defendant would have made the same decision regardless of the plaintiff’s disability, the Court may direct the jury to determine the amount of damages, if any, sustained by the plaintiff. This approach will protect against the necessity of a retrial of the case in the event the underlying liability determination is reversed on appeal.
3. When certain benefits, such as employer-subsidized health insurance, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. *See Hartley v. Dillard’s, Inc.*, 310 F.3d 1054, 1062 (8th Cir. 2002) (discussing lost benefits in ADEA case); *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104, 1111 (8th Cir. 1994) (allowing insurance replacement costs, lost 401(k) contributions in ADEA case).
4. Front pay is an equitable issue for the judge to decide. *Salitros v. Chrysler Corp.*, 306 F.3d 562, 571 (8th Cir. 2002). In some cases, the defendant will assert some independent post-discharge reason--such as a plant closing or sweeping reduction in force--as to why the plaintiff would have been terminated in any event before trial. *See, e.g., Cleverly v. Western Elec. Co.*, 450 F. Supp. 507 (W.D. Mo. 1978), *aff’d*, 594 F.2d 638 (8th Cir. 1979). In those cases, this instruction must be modified to submit this issue for the jury’s determination.
5. Under the Civil Rights Act of 1991, a prevailing ADA plaintiff may recover damages for mental anguish and other personal injuries. The types of damages mentioned in § 1981a(b)(3) include “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.” For cases involving the provision of a reasonable accommodation (Model Instruction 9.42, *supra*), the plaintiff may not recover such damages if the defendant demonstrated “good faith efforts” to arrive at a reasonable accommodation with the plaintiff. *See supra* Model Instruction 9.62.
6. If the issue of “front pay” is submitted to the jury, it should be distinguished from an award of compensatory damages, that is subject to the statutory cap. *See infra* Committee Comments. Accordingly, separate categories of damages must be identified.
7. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.
8. This paragraph is designed to submit the issue of “mitigation of damages” in appropriate cases. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983); *Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808-09 (8th Cir. 1982).
9. This paragraph may be given at the trial court’s discretion.

## Committee Comments

The Civil Rights Act of 1991 makes three significant changes in the law regarding the recovery of damages in Title VII cases. First, the plaintiff prevails on the issue of liability by showing that unlawful discrimination was a “motivating factor” in the relevant employment decision; however, the plaintiff cannot recover any actual damages if the employer shows that it would have made the same employment decision even in the absence of any discriminatory intent. 42 U.S.C. § 2000e-2(g)(2)(B). Second, the Civil Rights Act permits the plaintiff to recover general compensatory damages in addition to the traditional employment discrimination remedy of back pay and lost benefits. *Id.* § 1981a(a). Third, the Act expressly limits the recovery of general compensatory damages to certain dollar amounts, ranging from \$50,000 to \$300,000 depending upon the size of the employer. *Id.* § 1981a(b).

This instruction is designed to submit the standard back pay formula of lost wages and benefits reduced by interim earnings and benefits. See *Fiedler*, 670 F.2d at 808-09. This instruction may be modified to articulate the types of interim earnings that should be offset against the plaintiff’s back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. See *Krause v. Dresser Indus.*, 910 F.2d 674, 680 (10th Cir. 1990); *Cornetta v. United States*, 851 F.2d 1372, 1381 (Fed. Cir. 1988); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985). Unemployment compensation, Social Security benefits or pension benefits ordinarily are not offset against a back pay award. See *Doyne v. Union Elec. Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (holding that pension benefits are a “collateral source benefit”); *Gaworski v. IIT Commercial Fin. Corp.*, 17 F.3d 1104, 1112-14 (8th Cir. 1994) (holding that unemployment benefits were not deductible from back pay awards and observing that “[m]ost courts have refused to deduct such benefits as social security and unemployment compensation from ADEA awards”). *But see Blum v. Witco Chem. Corp.*, 829 F.2d 367, 375 (3d Cir. 1987) (“pension benefits received from a subsequent employer are simply another form of earned income, which, of course, may be set off from a front pay award consistent with plaintiff’s duty to mitigate damages”); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989) (deductibility of unemployment compensation is within trial court’s discretion); *Horn v. Duke Homes*, 755 F.2d 599, 607 n.12 (7th Cir. 1985) (same); *EEOC v. Enterprise Ass’n Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976) (same). However, because Title VII, as amended by the Civil Rights Act of 1991, no longer limits recovery of damages, the instruction permits the recovery of general damages for pain, suffering, humiliation, and the like.

Because the law imposes a limit on general compensatory damages but does not limit the recovery of back pay and lost benefits, the Committee believes that these types of damages must be considered and assessed separately by the jury. Otherwise, if the jury awarded a single dollar amount, it would be impossible to identify the portion of the award that was attributable to back pay and the portion that was attributable to “general damages.” As a result, the trial court would not be able to determine whether the jury’s award exceeded the statutory limit.

In some cases, a discrimination plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy “in lieu of” reinstatement, front pay is an issue for the court, not the jury. *Salitros v. Chrysler Corp.*, 306 F.3d 562, 571 (8th Cir. 2002). If the trial court

submits the issue of front pay to the jury, the jury's determination may be binding. *See Doyne*, 953 F.2d at 451 (ADEA case).

In *Kramer v. Logan County School Dist. No. R-1*, 157 F.3d 620, 625-26 (8th Cir. 1998), the court ruled that “front pay is an equitable remedy excluded from the statutory limit on compensatory damages provided for in [42 U.S.C.] § 1981a(b)(3).”

Although the Civil Rights Act of 1991 expressly limits the amount of compensatory and punitive damages depending upon the size of the employer, the jury must not be advised on any such limitation. 42 U.S.C. § 1981a(c)(2). Instead, the trial court will simply reduce the verdict by the amount of any excess.

## 9.71 DAMAGES: NOMINAL

If you find in favor of the plaintiff under Instruction \_\_\_\_\_<sup>1</sup> [and if you answer “no” in response to Instruction \_\_\_\_\_,<sup>2</sup>] but you do not find that the plaintiff’s damages have monetary value, then you must return a verdict for the plaintiff in the nominal amount of One Dollar (\$1.00).<sup>3</sup>

### Notes on Use

1. Fill in the number or title of the essential elements instruction here.
2. Fill in the number or title of the “same decision” instruction here. Even if the jury finds that the defendant would have made the same decision regardless of the plaintiff’s disability, the court may direct the jury to determine the amount of damages, if any, awarded to the plaintiff. This approach will protect against the necessity of a retrial of the case in the event the underlying liability determination is reversed on appeal.
3. One dollar (\$1.00) arguably is the required amount in cases where nominal damages are appropriate. Nominal damages are appropriate when the jury is unable to place a monetary value of the harm that the plaintiff suffered from the violation of his rights. *Dean v. Civiletti*, 670 F.2d 99, 101 (8th Cir. 1982) (Title VII); *cf. Cowans v. Wyrick*, 862 F.2d 697, 699 (8th Cir. 1988) (in prisoner civil rights action, nominal damages are appropriate where the jury cannot place a monetary value of the harm suffered by the plaintiff); *Haley v. Wyrick*, 740 F.2d 12, 14 (8th Cir. 1984).

### Committee Comments

Most employment discrimination cases involve lost wages and benefits. In some case, however, the jury may be permitted to return a verdict for only nominal damages. For example, if the plaintiff was given severance pay and was able to secure a better paying job, the evidence may not support an award of back pay, but may support an award of compensatory damages. This instruction is designed to submit the issue of nominal damages in appropriate cases.

## 9.72 DAMAGES: PUNITIVE

In addition to the damages mentioned in the other instructions, the law permits the jury under certain circumstances to award punitive damages.

If you find in favor of the plaintiff under Instruction(s) \_\_\_\_\_,<sup>1</sup> and if you answer “no” in response to Instruction \_\_\_\_\_,<sup>2</sup> then you must decide whether the defendant acted with malice or reckless indifference to the plaintiff’s right not to be discriminated against<sup>3</sup> on the basis of a disability. The defendant acted with malice or reckless indifference if:

it has been proved<sup>4</sup> that (insert the name(s) of the defendant or manager<sup>5</sup> who terminated<sup>5</sup> the plaintiff’s employment) knew that the [termination]<sup>6</sup> was in violation of the law prohibiting disability discrimination, or acted with reckless disregard of that law.<sup>7</sup>

[However, you may not award punitive damages if it has been proved [that the defendant made a good-faith effort to comply with the law prohibiting disability discrimination].<sup>8</sup>

If it has been proved that the defendant acted with malice or reckless indifference to the plaintiff’s rights [and did not make a good faith effort to comply with the law,] then, in addition to any other damages to which you find the plaintiff entitled, you may, but are not required to, award the plaintiff an additional amount as punitive damages for the purposes of punishing the defendant for engaging in such misconduct and deterring the defendant and others from engaging in such misconduct in the future. You should presume that the plaintiff has been made whole for [(his) (her) (its)] injuries by the damages awarded under Instruction \_\_\_\_\_.<sup>9</sup>

In determining whether to award punitive damages, you should consider whether the defendant’s conduct was reprehensible.<sup>10</sup> In this regard, you may consider whether the harm suffered by the plaintiff was physical or economic or both; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether the defendant’s conduct that harmed the plaintiff also caused harm or posed a

risk of harm to others; and whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed the plaintiff.<sup>11</sup>

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. How much harm the defendant's wrongful conduct caused the plaintiff [and could cause the plaintiff in the future].<sup>12</sup> [You may not consider harm to others in deciding the amount of punitive damages to award.]<sup>13</sup>

2. What amount of punitive damages, in addition to the other damages already awarded, is needed, considering the defendant's financial condition, to punish the defendant for [(his) (her) (its)] wrongful conduct toward the plaintiff and to deter the defendant and others from similar wrongful conduct in the future.

3. [The amount of fines and civil penalties applicable to similar conduct].<sup>14</sup>

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to the plaintiff.<sup>15</sup>

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.]<sup>16</sup>

[You may not award punitive damages against the defendant[s] for conduct in other states.]<sup>17</sup>

#### **Notes on Use**

1. Fill in the number or title of the essential elements instruction here. *See supra* Model Instructions 9.40, 9.41 and 9.42.

2. Fill in the number or title of the "same decision" instruction if applicable. *See supra* Model Instruction 9.10.

3. Although a finding of discrimination ordinarily subsumes a finding of intentional misconduct, this language is included to emphasize the threshold for recovery of punitive damages. Under the Civil Rights Act of 1991, the standard for punitive damages is whether the defendant acted “with malice or with reckless indifference to the [plaintiff’s] federally protected rights.” Civil Rights Act of 1991, § 102 (codified at 42 U.S.C. § 1981a(b)(1)).

4. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

5. Use the name of the defendant, the manager who took the action, or other descriptive phrase such as “the manager who fired the plaintiff.”

6. This language is designed for use in a discharge case. In a “failure to hire,” “failure to promote,” “demotion,” or “constructive discharge” case, the language must be modified.

7. See *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 535, 536 (1999) (holding that “‘malice’ or ‘reckless indifference’ pertain to the employer’s knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination” and that “an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages”); *Canny v. Dr. Pepper/Seven-Up Bottling Grp., Inc.*, 439 F.3d 894, 903 (8th Cir. 2006) (citing *Kolstad* and observing that an award of punitive damages may be inappropriate when the underlying theory of discrimination is novel or poorly recognized or “when the employer (1) is unaware federal law prohibits the relevant conduct, (2) believes the discriminatory conduct is lawful, or (3) reasonably believes there is a bona fide occupational qualification defense for the discriminatory conduct”).

8. Use this phrase only if the good faith of the defendant is to be presented to the jury. This two-part test was articulated by the Supreme Court in *Kolstad v. American Dental Ass’n*, 527 U.S. 526 (1999), a Title VII case. For a discussion of *Kolstad*, see the Committee Comments. It is not clear from the case who bears the risk of nonpersuasion on the good faith issue. The Committee predicts that case law will place the burden on the defendant to raise the issue and prove it.

9. Fill in the number or title of the actual damages or nominal damages instruction here.

10. The word “reprehensible” is used in the same sense as it is used in common parlance. The Supreme Court, in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003), stated: “It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” In *Philip Morris USA v. Williams*, 549 U.S. 346, 355-57 (2007), the Supreme Court held that, while harm to persons other than the plaintiff may be considered in determining reprehensibility, a jury may not punish for the harm caused to persons other than the plaintiff. The Court stated that procedures were necessary to assure “that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.” *Id.* at 355.

11. Any item not supported by the evidence, of course, should be excluded.

12. This sentence may be used if there is evidence of future harm to the plaintiff.

13. A paragraph instructing the jury that any punitive damages award should not include an amount for harm suffered by persons who are not parties to the case may be necessary if evidence concerning harm suffered by nonparties has been introduced. *See Philip Morris USA*, 549 U.S. at 355-57; *State Farm*, 538 U.S. 408 at (2003); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004).

14. Insert this phrase only if evidence has been introduced, or the court has taken judicial notice, of fines and penalties for similar conduct. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996), noting “civil penalties authorized in comparable cases” as a guidepost to be considered. *See also State Farm*, 538 U.S. at 428.

15. *See State Farm*, 538 U.S. at 425 (stating that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process” and observing that: “Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1 [citing *BMW*, 517 U.S. at 582] or, in this case, of 145 to 1”).

16. The bracketed language is available for use if punitive damages claims are submitted against more than one defendant.

17. If evidence has been introduced concerning conduct by the defendant that was legal in the state where it was committed, the jury must be told that they cannot award punitive damages against the defendant for such conduct. *See State Farm*, 538 U.S. at 422; *BMW*, 517 U.S. at 572-73; *Williams*, 378 F.3d at 797-98. This issue normally will not come up in cases under federal law. In any case where evidence is admitted for some purposes but may not be considered by the jury in awarding punitive damages, the court should give an appropriate limiting instruction.

### **Committee Comments**

Under the Civil Rights Act of 1991, a Title VII or ADA plaintiff may recover damages by showing that the defendant engaged in discrimination “with malice or with reckless indifference to [his or her] federally protected rights.” *See* 42 U.S.C. § 1981a(b)(1). *See also* Model Instruction 4.72, *supra*, on punitive damages and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). In 1999, the Supreme Court explained that the terms “malice” and “reckless” ultimately focus on the actor’s state of mind. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 535 (1999). The Court added that the terms pertain to the employer’s knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. *Id.* To be liable for punitive damages, the employer must at least discriminate in the face of a perceived risk that its actions will violate federal law. *Id.* at 536. Rejecting the conclusion of the lower court that punitive damages were limited to cases involving intentional discrimination of an “egregious” nature, the Court held that a plaintiff is not required to show egregious or outrageous discrimination independent of the employer’s state of mind. *Id.* at 546.

The *Kolstad* case also established a good-faith defense to place limits on an employer's vicarious liability for punitive damages. Recognizing that Title VII and the ADA are both efforts to promote prevention of discrimination as well as remediation, the Court held that an employer may not be vicariously liable for the discriminatory decisions of managerial agents where those decisions are contrary to the employer's good faith efforts to comply with Title VII or the ADA. *Id.* at 545. The Court did not clarify what party has the burden of proof on the issue of good faith.

For cases involving the provision of a reasonable accommodation (*see supra* Model Instruction 9.42), the plaintiff may not recover punitive damages if the defendant demonstrated "good faith efforts" to arrive at a reasonable accommodation with the plaintiff. *See infra* Model Instruction 9.62.

Under the ADA, as amended by the Civil Rights Act of 1991, the upper limit on an award including punitive and compensatory damages is \$300,000. *See* 42 U.S.C. § 1981a(b)(3) (limiting the sum of compensatory and punitive damages awards depending on the size of the employer). For a discussion of submitting punitive damages to the jury under both state and federal law, *see Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 575-78 (8th Cir. 1997).

This instruction attempts to incorporate the constitutionally relevant principles set forth by the Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459-62 (1993). In *State Farm*, 538 U.S. at 417, the court observed: "We have admonished that '[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and 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 Motor*, 512 U.S. at 432). *See Baker v. John Morrell & Co.*, 266 F. Supp. 2d 909, 961, n. 14 (N.D. Iowa 2003), *aff'd*, 382 F.3d 816 (8<sup>th</sup> Cir. 2004), and *In Re Exxon Valdez*, 296 F. Supp. 2d 1071, 1080, n. 28 (D. Alaska 2004), for examples of punitive damages instructions in which the court attempted to incorporate constitutional standards.

The last paragraph is based on *State Farm*, 538 U.S. at 421, where the court held: "A state cannot punish a defendant for conduct that may have been lawful where it occurred...Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." The court specifically mandated that: "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." *State Farm*, 538 U.S. at 422.

## 9.80 GENERAL VERDICT FORM

### VERDICT

**Note:** Complete the following paragraph by writing in the name required by your verdict.

On the claim of plaintiff [Jane Doe] under the Americans with Disabilities Act,<sup>1</sup> [as submitted in Instruction \_\_\_\_\_],<sup>2</sup> we find in favor of:

---

(Plaintiff Jane Doe)                      or                      (Defendant XYZ, Inc.)

**Note:** Answer the next question only if the above finding is in favor of the plaintiff. If the above finding is in favor of the defendant, have your foreperson sign and date this form because you have completed your deliberations on this claim.

Has it been proved<sup>3</sup> that the defendant would have discharged the plaintiff regardless of [(his) (her)] (specify alleged impairment(s))?<sup>4</sup>

\_\_\_\_\_Yes                      \_\_\_\_\_No

(Mark an “X” in the appropriate space)

**Note:** Complete the following paragraphs only if your answer to the preceding question is “no.” If you answered “yes” to the preceding question, have your foreperson sign and date this form because you have completed your deliberations on this claim.

We find the plaintiff’s lost wages and benefits through the date of this verdict to be:

\$ \_\_\_\_\_ (stating the amount or, if none, write the word “none”).

We find the plaintiff’s other damages, excluding lost wages and benefits, to be:

\$ \_\_\_\_\_ (stating the amount [or, if you find that the plaintiff’s damages do not have a monetary value, write in the nominal amount of One Dollar (\$1.00)]).

[We assess punitive damages against the defendant, as submitted in Instruction \_\_\_\_\_, as follows:

\$ \_\_\_\_\_ (stating the amount or, if none, write the word “none”)].<sup>5</sup>

---

Foreperson

Dated: \_\_\_\_\_

#### **Notes on Use**

1. The bracketed phrase should be submitted when the plaintiff submits multiple claims to the jury.
2. The number or title of the “essential elements” instruction may be inserted here. *See* Model Instruction 9.40.
3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.
4. This question submits the “same decision” issue to the jury. *See* Model Instruction 9.01.
5. This paragraph should be included if the evidence is sufficient to support an award of punitive damages. *See* Model Instruction 9.72.

**9.81 GENERAL VERDICT FORM**  
**FAILURE TO MAKE REASONABLE ACCOMMODATION**

VERDICT

**Note:** Complete the following paragraph by writing in the name required by your verdict.

On the claim of plaintiff [Jane Doe] under the Americans with Disabilities Act,<sup>1</sup> [as submitted in Instruction \_\_\_\_],<sup>2</sup> we find in favor of:

---

(Plaintiff Jane Doe)                      or                      (Defendant XYZ, Inc.)

**Note:** Answer the next question only if the above finding is in favor of the plaintiff. If the above finding is in favor of the defendant, have your foreperson sign and date this form because you have completed your deliberations on this claim.

Has it been proved<sup>3</sup> that the defendant made a good faith effort and consulted with the plaintiff, to identify and make a reasonable accommodation?<sup>4</sup>

\_\_\_\_\_Yes                      \_\_\_\_\_No  
(Mark an “X” in the appropriate space)

**Note:** Complete the following paragraphs only if you answer to the preceding question is “no.” If you answered “yes” to the preceding question, have your foreperson sign and date this form because you have completed your deliberations on this claim.

We find the plaintiff’s damages to be:

\$ \_\_\_\_\_ (stating the amount [or, if you find that the plaintiff's damages do not have a monetary value, write in the nominal amount of One Dollar (\$1.00)]).

[We assess punitive damages against the defendant, as submitted in Instruction \_\_\_\_\_, as follows:

\$ \_\_\_\_\_ (stating the amount or, if none, write the word "none").<sup>5</sup>

---

Foreperson

Dated: \_\_\_\_\_

#### Notes on Use

1. The bracketed phrase should be submitted when the plaintiff submits multiple claims to the jury.
2. The number or title of the "essential elements" instruction may be inserted here. *See* Model Instruction 9.42.
3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.
4. This question submits the "good faith" issue to the jury. *See* Model Instruction 9.62.
5. This paragraph should be included if the evidence is sufficient to support an award of punitive damages. *See* Model Instruction 9.72.

## 10. EMPLOYMENT—RETALIATION (ANTI-DISCRIMINATION STATUTES)

### 10.00 OVERVIEW

The following instructions are designed for use in cases where the plaintiff alleges that he or she was discharged or otherwise retaliated against because he or she opposed an unlawful employment practice, or “participated in any manner” in a proceeding under one of the discrimination statutes. Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and other federal employment laws expressly prohibit retaliation against employees who engage in “protected activity.” *See, e.g.*, 42 U.S.C. § 2000e-3 (Title VII); 29 U.S.C. § 623(d) (ADEA); 29 U.S.C. § 2615 (FMLA). In addition, 42 U.S.C. § 1981 has been construed to prohibit retaliation against employees who engage in protected opposition to racial discrimination. *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1059 (8th Cir. 1997). Moreover, the anti-retaliation laws may, in some circumstances, extend protection to cover “third-party reprisals,” in which an employer takes adverse action against one individual because of that person’s close relationship with another individual who engaged in protected activity. *See Thompson v. North America Stainless, LP*, 562 U.S. 170, 131 S.Ct. 863 (2011) (where employee engages in protected activity, and employer retaliates by discharging employee’s fiancé, fiancé is an aggrieved person with standing to sue under Title VII’s anti-retaliation provision).

Although the Americans with Disabilities Act (ADA) prohibits retaliation (42 U.S.C. § 12203), some courts have held that there is no statutory basis for jury trial, or award of compensatory or punitive damages, in ADA retaliation claims. *See Johnson v. Royal Oak Enters.*, 2010 U.S. Dist. LEXIS 39300 (W.D. Mo. Apr. 21, 2010); *Brown v. City of Lee’s Summit*, 1999 U.S. Dist. LEXIS 20935 (W.D. Mo. June 1, 1999); *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261 (9th Cir. 2009) (and cases cited therein).

These instructions are designed to submit the issue of liability in a retaliation case under Title VII and other federal discrimination laws. To establish a claim of retaliation, the plaintiff must show (1) he or she engaged in a “protected activity,” (2) the employer took or engaged in a materially adverse action, and (3) a causal connection existed between the protected activity and the materially adverse action. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68, 126 S. Ct. 2405, 2414-15 (2006); *see, e.g., Muldrow v. City of St. Louis Mo.*, 30 F.4th 680, 691 (8th Cir. 2022). An action is “materially adverse” if “it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination,” *Burlington*, 548 U.S. at 68; *Vajdl v. Mesabi Academy of Kidspeace, Inc.*, 484 F.3d 546, 552 (8th Cir. 2007).

#### **Protected Activity: Opposition**

A retaliation plaintiff does not need to prove that the underlying employment practice by the employer was unlawful; instead, employees are protected from retaliation if they oppose an employment practice that they reasonably and in good faith believe to be unlawful. *See Clark County School District v. Breeden*, 532 U.S. 268 (2001); *Gruttemeyer v. Transit Auth.*, 31 F.4th 638, 649 (8th Cir. 2022).

In order to be “protected activity,” the employee’s complaint must relate to unlawful employment practices; opposition to alleged discrimination against students or customers is not protected because it does not relate to an unlawful employment practice. *Artis v. Francis Howell*, 161 F.3d 1178 (8th Cir. 1998). As a general proposition, however, the threshold for engaging in “protected activity” is fairly low: the touchstone is simply whether the employee had a reasonable, good faith belief that the employer had committed an unlawful employment practice. *Gruttemeyer*, 31 F.4th at 649; *Stuart v. General Motors Corp.*, 217 F.3d 621, 634 (8th Cir. 2000); *Buettner v. Eastern Arch Coal Sales Co.*, 216 F.3d 707, 714 (8th Cir. 2000) .

### **Protected Activity: Participation**

In addition to prohibiting retaliation based on an employee’s “opposition” to what he or she reasonably believes to be an unlawful employment practice, Title VII and other federal employment laws protect employees from retaliation based on their “participation” in proceedings under these statutes. *E.g.*, 42 U.S.C. § 2000e-3 (Title VII); 29 U.S.C. § 623(d) (ADEA). *Cross v. Cleaver*, 142 F.3d 1059, 1071 (8th Cir. 1988). Protected “participation” appears to include filing a charge with the EEOC (or a parallel state or local agency), filing a lawsuit under one of the federal employment statutes, or serving as a witness in an EEOC case or discrimination lawsuit. Unlike “opposition” cases, employees who “participate” in these proceedings appear to have absolute protection from retaliation, irrespective of whether the underlying claim was made reasonably and in good faith. *Benson v. Little Rock Hilton Inn*, 742 F.2d 414 (8th Cir. 1984).

### **Materially Adverse Action**

To qualify as unlawful retaliation, the employer must have taken a “materially adverse” action. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68, 126 S. Ct. 2405, 2414-15 (2006). To be “materially adverse,” the plaintiff must show that a reasonable employee in plaintiff’s position might well have been “dissuaded” from filing or supporting a charge of discrimination. *Id.* at 68. This is an objective standard. *Id.*

The requisite “materially adverse” action is not limited to actions that affect the terms and conditions of employment. *Id.* Indeed, it extends beyond workplace and employment- related acts and harm. *Id.* On the other hand, trivial actions are not materially adverse. *Id.* at 1215-16. Petty slights, minor annoyances, or a simple lack of good manners normally are not sufficient to demonstrate that an action is materially adverse. *Id.* Both the action and its context must be examined, as acts that may be immaterial in some situations may be material in others. *Id.*; *see Clegg v. Arkansas Dept. of Correction*, 2007 WL 2296414 (8th Cir. 2007); *Stewart v. Independent Sch. Dist. No. 196*, 481 F.3d 1034 (8th Cir. 2007). The “materially adverse” element may be met by “the ‘cumulative effect’ of an employer’s alleged retaliatory conduct, if the acts, considered in the aggregate, would dissuade a reasonable employee from reporting discrimination.” *Quinn v. St. Louis Cnty.*, 653 F.3d 745, 751 (8th Cir. 2011).

In appropriate cases, the question of whether a particular action is “materially adverse” may be decided by the court. *See, e.g., Stewart v. Independent School District No. 196*, 481 F. 3d 1034, 1046 (8th Cir. 2007) (affirming summary judgment where, “given the practical considerations involved in holding a position open for an employee during a two-year absence,

no reasonable jury could find that the lack of immediate support and lack of well-defined duties in January 2005 is the type of response that could ‘dissuade[] a reasonable worker from making or supporting a charge of discrimination’”) (quoting *Burlington Northern*, 126 S. Ct. at 2415); *Morales-Vallellanes v. Potter*, 605 F.3d 27, 33 (1st Cir. 2010) (“Often, whether an employee has suffered a materially adverse employment action capable of supporting claims under Title VII is a question of law for the court.”). *See also Hyde v. K.B. Home, Inc.*, 355 Fed. Appx. 266, 268 (11th Cir. 2009) (whether an employment action is adverse is “a question of fact, although one still subject to the traditional rules governing summary judgment”); *Bergeron v. Cabral*, 560 F.3d 1, 6 n.1 (1st Cir. 2009) (“the existence of an adverse employment action may be a question for the jury when there is a dispute concerning the manner in which the action taken affected the plaintiff-employee”) *abrogated on other grounds by Maldonado v. Fontanes*, 568 F.3d 263 (1st Cir.2009); *McArdle v. Dell Products, L.P.*, 293 Fed. Appx. 331, 337 (5th Cir. 2008) (“Whether a reasonable employee would view the challenged action as materially adverse involves questions of fact generally left for a jury to decide.”).

### **Causal Connection**

Plaintiff must show there was a causal connection between the plaintiff’s protected activity and the employer’s materially adverse action. It has been held that timing alone may be insufficient to establish causation. *Compare Auer v. City of Minot*, 896 F.3d 854, 860 (8th Cir. 2018); *Scroggins v. University of Minnesota*, 221 F.3d 1042 (8th Cir. 2000), *with Wilson v. Ark. Dept. of Hum. Servs.*, 850 F.3d 368, 373 (8th Cir. 2017); *Bassett v. City of Minneapolis*, 211 F.3d 1097, 1105 (8th Cir. 2000); *see also Smith v. St. Louis University*, 109 F.3d 1261, 1266 (8th Cir. 1997) (“The passage of time between events does not by itself foreclose a claim of retaliation”). The proximity between the plaintiff’s protected activity and the employer’s materially adverse action often is a strong circumstantial factor. *Smith*, 109 F.3d at 1266; *Bassett*, 211 F.3d at 1105. In *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273 (2001), the Supreme Court noted that the “cases that accept mere temporal proximity between an employer’s knowledge of protected activity” and a materially adverse employment action “as sufficient evidence of casualty to establish a prima facie case uniformly hold that the temporal proximity must be ‘very close.’”

### **Standard for Causation**

Under Title VII, as amended by the Civil Rights Act of 1991, the standard for causation to establish liability for discrimination is whether discriminatory intent was a “motivating factor” in the employer’s decision. 42 U.S.C. § 2000e-2(m) (pretext cases); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *see also Pedigo v. P.A.M. Transp. Inc.*, 60 F.3d 1300 (8th Cir. 1995) (applying “motivating factor” causation standard in ADA case). However, the Supreme Court has held that “a plaintiff making a retaliation claim under [Title VII] § 2000e-3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.” *University of Texas Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 133 S.Ct. 2517, 2534 (2013) (noting that “this standard requires the plaintiff to show ‘that the harm would not have occurred’ in the absence of – that is, but for – the defendant’s conduct.”) (*citing Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) and Restatement of Torts § 431, comment a). The Supreme Court in *Nassar* relied heavily on the “lack of any meaningful textual difference between” Title VII’s anti-retaliation provision, which prohibits retaliation “because” the

employee engaged in certain protected activity, and the “because of” language in the Age Discrimination in Employment Act (ADEA), for which the *Gross* court previously adopted the “but-for” standard. *Id.* at 2528.

In *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, 1739 (2020), the Supreme Court clarified that events may have multiple but-for causes, and “a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision. So long as the plaintiff’s [protected characteristic] was one but-for cause of that decision, that is enough to trigger the law.” “In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.” *Id.*

Since *Nassar*, the Eighth Circuit has expressly extended the “but-for” standard to retaliation cases arising under the ADA and 42 U.S.C. § 1981. *Oehmke v. Medtronic, Inc.*, 844 F.3d 748, 758 (8th Cir. 2016) (ADA retaliation at summary judgment stage); *Wright v. St. Vincent Health System*, 730 F.3d 732, 738 n.5 (8th Cir. 2013) (§ 1981 retaliation). The Eighth Circuit also applied the “but-for” standard in a retaliation case under the Equal Pay Act, which is part of the Fair Labor Standards Act (see 29 U.S.C. §§ 206(d) and 218c(a)), *Donathan v. Oakley Grain, Inc.*, 861 F.3d 735, 739-40 n. 3 (8th Cir. 2017) (noting that the parties did not argue a more lenient causation standard applied),

Further, the Supreme Court’s analysis in *Nassar* suggests that the “but-for” standard applies to other anti-retaliation statutes that prohibit retaliation “because” an employee engaged in protected activity. Anti-retaliation statutes that use “because” language similar to Title VII include the Family and Medical Leave Act (FMLA) (29 U.S.C. § 2615(b)). See, e.g., *Little Technical Specialty Prods. LLC*, 2013 U.S. Dist. LEXIS 152042 (E.D. Tex. Oct. 23, 2013) (applying “but-for” to FLSA retaliation claim); *Sparks v. Sunshine Mills, Inc.*, 2013 U.S. Dist. LEXIS 125756 (N.D. Ala. Sept. 4, 2013) (applying “but-for” to FMLA retaliation claim); but see *Riley v. St. Mary Med. Ctr.*, 2014 U.S. Dist. LEXIS 57065, at \*15-16 n.4 (E.D. Pa. April 23, 2014) (noting that *Nassar*’s detailed analysis of the issue “may caution against a wholesale application of the *Nassar* analysis to other statutes at this juncture.”)

Where the “but-for” standard of causation applies, as it does in retaliation cases arising under 42 U.S.C. § 1981, there appears to be no place for a “same decision” jury instruction. If the jury believes that the defendant would have taken the same adverse action against the plaintiff, even if the plaintiff had not engaged in the protected activity, it cannot find in favor of the plaintiff. In contrast, if the jury determines that the defendant would not have taken the adverse action but for the plaintiff’s engagement in protected activity, the jury will return a verdict for the plaintiff.

In First Amendment retaliation cases under 42 U.S.C. § 1983, however, the courts have continued to apply the “motivating factor” standard, and as a result, a “same decision” instruction may be appropriate in such cases. See *Slalsky v. Independent School Dist. No. 743*, 772 F.3d 1126, 1130 (8th Cir. 2014) (holding that, to establish a prima facie case of First Amendment retaliation, the plaintiff must prove that “the protected conduct was a substantial or motivating factor in the defendant’s decision to take the adverse employment action” and that, if the plaintiff meets this burden, “the burden shifts to the defendant to demonstrate that the same employment action would have been taken in the absence of the protected activity”) (quoting *Davison v. City*

*of Minneapolis*, 490 F.3d 648, 654-55 (8th Cir. 2007)). See also *Hutton v. Maynard*, 2015 WL 114723 at \*10 (E.D. Ark. Jan. 8, 2015) (discussing "motivating factor" and "same decision" in a First Amendment retaliation case under 42 U.S.C. § 1983); *Stoner v. Arkansas Dep. of Correction*, 983 F.Supp.2d 1074, 1097-98, 1099 (E.D. Ark. 2013) (applying "but-for" standard to Title VII retaliation claim against employer and "motivating factor/same decision" standard to First Amendment claim against supervisor).

**Remedies and Verdict Forms**

Lawyers and judges should utilize the damages instructions and verdict forms that apply to the type of discrimination in question. In other words, in a Title VII retaliation case (and subject to the causation standard issue discussed above), the court should use supra Model Instructions 5.70 et seq.; in an ADEA retaliation case, the court should use supra Model Instructions 6.70 et seq.; and so on.

The following instructions are patterned on a situation where the plaintiff claims retaliation based on his or her opposition to alleged race discrimination.

**CHAPTER 10 INSTRUCTIONS AND VERDICT FORMS**

10.40 ELEMENTS OF CLAIM: RETALIATION FOR PARTICIPATION IN PROCEEDINGS UNDER EMPLOYMENT STATUTES .....10-6

10.41 ELEMENTS OF CLAIM: RETALIATION FOR OPPOSITION TO HARASSMENT OR DISCRIMINATION ..... 10-8

10.42 ELEMENTS OF CLAIM: RETALIATION—THIRD PARTY REPRISAL FOR PARTICIPATION IN PROCEEDINGS UNDER EMPLOYMENT STATUTES ..... 10-11

10.43 ELEMENTS OF CLAIM: RETALIATION—THIRD PARTY REPRISAL FOR OPPOSITION TO HARASSMENT OR DISCRIMINATION ..... 10-14

10.70 ACTUAL DAMAGES ..... 10-17

10.71 NOMINAL DAMAGES ..... 10-18

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10.80 GENERAL VERDICT FORM ..... 10-20

## 10.40 ELEMENTS OF CLAIM: RETALIATION FOR PARTICIPATION IN PROCEEDINGS UNDER EMPLOYMENT STATUTES

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all the following elements have been proved<sup>1</sup>:

*First*, the plaintiff [filed an EEOC charge alleging (race discrimination)]<sup>2</sup>; and

*Second*, the defendant (discharged, transferred, reassigned)<sup>3</sup> the plaintiff; and

[*Third*, the plaintiff's (discharge, transfer, reassignment) might well dissuade a reasonable worker in the same or similar circumstances from making or supporting a charge of discrimination]<sup>4</sup>; and

[*Fourth*,] the defendant would not have (discharged, transferred, reassigned) plaintiff but-for<sup>5</sup> plaintiff's [filing of an EEOC charge].

If any of the above elements has not been proved, your verdict must be for the defendant and you need not proceed further in considering this claim.

“But-for” does not require that plaintiff's (filing of the EEOC charge) was the only reason for the decision<sup>6</sup> made by the defendant. [You may find that the defendant would not have discharged the plaintiff “but-for” plaintiff's (filing of the EEOC charge) if it has been proved that the defendant's stated reason(s) for its decision(s) [(is) (are)] not the real reason(s), but [(is) (are)] a pretext to hide retaliation].<sup>7</sup>

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Describe the protected conduct and select the appropriate terms depending upon whether the plaintiff's underlying complaint involved discrimination based on race, gender, age, disability, etc.

3. Select the appropriate term depending upon whether the alleged retaliatory action involved discharge, demotion, failure to promote, transfer, suspension, etc.

4. Submit this paragraph only when the parties dispute whether a decision or act was “materially adverse” and the Court determines that the issue involves questions of fact to be decided by the jury. See Overview on Materially Adverse Action. The Committee elected not to use the phrase “materially adverse” directly in the elements instruction for simplicity. Actual use of the phrase “materially adverse” in the elements instruction may be preferred in some instances. The Committee recommends defining “materially adverse” in the instruction in this instance. To qualify as unlawful retaliation, the employer must have taken a “materially adverse” action. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67- 68, 126 S. Ct. 2405, 2414-15 (2006). To be “materially adverse,” the plaintiff must show that a reasonable employee in plaintiff’s position might well have been “dissuaded” from filing or supporting a charge of discrimination. *Id.* at 68. This is an objective standard. *Id.* “By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff’s position, [the Supreme Court] believe[s] this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.” *Id.* at 69-70. Ultimate employment decisions such as demotion and discharge generally meet this standard. *Id.* at 60.

5. See the discussion in the Overview, Section 10.00, regarding the standard for liability in retaliation cases. This instruction assumes retaliation under Title VII (race, color, sex, etc.).

6. This instruction makes references to the defendant’s “decision.” It may be modified if another term -- such as “actions” or “conduct” – would be more appropriate.

7. This sentence may be added, if appropriate. See Model Instruction 6.40 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790, n.9 (8th Cir. 2001) (“[W]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.”).

## 10.41 ELEMENTS OF CLAIM: RETALIATION FOR OPPOSITION TO HARASSMENT OR DISCRIMINATION

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on plaintiff's claim [generally describe claim] if all the following elements have been proved<sup>1</sup>:

*First*, the plaintiff complained to the defendant that [(he) (she) (name of third party)]<sup>2</sup> was being (harassed/discriminated against)<sup>3</sup> on the basis of (race)<sup>4</sup>; and

*Second*, the plaintiff reasonably believed that [(he) (she) (name of third party)] was being (harassed/discriminated against) on the basis of (race)<sup>5</sup>; and

*Third*, the defendant (discharged, transferred, reassigned)<sup>6</sup> the plaintiff; and

[*Fourth*, the plaintiff's (discharge, transfer, reassignment) might well dissuade a reasonable worker in the same or similar circumstances from making or supporting a charge of discrimination<sup>7</sup>; and

*Fifth*, the defendant would not have (discharged, transferred, reassigned) plaintiff but-for<sup>8</sup> plaintiff's complaint of (race) (harassment/discrimination).

If any of the above elements has not been proved, your verdict must be for the defendant and you need not proceed further in considering this claim.

“But-for” does not require that the plaintiff's complaint of (harassment/discrimination) was the only reason for the decision<sup>9</sup> made by the defendant. [You may find the defendant would not have discharged the plaintiff “but-for” plaintiff's complaint of (harassment/discrimination) if it has been proved that the defendant's stated reason(s) for its decision(s) [(is) (are)] not the real reason(s), but [(is) (are)] a pretext to hide retaliation].<sup>10</sup>

## Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Select the appropriate term depending upon whether the plaintiff complained about discrimination toward himself or herself or a third party.

3. Select the appropriate term depending on whether the plaintiff’s underlying complaint involved harassment or an allegedly discriminatory employment decision.

4. Select the appropriate term depending upon whether the underlying complaint was based on race, gender, age, disability, etc.

5. The plaintiff need not prove that the underlying employment practice by the employer was, in fact, unlawful. Instead, employees are protected if they opposed an employment practice that they reasonably and in good faith believe to be unlawful. Submit this paragraph only if there is evidence to support a factual dispute as to whether the plaintiff was complaining of or opposing discrimination in good faith. *See supra* Introductory Comments, Section 10.00.

6. Select the appropriate term depending upon whether the allegedly retaliatory action involved discharge, demotion, failure to promote, reassignment, suspension, etc.

7. Submit this paragraph only when the parties dispute whether a decision or act was “materially adverse” and the Court determines that the issue involves questions of fact to be decided by the jury. See Overview on Materially Adverse Action. The Committee elected not to use the phrase “materially adverse” directly in the elements instruction for simplicity. Actual use of the phrase “materially adverse” in the elements instruction may be preferred in some instances. The Committee recommends defining “materially adverse” in the instruction in this instance. To qualify as unlawful retaliation, the employer must have taken a “materially adverse” action. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67- 68, 126 S.Ct. 2405, 2414-15 (2006). To be “materially adverse,” the plaintiff must show that a reasonable employee in plaintiff’s position might well have been “dissuaded” from complaining about discrimination or harassment. *Id.* at 68. This is an objective standard. *Id.* “By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff’s position, [the Supreme Court] believe[s] this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.” *Id.* at 69-70. Ultimate employment decisions such as demotion and discharge generally meet this standard. *Id.* at 60.

8. See the discussion in the Overview, Section 10.00, regarding the standard for liability in retaliation cases. This instruction assumes retaliation under Title VII (race, color, sex, etc.).

9. This instruction makes references to the defendant’s “decision.” It may be modified if another term--such as “actions” or “conduct”--would be more appropriate.

10. This sentence may be added, if appropriate. *See* Model Instruction 6.40 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001) (“[W]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.”).

**10.42 ELEMENTS OF CLAIM: RETALIATION—THIRD PARTY REPRISAL FOR PARTICIPATION IN PROCEEDINGS UNDER EMPLOYMENT STATUTES**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all the following elements have been proved<sup>1</sup>:

*First*, the plaintiff had a [specify nature of relationship] with [NAME OF PERSON WHO COMPLAINED];<sup>2</sup> and

*Second*, [NAME OF PERSON WHO COMPLAINED] [filed an EEOC charge alleging (race discrimination)]<sup>3</sup>; and

*Third*, the defendant (discharged, transferred, reassigned)<sup>4</sup> the plaintiff; and

*Fourth*, the plaintiff's (discharge, transfer, reassignment) might well dissuade a reasonable worker in the same or similar circumstances as [NAME OF PERSON WHO COMPLAINED] from making or supporting a charge of discrimination<sup>5</sup>; and

*Fifth*, defendant would not have (discharged, transferred, reassigned) plaintiff but-for<sup>6</sup> [NAME OF PERSON WHO COMPLAINED]'s (filing of an EEOC charge) .

If any of the above elements has not been proved, your verdict must be for the defendant and you need not proceed further in considering this claim.

“But-for” does not require that [NAME OF PERSON WHO COMPLAINED]'s (filing of the EEOC charge) was the only reason for the decision<sup>7</sup> made by the defendant. [You may find the defendant would not have discharged the plaintiff “but-for”[NAME OF PERSON WHO COMPLAINED]'S (filing of the EEOC charge) if it has been proved that the defendant's stated reason(s) for its decision(s) [(is) (are)] not the real reason(s), but [(is) (are)] a pretext to hide retaliation].<sup>8</sup>

## Notes on Use

This instruction is based on Model Instruction 10.40 and is intended to submit a third-party reprisal claim in which the plaintiff/employee was allegedly subjected to unlawful retaliation because another employee, with whom the plaintiff had a relationship, engaged in protected participation.

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Insert the name of the individual alleged to have engaged in the protected activity, and describe the nature of the relationship with the plaintiff. In *Thompson v. North American Stainless, LP*, 562 U.S. 170, 131 S.Ct. 863 (2011), the Court held that, where an employee engages in protected activity, and the employer retaliates by discharging the employee’s fiancé, the fiancé is an aggrieved person with standing to sue under Title VII’s anti-retaliation provision. However, the Court expressly “decline[d] to identify a fixed class of relationships for which third-party reprisals are unlawful. We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize.” 131 S.Ct. at 868. The trial court must determine whether the relationship at issue satisfies the *Thompson* standard, and this paragraph should be used if there is a factual dispute as to the nature of the relationship.

3. Describe the protected conduct and select the appropriate terms depending upon whether the plaintiff’s underlying complaint involved discrimination based on race, gender, age, disability, etc.

4. Select the appropriate term depending upon whether the alleged retaliatory action involved discharge, demotion, failure to promote, transfer, suspension, etc.

5. Submit this paragraph only when the parties dispute whether a decision or act was “materially adverse” and the Court determines that the issue involves questions of fact to be decided by the jury. See Overview on Materially Adverse Action. The Committee elected not to use the phrase “materially adverse” directly in the elements instruction for simplicity. Actual use of the phrase “materially adverse” in the elements instruction may be preferred in some instances. The Committee recommends defining “materially adverse” in the instruction in this instance. To qualify as unlawful retaliation, the employer must have taken a “materially adverse” action. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67- 68, 126 S.Ct. 2405, 2414-15 (2006). To be “materially adverse,” the plaintiff must show that a reasonable employee in plaintiff’s position might well have been “dissuaded” from complaining about discrimination or harassment. *Id.* at 68. This is an objective standard. *Id.* “By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff’s position, [the Supreme Court] believe[s] this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.” *Id.* at 69-70. Ultimate employment decisions such as demotion and discharge generally meet this standard. *Id.* at 60.

6. See the discussion in the Overview, Section 10.00, regarding the standard for liability in retaliation cases. This instruction assumes retaliation under Title VII (race, color, sex, etc.).

7. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

8. This sentence may be added, if appropriate. *See* Model Instruction 6.40 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001) ("[W]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.").

### **10.43 ELEMENTS OF CLAIM: RETALIATION—THIRD PARTY REPRISAL FOR OPPOSITION TO HARASSMENT OR DISCRIMINATION**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all the following elements have been proved<sup>1</sup>:

*First*, the plaintiff had a [specify nature of relationship] with [NAME OF PERSON WHO COMPLAINED]<sup>2</sup>; and

*Second*, [NAME OF PERSON WHO COMPLAINED] complained to the defendant that [(he) (she) (name of third party)]<sup>3</sup> was being (harassed/discriminated against)<sup>4</sup> on the basis of (race)]<sup>5</sup>; and

*Third*, [NAME OF PERSON WHO COMPLAINED] reasonably believed that [(he) (she) (name of third party)] was being (harassed/discriminated against)<sup>6</sup> on the basis of (race); and

*Fourth*, the defendant (discharged, transferred, reassigned)<sup>7</sup> the plaintiff; and

[*Fifth*, the plaintiff's (discharge, transfer, reassignment) might well dissuade a reasonable worker in the same or similar circumstances as [NAME OF THE PERSON WHO COMPLAINED] from making or supporting a charge of discrimination; and]<sup>8</sup>

*Sixth*, defendant would not have (discharged, transferred, reassigned) plaintiff but-for<sup>9</sup> [NAME OF PERSON WHO COMPLAINED]'s complaint of [(racial harassment) (race discrimination)].

If any of the above elements has not been proved, your verdict must be for the defendant and you need not proceed further in considering this claim.

“But-for” does not require that the [NAME OF PERSON WHO COMPLAINED]'s complaint of (harassment/discrimination) was the only reason for the decision<sup>10</sup> made by the defendant. [You may find that [NAME OF PERSON WHO

COMPLAINED]’s complaint of (harassment/discrimination) if it has been proved that the defendant’s stated reason(s) for its decision(s) [(is)(are)] not the real reason(s), but [(is) (are)] a pretext to hide retaliation.] <sup>11</sup> [was a determining factor] in the defendant’s (decision)<sup>11</sup> if it has been proved that the defendant’s stated reason(s) for its (decision) [(is) (are)] a pretext to hide retaliation.] <sup>12</sup>

### Notes on Use

This instruction is based on Model Instruction 10.41 and is intended to submit a third-party reprisal claim in which the plaintiff/employee alleges unlawful retaliation because another employee, with whom the plaintiff had a relationship, engaged in protected opposition.

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Insert the name of the individual alleged to have engaged in the protected activity, and describe the nature of the relationship with the plaintiff. In *Thompson v. North American Stainless, LP*, 562 U.S. 170, 131 S.Ct. 863 (2011), the Court held that, where an employee engages in protected activity, and the employer retaliates by discharging the employee’s fiancé, the fiancé is an aggrieved person with standing to sue under Title VII’s anti-retaliation provision. However, the Court expressly “decline[d] to identify a fixed class of relationships for which third-party reprisals are unlawful. We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize.” 131 S.Ct. at 868. The trial court must determine whether the relationship at issue satisfies the *Thompson* standard, and this paragraph should be used if there is a factual dispute as to the nature of the relationship.

3. Select the appropriate term depending upon whether the individual complained about discrimination toward himself or herself or a third party.

4. Select the appropriate term depending on whether the individual’s underlying complaint involved harassment or an allegedly discriminatory employment decision.

5. Select the appropriate term depending upon whether the underlying complaint was based on race, gender, age, disability, etc.

6. The plaintiff need not prove that the underlying employment practice by the employer was, in fact, unlawful. Instead, employees are protected if they opposed an employment practice that they reasonably and in good faith believe to be unlawful. Submit this paragraph only if there is evidence to support a factual dispute as to whether the individual was complaining of or opposing discrimination in good faith. *See supra* Introductory Comments.

7. Select the appropriate term depending upon whether the allegedly retaliatory action involved discharge, demotion, failure to promote, reassignment, suspension, etc.

8. Submit this paragraph only when the parties dispute whether a decision or act was “materially adverse” and the Court determines that the issue involves questions of fact to be decided by the jury. See Overview on Materially Adverse Action. The Committee elected not to use the phrase “materially adverse” directly in the elements instruction for simplicity. Actual use of the phrase “materially adverse” in the elements instruction may be preferred in some instances. The Committee recommends defining “materially adverse” in the instruction in this instance To qualify as unlawful retaliation, the employer must have taken a “materially adverse” action. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67- 68, 126 S. Ct. 2405, 2414-15 (2006). To be “materially adverse,” the plaintiff must show that a reasonable employee in plaintiff’s position might well have been “dissuaded” from complaining about discrimination or harassment. *Id.* at 68. This is an objective standard. *Id.* “By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff’s position, [the Supreme Court] believe[s] this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.” *Id.* at 69-70. Ultimate employment decisions such as demotion and discharge generally meet this standard. *Id.* at 60.

9. See the discussion in the Overview, Section 10.00, regarding the standard for liability in retaliation cases. This instruction assumes retaliation under Title VII (race, color, sex, etc.).

10. This instruction makes references to the defendant’s “decision.” It may be modified if another term--such as “actions” or “conduct”-- would be more appropriate.

11. This sentence may be added, if appropriate. See Model Instruction 6.40 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001) (“[W]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.”).

## **10.70 ACTUAL DAMAGES**

Actual damages for retaliation are generally governed by the same statute that prohibits the discrimination itself. Thus,

5.70 should be reviewed for drafting an instruction dealing with actual damages in retaliation cases under Title VII;

6.70 should be reviewed for drafting an instruction dealing with actual damages in retaliation cases under the ADEA;

There is no statutory basis for jury trial or compensatory damages other than back pay in an ADA retaliation claim. See 10.00;

11.70 should be reviewed for drafting an instruction dealing with actual damages in retaliation cases under 42 U.S.C. § 1981;

12.70 should be reviewed for drafting an instruction dealing with actual damages in retaliation cases under 42 U.S.C. § 1983.

## **10.71 NOMINAL DAMAGES**

Nominal damages for retaliation are generally governed by the same statute that prohibits the discrimination itself. Thus,

5.71 should be reviewed for drafting an instruction dealing with nominal damages in retaliation cases under Title VII;

6.71 should be reviewed for drafting an instruction dealing with nominal damages in retaliation cases under the ADEA;

There is no statutory basis for jury trial in an ADA claim. See 10.00;

11.71 should be reviewed for drafting an instruction dealing with nominal damages in retaliation cases under 42 U.S.C. § 1981;

12.71 should be reviewed for drafting an instruction dealing with nominal damages in retaliation cases under 42 U.S.C. § 1983.

## **10.72 PUNITIVE DAMAGES**

Punitive damages for retaliation are generally governed by the same statute that prohibits the discrimination itself. Thus,

5.72 should be reviewed for drafting an instruction dealing with punitive damages in retaliation cases under Title VII;

6.20 should be reviewed for drafting an instruction dealing with liquidated damages in retaliation cases under the ADEA;

There is no statutory basis for jury trial or punitive damages in an ADA retaliation claim. See 10.00;

11.72 should be reviewed for drafting an instruction dealing with punitive damages in retaliation cases under 42 U.S.C. § 1981;

12.72 should be reviewed for drafting an instruction dealing with punitive damages in retaliation cases under 42 U.S.C. § 1983.

**10.80 GENERAL VERDICT FORM**

**GENERAL VERDICT**

**Note:** Complete the following paragraph by writing in the name required by your verdict.

On the retaliation claim of plaintiff [Jane Doe]<sup>1</sup> [as submitted in Instruction \_\_\_\_\_]<sup>2</sup>, we find in favor of:

---

(Plaintiff Jane Doe)                      or                      (Defendant XYZ, Inc.)

**Note:** Complete the following paragraphs only if the above finding is in favor of the plaintiff. If the above finding is in favor of the defendant, have your foreperson sign and date this form because you have completed your deliberations on this claim.

We find the plaintiff's lost wages and benefits through the date of this verdict to be:

\$ \_\_\_\_\_ (stating the amount or, if none, write the word "none").

We find the plaintiff's other damages, excluding lost wages and benefits, to be:

\$ \_\_\_\_\_ (stating the amount [or, if you find that the plaintiff's damages do not have a monetary value, write in the nominal amount of One Dollar (\$1.00)]).

[We assess punitive damages against the defendant, as submitted in Instruction \_\_\_\_\_, as follows:

\$ \_\_\_\_\_ (stating the amount or, if none, write the word "none").]<sup>3</sup>

---

Foreperson

Dated: \_\_\_\_\_

**Notes on Use**

1. The bracketed phrase should be submitted when the plaintiff submits multiple claims to the jury.

2. The number or title of the "essential elements" instruction may be inserted here. *See* Model Instruction 10.40.

3. This paragraph should be included if the evidence is sufficient to support an award of punitive damages. *See* Model Instruction 10.72.

## 11. EMPLOYMENT—RACE DISCRIMINATION (42 U.S.C. § 1981)

### 11.00 OVERVIEW

Section 1981 of Title 42, United States Code, which prohibits race discrimination in the making and enforcement of contracts, provides a cause of action for race discrimination in employment claims. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-460 (1975); *see also Swapshire v. Baer*, 865 F.2d 948, 952-953 (8th Cir. 1989). Race discrimination claimants often join claims under § 1981 with claims under Title VII because § 1981, unlike Title VII, does not limit the recovery of compensatory and punitive damages.

If the plaintiff joins a jury-triable claim under Title VII with a § 1981 claim, the Committee recommends the use of the 5.01 series of instructions and accompanying verdict form. *See Wright v. St. Vincent Health System*, 730 F.3d 732, 739 & n. 6 (8th Cir. 2013) (“the same causation standard applies in *parallel* Title VII and § 1981 racial discrimination claims”) (emphasis added).

*Comcast Corp. v. National Ass’n of African American-Owned Media* held that 42 U.S.C. § 1981 claims require proof of “but-for” causation and there is no “motivating factor” theory of recovery available under the statute. 140 S. Ct. 1009, 1014-1019 (2020).

*Bostock v. Clayton County* held that proving “but-for” causation does not require proving that a defendant made an adverse employment decision solely because of or primarily because of an impermissible reason. 140 S. Ct. 1731, 1739-1740, 1744-1745, 1748 (2020). An adverse employment decision can have more than one “but for” cause, thus, if race or national origin is decisive in an employer’s adverse employment decision, that employer is liable under Title VII even if “...other factors besides [race or national origin] contribute[d] to the [adverse employment decision].” *Bostock*, 140 S. Ct. at 1748.

## CHAPTER 11 INSTRUCTIONS AND VERDICT FORMS

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## 11.41 ELEMENTS OF CLAIM: BUT-FOR CAUSATION (42 U.S.C. § 1981)

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all the following elements have been proved<sup>1</sup>:

*First*, the defendant [discharged]<sup>2</sup> the plaintiff; and

*Second*, the defendant would not have [discharged]<sup>2</sup> the plaintiff but-for<sup>3</sup> plaintiff's (race).

If any of the above elements has not been proved, your verdict must be for the defendant.

“But-for” does not require that race was the only reason for the decision made by the defendant.<sup>4</sup> [You may find that the defendant would not have discharged the plaintiff “but-for” the plaintiff's race if it has been proved that the defendant's stated reason(s) for its decision(s) [(is) (are)] not the real reason(s), but [(is) (are)] a pretext to hide race discrimination.<sup>5</sup>

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. This instruction is designed for use in a discharge case. In a “failure to hire,” “failure to promote,” or “demotion” case, the instruction must be modified. Where the plaintiff resigned but claims a “constructive discharge,” this instruction should be modified. *See* Model Instruction 5.41.

3. The language for the “but-for” causation standard is based on Model Instruction 6.40 (ADEA cases) and Model Instruction 10.40 (Title VII retaliation cases).

4. The defendant cannot avoid liability just by citing some other factor that contributed to adverse employment decision. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020). So long as the plaintiff's race was one but-for cause of the adverse employment decision, that is enough to find for the plaintiff. *Bostock*, 140 S. Ct. at 1739 (citing; *Burrage v. United States*, 571 U.S. 204, 211–212, (2014); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013)).

5. This sentence may be added, if appropriate. *See* Model Instruction 5.20 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states “[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.”

## 11.70 DAMAGES: ACTUAL (42 U.S.C. § 1981)

If you find in favor of the plaintiff [under Instruction \_\_\_\_\_ ]<sup>1</sup>, then you must award the plaintiff such sum as you find will fairly and justly compensate [(him) (her)] for damages you find [(he) (she)] sustained as a direct result of the defendant's conduct as described in Instruction \_\_\_\_\_.<sup>1</sup> Damages include wages or fringe benefits you find the plaintiff would have earned in [(his) (her)] employment with the defendant if [(he) (she)] had not been discharged on (fill in date of discharge), through the date of your verdict, *minus* the amount of earnings and benefits from other employment received by the plaintiff during that time.]<sup>2</sup> Damages also may include [list damages supported by the evidence].<sup>3</sup>

[You are also instructed that the plaintiff has a duty under the law to “mitigate” [(his) (her)] damages--that is, to exercise reasonable diligence under the circumstances to minimize [(his) (her)] damages. Therefore, if you find that the plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [(him) (her)], you must reduce [(his) (her)] damages by the amount of the wages and fringe benefits the plaintiff reasonably could have earned if [(he) (she)] had sought out or taken advantage of such an opportunity.]<sup>4</sup>

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.]<sup>5</sup>

### Notes on Use

1. Insert the number or title of the “essential elements” instruction here.
2. When certain benefits, such as employer-subsidized health insurance benefits, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. Claims for lost benefits often present difficult issues as to the proper measure of recovery. *See Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 470 (8th Cir. 1989) (discussing different approaches). Some courts deny recovery for lost benefits unless the employee purchases substitute coverage, in which case the measure of damages is the employee's out-of-pocket expenses. *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 161 (7th Cir. 1981), *overruled on other grounds*, 860 F.2d 834, 836-837 (7th Cir.

1988); *Pearce v. Carrier Corp.*, 966 F.2d 958, 959 (5th Cir. 1992). Other courts permit the recovery of the amount the employer would have paid as premiums on the employee's behalf. *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 964-965 (4th Cir. 1985). The Committee expresses no view as to which approach is proper. This instruction also may be modified to exclude certain items that were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law.

3. In § 1981 cases, a prevailing plaintiff may recover damages for mental anguish, damage to reputation, or other personal injuries. *See Wilmington v. J.I. Case Co.*, 793 F.2d 909, 921-922 (8th Cir. 1986). The specific elements of damages set forth in this instruction are similar to those found in the Civil Rights Act of 1991. *See* 42 U.S.C. § 1981a(b)(3). *See* Model Instruction 5.70 n.7.

4. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983).

5. This paragraph may be given at the trial court's discretion.

### Committee Comments

This instruction is designed to submit the standard back pay formula of lost wages and benefits *minus* interim earnings and benefits. *See Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808 (8th Cir. 1982). Moreover, because § 1981 is open-ended in the types of damages that may be recovered, this instruction also permits the recovery of general damages for pain, suffering, humiliation, and the like. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 182 n.4 (1989). Unlike Title VII cases under the Civil Rights Act of 1991, there is no "cap" on damages under § 1981.

In some cases, a discrimination plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy "in lieu of" reinstatement, front pay is an issue for the court, not the jury. *Excel Corp. v. Bosley*, 165 F.3d 635, 639 (8th Cir. 1999); *see also MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1060 (8th Cir. 1988); *Newhouse v. McCormick & Co.*, 110 F.3d 635, 641-43 (8th Cir. 1997) (front pay is an issue for the court, not the jury, in ADEA cases). If the trial court submits the issue of front pay to the jury, the jury's determination may be binding. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (ADEA case).

This instruction may be modified to articulate the types of interim earnings that should be offset against the plaintiff's back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *See Krause v. Dresser Indus., Inc.*, 910 F.2d 674, 680 (10th Cir. 1990); *Cornetta v. United States*, 851 F.2d 1372, 1381 (Fed. Cir. 1988); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985). Unemployment compensation, Social Security benefits or pension benefits ordinarily are not offset against a back pay award. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (holding that pension benefits are a "collateral source benefit"); *Dreyer v. Arco Chemical Co.*, 801 F.2d 651, 653 n.1 (3d Cir. 1986) (Social Security and pension benefits received are not deductible); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 138-139 (3d Cir. 1986) (unemployment benefits received are not deductible); *overruled on other grounds by Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1099 n.10 (3d Cir. 1995); *Rasimas v. Michigan Dep't of Mental*

*Health*, 714 F.2d 614, 627 (6th Cir. 1983) (same). *But cf. Blum v. Witco Chemical Corp.*, 829 F.2d 367, 374-375 (3d Cir. 1987) (pension benefits received as a result of subsequent employment considered in offsetting damages award); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989) (deductibility of unemployment compensation is within trial court's discretion); *Horn v. Duke Homes*, 755 F.2d 599, 607 n.12 (7th Cir. 1985) (same); *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976) (same).

This instruction is designed to encompass a situation where the defendant asserts some independent post-discharge reason--such as a plant closing or sweeping reduction in force--why the plaintiff would have been terminated in any event before trial. *See, e.g., Cleverly v. Western Elec. Co.*, 450 F. Supp. 507, 509-510 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638, 641-642 (8th Cir. 1979). Nevertheless, the trial court may give a separate instruction that submits this issue in more direct terms.

## 11.71 DAMAGES: NOMINAL (42 U.S.C. § 1981)

If you find in favor of the plaintiff under Instruction \_\_\_\_\_<sup>1</sup>, but you do not find that the plaintiff's damages have monetary value, then you must return a verdict for the plaintiff in the nominal amount of One Dollar (\$1.00).<sup>2</sup>

### Notes on Use

1. Insert the number or title of the “essential elements” instruction here.

2. One Dollar (\$1.00) arguably is the required amount in cases where nominal damages are appropriate. Nominal damages are appropriate when the jury is unable to place a monetary value on the harm that the plaintiff suffered from the violation of his rights. *Cf. Cowans v. Wyrick*, 862 F.2d 697, 700 (8th Cir. 1988) (in prisoner civil rights action, nominal damages are appropriate where the jury cannot place a monetary value on the harm suffered by the plaintiff); *Haley v. Wyrick*, 740 F.2d 12, 14 (8th Cir. 1984).

### Committee Comments

Most employment discrimination cases involve lost wages and benefits. In some cases, however, the jury may be permitted to return a verdict for only nominal damages. For example, if the plaintiff was given severance pay and was able to secure a better paying job, the evidence may not support an award of back pay, but may support an award of compensatory damages. This instruction is designed to submit the issue of nominal damages in appropriate cases.

If nominal damages are submitted, the verdict form must contain a line where the jury can make that finding.

An award of nominal damages can support a punitive damage award. *See Goodwin v. Circuit Court of St. Louis County*, 729 F.2d 541, 548 (8th Cir. 1984) (§ 1983 case).

## 11.72 DAMAGES: PUNITIVE (42 U.S.C. § 1981)

In addition to the damages mentioned in other instructions, the law permits the jury under certain circumstances to award punitive damages.

If you find in favor of the plaintiff under Instruction(s) \_\_\_\_\_ and if it has been proved <sup>1</sup> that the conduct of that defendant as submitted in Instruction \_\_\_\_\_ <sup>2</sup> was malicious or recklessly indifferent to the plaintiff's (specify, *e.g.*, medical needs),<sup>3</sup> then you may, but are not required to, award the plaintiff an additional amount of money as punitive damages for the purposes of punishing the defendant for engaging in misconduct and [detering] [discouraging] the defendant and others from engaging in similar misconduct in the future. You should presume that a plaintiff has been made whole for [his, her, its] injuries by the damages awarded under Instruction \_\_\_\_\_.<sup>4</sup>

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. How reprehensible the defendant's conduct was.<sup>5</sup> In this regard, you may consider [whether the harm suffered by the plaintiff was physical or economic or both; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether the defendant's conduct that harmed the plaintiff also posed a risk of harm to others; whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed the plaintiff].<sup>6</sup>

2. How much harm the defendant's wrongful conduct caused the plaintiff [and could cause the plaintiff in the future].<sup>7</sup> [You may not consider harm to others in deciding the amount of punitive damages to award.]<sup>8</sup>

3. What amount of punitive damages, in addition to the other damages already awarded, is needed, considering the defendant's financial condition, to punish the defendant for [his, her, its] wrongful conduct toward the plaintiff and to deter the defendant and others from similar wrongful conduct in the future.

4. [The amount of fines and civil penalties applicable to similar conduct].<sup>9</sup>

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to the plaintiff.<sup>10</sup>

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against those defendants may be the same or they may be different.]<sup>11</sup>

[You may not award punitive damages against the defendant[s] for conduct in other states.]<sup>12</sup>

#### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Punitive damages are allowed even though the threshold for liability requires reckless conduct. If the threshold for the underlying tort liability is less than “reckless,” the bracketed language correctly states the standard for punitive damages under 42 U.S.C. § 1983. *Smith v. Wade*, 461 U.S. 30, 45-48 (1983). See *Kolstad v. American Dental Ass’n*, 527 U.S. 526, 535, 536 (1999), and *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 903 (8th Cir. 2006), discussing the meaning of “malice” and “reckless indifference.” If the threshold for liability is “malice” or “reckless indifference” or something more culpable, no additional finding should be necessary because the language in the issue/element instruction requires the jury to find the culpability necessary for imposing punitive damages. However, it is recommended that the punitive damages instruction include such language to be sure the jury focuses on that issue.

3. Use this phrase only if the good faith of the defendant is to be presented to the jury. This two-part test was articulated by the United States Supreme Court in *Kolstad v. American Dental Ass’n*, 527 U.S. 526, 544-546 (1999), a Title VII case. The Supreme Court has not yet decided whether it applies to actions under 42 U.S.C. §1981. For a discussion of *Kolstad*, see the Committee Comments. See also *Madison v. IBP, Inc.*, 257 F.3d 780, 794-795 (8th Cir. 2001), *vacated on other grounds*, 536 U.S. 919, 919 (2002), *on remand*, 330 F.3d 1051, 1060-1061 (8th Cir. 2003), discussing good faith in a case involving both Title VII and Section 1981 claims. It is not clear from the case who bears the risk of nonpersuasion on the good-faith issue. The Committee predicts that case law will place the burden on the defendant to raise the issue and prove it.

4. Fill in the number or title of the actual damages or nominal damages instruction here.

5. The word “reprehensible” is used in the same sense as it is used in common parlance. The Supreme Court, in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003), stated: “It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” In *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007), the Supreme Court held that, while harm to persons other than the plaintiff may be considered in determining reprehensibility, a jury may not punish for the harm caused to persons other than the plaintiff. The Court stated that procedures were necessary to assure “that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.” *Id.* at 355.

6. Any item not supported by the evidence, of course, should be excluded.

7. This sentence may be used if there is evidence of future harm to the plaintiff.

8. A paragraph instructing the jury that any punitive damages award should not include an amount for harm suffered by persons who are not parties to the case may be necessary if evidence concerning harm suffered by nonparties has been introduced. *See Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-424 (2003); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-798 (8th Cir. 2004).

9. Insert this phrase only if evidence has been introduced, or the court has taken judicial notice, of fines and penalties for similar conduct. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996), noting “civil penalties authorized in comparable cases” as a guidepost to be considered. *See also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003).

10. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (stating that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process” and observing that: “Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1 [citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996)] or, in this case, of 145 to 1.”).

11. The bracketed language is available for use if punitive damages claims are submitted against more than one defendant.

12. If evidence has been introduced concerning conduct by the defendant that was legal in the state where it was committed, the jury must be told that they cannot award punitive damages against the defendant for such conduct. *See State Farm Mut. Auto. Inc. Co. v. Campbell*, 538 U.S. 408, 422 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572-573 (1996); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-798 (8th Cir. 2004). This issue normally will not come up in cases under federal law. In any case where evidence is admitted for some purposes but may not be considered by the jury in awarding punitive damages, the court should give an appropriate limiting instruction.

## Committee Comments

This instruction attempts to incorporate the constitutionally relevant principles set forth by the Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346, 353-354 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417-418, 429 (2003), *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-575, 580-581, 583-584 (1996), *Honda Motor Co. v. Oberg*, 512 U.S. 415, 418-421, 430-432 (1994), and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459-462 (1993). In *State Farm*, 538 U.S. at 417, the Court observed: “We have admonished that “[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and 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 Motor*, 512 U.S. at 432). See *Baker v. John Morrell & Co.*, 266 F. Supp. 2d 909, 961 (N.D. Iowa 2003), *aff’d*, 382 F.3d 816, 819 (8th Cir. 2004), and *In Re Exxon Valdez*, 296 F. Supp. 2d 1071, 1080 (D. Alaska 2004), for examples of punitive damages instructions where the court attempted to incorporate constitutional standards.

The last paragraph is based on *State Farm*, 538 U.S. at 421, where the Court held: “A state cannot punish a defendant for conduct that may have been lawful where it occurred. . . . Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.” The Court specifically mandated that: “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.” *State Farm*, 538 U.S. at 422.

**11.80 GENERAL VERDICT FORM (42 U.S.C. § 1981)**

**Note:** Complete this form by writing in the names required by your verdict.

On the [race discrimination]<sup>1</sup> claim of plaintiff [John Doe], as submitted in Instruction \_\_\_\_\_<sup>2</sup>, we find in favor of

---

(Plaintiff Jane Doe) or (Defendant XYZ, Inc.)

**Note:** Complete the following paragraphs only if the above finding is in favor of the plaintiff. If the above finding is in favor of the defendant, have your foreperson sign and date this form because you have completed your deliberation on this claim.

We find the plaintiff's damages as defined in Instruction \_\_\_\_\_<sup>3</sup> to be:

\$ \_\_\_\_\_ (stating the amount or, if none, write the word "none")<sup>4</sup> (stating the amount, or if you find that the plaintiff's damages have no monetary value, set forth a nominal amount such as \$1.00).<sup>5</sup>

We assess punitive damages against defendant (name), as submitted in Instruction \_\_\_\_\_,<sup>6</sup> as follows:

\$ \_\_\_\_\_ (stating the amount or, if none, write the word "none").

---

Foreperson

Dated: \_\_\_\_\_

**Notes on Use**

1. The bracketed language should be included when the plaintiff submits multiple claims to the jury.

2. The number or title of the “essential elements” instruction should be inserted here.
3. The number or title of the “actual damages” instruction should be inserted here.
4. Use this phrase if the jury has not been instructed on nominal damages.
5. Include this paragraph if the jury is instructed on nominal damages.
6. The number or title of the “punitive damages” instruction should be inserted here.

## 11.90 SPECIAL VERDICT FORM

(To elicit findings under both motivating factor and but-for causation standards)

**Note: Your verdict in this case will be determined by your answers to the following questions. Read the questions and notes carefully because they explain the order in which the questions should be answered and which questions may be skipped.**

**Question No. 1:** Has it been proved<sup>1</sup> that the defendant would not have [discharged]<sup>2</sup> the plaintiff but-for the plaintiff's race? "But-for" does not require that race was the only reason for the decision made by the defendant.<sup>3</sup> [You may find that the defendant would not have discharged the plaintiff "but-for" the plaintiff's race if it has been proved that the defendant's stated reason(s) for its decision(s) [(is) (are)] not the real reason(s), but [(is) (are)] a pretext to hide race discrimination.]<sup>4</sup>

\_\_\_\_\_ Yes                      \_\_\_\_\_ No

**(Mark an "X" in the appropriate space.)**

**Note: If you answered "yes" to Question No. 1, skip Questions 2 and 3, and answer questions 4 and 5. If you answered "no" to Question No. 1, proceed to Question No. 2.**

**Question No. 2:** Has it been proved that the plaintiff's (race) was a motivating factor in the defendant's decision to (discharge) [(him) (her)]? (Race) was a "motivating factor" if the plaintiff's (race) played a part [or a role] in the defendant's decision to (discharge) the plaintiff.<sup>5</sup> However, the plaintiff's (race) need not have been the only reason for the defendant's decision to (discharge) the plaintiff. [You may find that (race) was a motivating factor if it has been proved that the defendant's stated reason(s) for its decision are not the real reason(s), but are a pretext to hide (race) discrimination.]<sup>6</sup>

\_\_\_\_\_ Yes                      \_\_\_\_\_ No

**(Mark an "X" in the appropriate space.)**

**Note: If you answered “yes” to Question No. 2, continue on to Question No. 3. If you answered “no” to Question No. 1 and “no” to Question No. 2, you should have your foreperson sign and date this form because you have completed your deliberations on this (race) discrimination claim.**

**Question No. 3:** Has it been proved that the defendant would have (discharged) the plaintiff regardless of [(his) (her)] [race]?

\_\_\_\_\_Yes                      \_\_\_\_\_No

**(Mark an “X” in the appropriate space.)**

**Note: Answer Questions 4 and 5 if you answered “yes” to Question No. 1 or if you answered “yes” to Question No. 2 and “no” to Question No. 3. If you answered “yes” to Question No. 3, have your foreperson sign and date this form because you have completed your deliberations on this (race) discrimination claim.**

**Question No. 4:** State the amount of the plaintiff’s actual damages as that term is defined in Instruction \_\_\_\_.<sup>7</sup> \$\_\_\_\_\_. (stating the amount [or, if you find that the plaintiff’s damages have no monetary value, write in the nominal amount of One Dollar (\$1.00)]).

**Question No. 5:** What amount, if any, do you assess for punitive damages as that term is defined in Instruction \_\_\_\_?<sup>8</sup> \$ \_\_\_\_\_. (stating the amount or, if none, write the word “none”).

\_\_\_\_\_  
Foreperson

Date: \_\_\_\_\_

**Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. These interrogatories are designed for use in a discharge case. In a “failure to hire,” “failure to promote,” or “demotion” case, the interrogatories must be modified. Where the plaintiff resigned but claims that he or she was “constructively discharged,” an additional interrogatory should be given as a threshold to the interrogatories shown above and the subsequent interrogatories will have to be renumbered. *See* Model Instruction 5.41.

3. The defendant cannot avoid liability just by citing some other factor that contributed to adverse employment decision. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020). So long as the plaintiff’s race was one but-for cause of the adverse employment decision, that is enough to find for the plaintiff. *Bostock*, 140 S. Ct. at 1739 (citing; *Burrage v. United States*, 571 U.S. 204, 211–212, (2014); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013)).

4. The bracketed phrase may be added at the court's option.

5. The Committee believes the term “motivating factor” should be defined. *See* Model Instruction 5.21.

6. The bracketed phrase may be added at the court's option.

7. Fill in the number of the “actual damages” instruction here. *See, e.g.*, Model Instruction 11.70 (§1981 cases), 12.70 (§1983 cases).

8. Fill in the number of the “punitive damages” instruction here. *See, e.g.*, Model Instruction 11.72.

### **Committee Comments**

This set of interrogatories may be appropriate in cases filed under 42 U.S.C. § 1983, the Family Medical Leave Act, or other statutes in which the standard for liability is not clear. *See* Introduction to Section 5 and the Overview of Section 11.

Questions 1, 2, and 3 are to be submitted in lieu of an elements instruction. Questions 4 and 5 are to be submitted to elicit findings, if appropriate, on the issues of actual damages and punitive damages. The Committee makes no recommendation regarding whether all issues should be submitted to the jury simultaneously or whether jury deliberations should be bifurcated, with the issues of actual damages and punitive damages being submitted separately from Questions 1, 2, and 3.

As discussed in the Overview of Chapter 11, these special interrogatories are designed for use when the parties disagree regarding the standard for liability and the trial court wants to elicit findings under both the “motivating factor/same decision” and “but-for” causation standards. In *Wright v. St. Vincent Health System*, 730 F.3d 732, 739 & n.6 (8th Cir. 2013) the Eighth Circuit stated that the “same causation standard applies in *parallel* Title VII and § 1981 racial discrimination claims.”

*Comcast Corp. v. National Ass’n of African American-Owned Media* held that 42 U.S.C. § 1981 claims require proof of “but-for” causation and there is no “motivating factor” theory of recovery available under the statute. 140 S. Ct. 1009, 1014-1019 (2020).

*Bostock v. Clayton County* held that proving “but-for” causation does not require proving that a defendant made an adverse employment decision solely because of or primarily because of an impermissible reason. 140 S. Ct. 1731, 1739-1740, 1744-1745, 1748 (2020). An adverse employment decision can have more than one “but for” cause, thus, if race or national origin is decisive in an employer’s adverse employment decision, that employer is liable under Title VII even if “...other factors besides [race or national origin] contribute[d] to the [adverse employment decision].” *Bostock*, 140 S. Ct. at 1748.

Question No. 1 is designed to test the proof on the issue of “but-for” causation. If the jury answers “yes” to Question 1 because it has found unlawful discrimination under the more demanding “but-for” standard, the jury should not consider or answer Questions 2 and 3; instead, judgment should be entered for the plaintiff on this claim.

Question No. 2 is designed to test the proof on the “motivating factor” issue. The note following Question No. 2 directs the jury to continue in its analysis only if it answers “yes” to this question. If the jury answers “no” to this question because it did not find that unlawful discrimination was a motivating factor, the jury should not consider or answer Question No. 3; instead, judgment should be entered for the defendant on this claim.

Question No. 3 is designed to test the proof on the “same decision” issue. If the jury reaches Question No. 3 and answers “yes,” judgment should be entered for the defendant.

The benefits of these special interrogatories are:

1. In many cases, determination of the “correct” causation standard will become moot; as discussed above, if the jury answers “yes” to Question No. 1, “no” to Question No. 2, or “yes” to Question No. 3, the prevailing party will be clear.

2. If the jury reaches and answers “no” to Question No. 3, the courts will have a complete set of findings under both standards and, in turn, there is no need for a retrial if the appellate court does not agree with the trial court’s determination regarding the “correct” causation standard.

## 12. EMPLOYMENT—PUBLIC EMPLOYERS (42 U.S.C. § 1983)

### 12.00 OVERVIEW

Discrimination claims against public employers are often brought under 42 U.S.C. § 1983 as well as Title VII. *E.g.*, *Bunch v. Univ. of Ark. Bd. of Trustees*, 863 F.3d 1062, 1066 (8th Cir. 2017); *Carter v. Pulaski County Spec. Schl. Dist.*, 956 F.3d 1055 (8th Cir. 2020). Section 1983 historically included three components that Title VII did not contain: (1) the right to a jury trial; (2) the availability of general damages for humiliation, loss of reputation, and the like; and (3) the availability of punitive damages against individual defendants. Although the Civil Rights Act of 1991 has eliminated these differences, section 1983 claims will remain distinctive in two respects: (1) section 1983 does not require exhaustion of the EEOC administrative process; and (2) section 1983 does not place a cap on compensatory and punitive damages. The theory of liability in a section 1983 discrimination claim is that discrimination on the basis of race, gender, or religion constitutes a deprivation of equal protection and, thus, violates the Fourteenth Amendment. The Committee expresses no position on the issue of whether discrimination on the basis of age or disability is within the purview of section 1983.

The following instructions are designed for use in all discrimination cases brought pursuant to 42 U.S.C. § 1983. In the interests of simplicity and uniformity, the model instruction on the issue of liability utilizes a motivating-factor/same-decision format for all cases. *See* Model Instruction 12.40. Nevertheless, if the trial court believes it is appropriate to distinguish between a mixed motive case and a pretext case, Model Instruction 12.41 contains a sample pretext instruction. Moreover, if the trial court is inclined to adhere to a pretext/mixed motive distinction but cannot determine how to categorize a particular case, Model Special Verdict Form 11.90 contains a set of special interrogatories designed to elicit a complete set of findings for post-trial analysis.

### CHAPTER 12 INSTRUCTIONS AND VERDICT FORM

12.20 DEFINITION: COLOR OF STATE LAW (42 U.S.C. § 1983).....	12—3
12.21 DEFINITION: MOTIVATING FACTOR .....	12—4
12.40 ELEMENTS OF CLAIM: (SEX) DISCRIMINATION (MIXED MOTIVE) (42 U.S.C. § 1983) .....	12—6
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## **12.20 DEFINITION: COLOR OF STATE LAW (42 U.S.C. § 1983)**

Acts are done under color of law when a person acts or [falsely appears] [falsely claims] [purports] to act in the performance of official duties under any state, county or municipal law, ordinance or regulation.

### **Committee Comments**

*See Monroe v. Pape*, 365 U.S. 167 (1961), *overruled in part*, *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Screws v. United States*, 325 U.S. 91 (1945); *United States v. Classic*, 313 U.S. 299, *reh'g denied*, 314 U.S. 707 (1941). The court should, if possible, rule on the record whether the conduct of the defendant, if it occurred as claimed by the plaintiff, constitutes acts under color of state (county, municipal) law and not even instruct the jury on this issue. In most cases, the color of state law issue is not challenged and the jury need not be instructed on it. If it must be instructed, this instruction should normally be sufficient.

## 12.21 DEFINITION: MOTIVATING FACTOR

As used in these instructions, the plaintiff's (sex, gender, race, national origin, religion, disability)<sup>1</sup> was a "motivating factor," if the plaintiff's (sex, gender, race, national origin, religion, disability) played a part<sup>2</sup> [or a role<sup>3</sup>]<sup>4</sup> in the defendant's decision to \_\_\_\_\_<sup>5</sup> the plaintiff. However, the plaintiff's (sex, gender, race, national origin, religion, disability) need not have been the only reason for the defendant's decision to \_\_\_\_\_ the plaintiff.

### Notes on Use

1. Here state the alleged unlawful consideration.
2. See *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1101-02 (8th Cir. 1988).
3. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("Whatever the employer's decision making process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.")
4. Case law suggests that other language can be used properly to define "motivating factor." A judge may wish to consider the following alternatives:

The term "motivating factor," as used in these instructions, means a reason, alone or with other reasons, on which the defendant relied when it \_\_\_\_\_ the plaintiff, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42 (1989);] or which moved the defendant toward its decision to \_\_\_\_\_ the plaintiff, *id.* at 241; or because of which the defendant \_\_\_\_\_ the plaintiff, 29 U.S.C. § 623(a)(1) (ADEA); 42 U.S.C. § 2000e-2 (Title VII); 42 U.S.C. § 12112(a) (ADA)].

"Determining factor" is appropriate to signify the sole cause in an indirect evidence, pretext case brought under the decisional format of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1101-02 (8th Cir. 1988). "Motivating" is often used in a direct evidence, mixed-motive case brought under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), to signify the multiple factors, at least one of which is assertedly unlawful, that caused the adverse employment decision. 42 U.S.C. § 2000e-2(m); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1350-51 (8th Cir. 1995); *Parton v. GTE North, Inc.*, 971 F.2d 150, 153 (8th Cir. 1992); *Foster v. Univ. of Ark.*, 938 F.2d 111, 114 (8th Cir. 1991). "Determining factor" also has been used in a mixed-motive case. *Williams v. Fermenta Animal Health Co.*, 984 F.2d 261, 265 (8th Cir. 1993). "Substantial factor" and "motivating factor" have been used to convey the same legal standard. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Glover v. McDonnell Douglas Corp.*, 981 F.2d 388, 393-95 (8th Cir.), *vacated and remanded on other grounds*, 510 U.S. 802 (1993), 12 F.3d 845 (8th Cir. 1994). "Motivating factor" has been used with "determining factor" in the decisional calculus of a single cause, pretext case. *Nelson v. Boatmen's Bancshares, Inc.*,

26 F.3d 796, 801 (8th Cir. 1994). “Discernible factor” has been equated with “motivating factor” in a mixed-motive case. *Estes*, 856 F.2d at 1102.

“Motive” (the root of “motivating”) is defined as “something that causes a person to act in a certain way, do a certain thing, etc.” Random House Compact Unabridged Dictionary, Motive, p. 1254 (Special Second Edition, 1996).

The Age Discrimination in Employment Act, at 29 U.S.C. § 623(a)(1), and Title VII of the Civil Rights Act of 1964, as amended, at 42 U.S.C. § 2000e-2(a), also use the phrase “because of” to describe the prohibited causal relationship between the defendant’s intention and factors that may not be used in making an employment decision.

5. Here state the alleged adverse employment action.

### **Committee Comments**

For the trials of disparate treatment cases, the Committee has selected the term “motivating factor” to constitute the subject matter of the defendant’s asserted, unlawful state of mind when the action sued upon occurred. Whether this term or another term<sup>6</sup> is selected is immaterial as long as the term used signifies the proper legal definition for the jury. A court may decide that the term “motivating factor” need not be defined expressly because its common definition<sup>7</sup> is also the applicable legal definition.

The Americans With Disabilities Act prohibits each “covered entity” from discriminating against a “qualified individual” with a disability in an employment context “because of”<sup>8</sup> the disability. *See* 42 U.S.C. § 12112(a). The gist of the term “because of” is intentional discrimination that resulted in the employment decision adverse to the plaintiff, whether in a sole cause, pretext context or in a mixed-motive context. The burden on the plaintiff, in both a sole cause and a mixed-motive case, is to prove to the factfinder that the adverse employment decision resulted from the unlawful motive, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989); *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 514-517 (1993), and the burden of proof on the defendant in a mixed-motive case is to prove, as an affirmative defense, that the same decision would have been made absent the unlawful motive. *Price Waterhouse*, 490 U.S. at 258. The evidence offered in what starts out as the trial of a sole cause case may support a finding of a mixed-motive liability. *See Nelson v. Boatmen’s Bancshares, Inc.*, 26 F.3d 796, 801 (8th Cir. 1994) (the employer’s proffered nondiscriminatory explanation may permit an inference of the existence of an unlawful motivating factor). In both contexts, the plaintiff’s ultimate burden is to persuade the factfinder that the defendant intentionally acted adversely to the plaintiff for a proscribed reason. *St. Mary’s Honor Center v. Hicks*, 509 U.S. at 507-08.

Each of the definitions of “motivating factor” set out in this section accurately states the law.

**12.40 ELEMENTS OF CLAIM: (SEX) DISCRIMINATION  
(Mixed Motive) (42 U.S.C. § 1983)**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if both of the following elements have been proved<sup>1</sup>:

*First*, the defendant [discharged]<sup>5</sup> the plaintiff; and

*Second*, the plaintiff's (sex) [was a motivating factor]<sup>6</sup> [played a part]<sup>7</sup> in the defendant's decision[; and

*Third*, the defendant was acting under color of state law].<sup>8</sup>

However, your verdict must be for the defendant if any of the above elements has not been proved, or if it has been proved that the defendant would have [discharged] the plaintiff regardless of [(his) (her)] (sex). [You may find that the plaintiff's (sex) [was a motivating factor] [play a part] in the defendant's (decision)<sup>9</sup> if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] not the real reason(s), but [(is) (are)] a pretext to hide (sex) discrimination.]<sup>10</sup>

**Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. This instruction is designed for use in a discharge case. In a "failure to hire" "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See* Model Special Verdict Form 11.90.

3. The appropriate standard in a section 1983 case is not clearly resolved. "Motivating factor" was used previously in these instructions and these cases have many similarities to Title VII cases. The phrase "motivating factor" should be defined, if used. *See* Model Instruction 5.21. If the court decides "determining factor" is appropriate, use Model Instruction 12.41. If the court is uncertain as to what standard should be used in a particular case, the Special Interrogatories in Model Instruction 11.90 may be used.

4. See Model Instruction 5.21, which defines “motivating factor” in terms of whether the characteristic “played a part or a role” in the defendant’s decision. The phrase “motivating factor” need not be defined if the definition itself is used in the elements instruction.

5. Use this language if there is an issue of whether the defendant was acting under color of state law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, this element will be conceded by the defendant. If so, it need not be included in this instruction.

6. This instruction makes references to the defendant’s “decision.” It may be modified if another term--such as “actions” or “conduct”--would be more appropriate.

7. This sentence may be added, if appropriate. See Model Instruction 5.20 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states “[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.”

### **Committee Comments**

To prevail on a section 1983 discrimination claim, the plaintiff must prove intentional discrimination. *Washington v. Davis*, 426 U.S. 229, 240 (1976). This intent to discriminate must be a causal factor in the defendant’s employment decision. *Tyler v. Hot Springs School Dist. No. 6*, 827 F.2d 1227, 1230-31 (8th Cir. 1987).

**12.41 ELEMENTS OF CLAIM: (SEX) DISCRIMINATION (Determining Factor)  
(42 U.S.C. § 1983)**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all the following elements have been proved<sup>1</sup>:

*First*, the defendant [discharged]<sup>2</sup> the plaintiff; and

*Second*, the plaintiff's (sex) was a determining factor in the defendant's decision.

Your verdict must be for the defendant if any of the above elements has not been proved.

“(Sex) was a determining factor” only if the defendant would not have discharged the plaintiff but for the plaintiff's (sex); it does not require that (sex) was the only reason for the decision made by the defendant.<sup>3</sup> [You may find (sex) was a determining factor if it has been proved that the defendant's stated reason(s) for its decision(s) [(is) (are)] not the real reason(s), but [(is) (are)] a pretext to hide (sex) discrimination].<sup>4</sup>

**Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. This instruction is designed for use in a discharge case. In a “failure to hire,” “failure to promote,” or “demotion” case, the instruction must be modified. Where the plaintiff resigned but claims a “constructive discharge,” this instruction should be modified. *See* Model Instruction 5.41.

3. This definition of the phrase “(\_\_\_\_\_) was a determining factor” is based on *Grebin v. Sioux Falls Indep. School Dist. No. 49-5*, 779 F.2d 18, 20 n.1 (8th Cir. 1985).

4. This sentence may be added, if appropriate. *See* Model Instruction 5.20 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states “[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.”

## **Committee Comments**

*See* Notes on Use 6 to Model Instruction 12.40.

## 12.70 DAMAGES: ACTUAL (42 U.S.C. § 1983)

If you find in favor of the plaintiff under Instruction \_\_\_\_\_<sup>1</sup> and if you answer “no” in response to Instruction \_\_\_\_\_<sup>2</sup>, then you must award the plaintiff such sum as you find will fairly and justly compensate the plaintiff for any damages you find the plaintiff sustained as a direct result of [describe the defendant’s decision - *e.g.*, “the defendant’s decision to discharge the plaintiff”]. The plaintiff’s claim for damages includes two distinct types of damages and you must consider them separately:

*First*, you must determine the amount of any wages and fringe benefits<sup>3</sup> the plaintiff would have earned in [(his) (her)] employment with the defendant if [(he) (she)] had not been discharged on [fill in date of discharge] through the date of your verdict,<sup>4, 5, 6</sup> *minus* the amount of earnings and benefits that the plaintiff received from other employment during that time.

*Second*, you must determine the amount of any other damages sustained by the plaintiff, such as [list damages supported by the evidence].<sup>7</sup> You must enter separate amounts for each type of damages in the verdict form and must not include the same items in more than one category.

[You are also instructed that the plaintiff has a duty under the law to “mitigate” [(his) (her)] damages - that is, to exercise reasonable diligence under the circumstances to minimize [(his) (her)] damages. Therefore, if you find that the plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [(him) (her)], you must reduce [(his) (her)] damages by the amount [(he) (she)] reasonably could have avoided if [(he) (she)] had sought out or taken advantage of such an opportunity.]<sup>8</sup>

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.]<sup>9</sup>

## Notes on Use

1. Insert the number of the “elements of claim” instruction.
2. Insert the number or title of the “same decision” instruction.
3. When certain benefits, such as employer-subsidized health insurance, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. Claims for lost benefits often present difficult issues as to the proper measure of recovery. *See EEOC v. Dial Corp.*, 469 F.3d 735, 744 (8th Cir. 2006) (discussing different approaches and holding district court did not err in awarding lost health insurance premiums). Some courts deny recovery for lost benefits unless the employee purchased substitute coverage, in which case the measure of damages is the employee’s out-of-pocket expenses. *Id.* (citing *Galindo v. Stoodly Co.*, 793 F.2d 1502, 1517 (9th Cir. 1986)). Other courts permit the recovery of the amount the employer would have paid as premiums on the employee’s behalf. *Id.* (citing *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 964-65 (4th Cir. 1985)). The Committee expresses no view as to which approach is proper. This instruction also may be modified to exclude certain items that were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law.
4. In some cases, the defendant asserts some independent post-discharge reason - such as a plant closing or sweeping reduction in force - as to why the plaintiff would have been terminated in any event before trial. *See, e.g., Cleverly v. Western Elec. Co.*, 450 F. Supp. 507, 511 (W.D. Mo. 1978), *aff’d*, 594 F.2d 638 (8th Cir. 1979); *see also Milhauser v. Minco Prods., Inc.*, 855 F. Supp. 2d 885, 903 (D. Minn. 2012) (noting, in the context of a USERRA claim, that “[t]here is substantial case law indicating that a reduction in force that reasonably would have included the plaintiff constitutes a circumstance making reemployment unreasonable.”). In those cases, this instruction must be modified to submit this issue for the jury’s determination.
5. The trial court may decide to set a time limit beyond which an award of future damages would be impermissibly speculative. *See Hybert v. Hearst Corp.*, 900 F.2d 1050, 1056-57 (7th Cir. 1990).
6. Front pay is essentially an equitable remedy “in lieu of” reinstatement. *Dollar v. Smithway Motor Express, Inc.*, 710 F.3d 798, 809 (8th Cir. 2013). Front pay is an issue for the court, not the jury. *Nassar v. Jackson*, 779 F.3d 547, 553 (8th Cir. 2015) (“Front pay, however, may be awarded only by a court, not by a jury. . . . [I]t was error for the court to allow the jury to award it.”). If front pay is awarded, it should be excluded from the statutory limit on compensatory damages provided for in 42 U.S.C. § 1981a(b)(3). *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 854 (2001) (“Because front pay is a remedy authorized under § 706(g), Congress did not limit the availability of such awards in § 1981a.”).
7. A prevailing plaintiff may recover damages for mental anguish and other personal injuries including “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.” 42 U.S.C. § 1981a(b)(3).
8. This paragraph is designed to submit the issue of “mitigation of damages” in appropriate cases. *See Wages v. Stuart Mgmt. Corp.*, 798 F.3d 675, 682 (8th Cir. 2015) (“For example, a jury should have determine[d] whether [plaintiff] mitigated damages (and to what extent) . . . .”); *Canny v. Dr. Pepper/Seven-Up Bottling Grp., Inc.*, 439 F.3d 894, 905 (8th Cir. 2006) (noting district court’s issuance of jury instruction on mitigation of damages).

9. This paragraph may be given at the trial court’s discretion.

### **Committee Comments**

This instruction is designed to submit the standard back pay formula of lost wages and benefits reduced by interim earnings and benefits. *See Hartley v. Dillard’s, Inc.*, 310 F.3d 1054, 1062 (8th Cir. 2002). This instruction may be modified to articulate the types of interim earnings that should be offset against the plaintiff’s back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *See, e.g., Rhodes v. Guiberson Oil Tools*, 82 F.3d 615, 620 (5th Cir. 1996) (offsetting severance pay); *Krause v. Dresser Indus.*, 910 F.2d 674, 680 (10th Cir. 1990). Unemployment compensation, Social Security benefits, pension benefits, and workers’ compensation benefits ordinarily are not offset against a back pay award. *See Moysis v. DTG Datanet*, 278 F.3d 819, 828 (8th Cir. 2002) (classifying unemployment and workers’ compensation benefits as “collateral sources” that cannot be offset); *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104, 1112 (8th Cir. 1994) (“[M]ost courts have refused to deduct such benefits as social security and unemployment compensation . . . .”); *Doyme v. Union Electric Co.*, 953 F.2d 447, 451-52 (8th Cir. 1992) (holding that pension benefits are a “collateral source benefit”).

Damages other than backpay and interest on backpay are subject to limits based on the size of the employer. *See* 42 U.S.C. § 1981a(b)(3). The jury is not to be informed of the damage limits. 42 U.S.C. § 1981a(c). Instead, the trial court will simply reduce the verdict by the amount of any excess. Because the law imposes a limit on general compensatory damages but does not limit the recovery of back pay and lost benefits, the Committee believes that these types of damages must be considered and assessed separately by the jury. Otherwise, if the jury awarded a single dollar amount, it would be impossible to identify the portion of the award that was attributable to back pay and the portion that was attributable to “general damages.” As a result, the trial court would not be able to determine whether the jury’s award exceeded the statutory limit.

In some cases, a discrimination plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy “in lieu of” reinstatement, this remedy traditionally has been viewed as an issue for the court, not the jury. *Nassar v. Jackson*, 779 F.3d 547, 553 (8th Cir. 2015) (“Front pay, however, may be awarded only by a court, not by a jury. . . . [I]t was error for the court to allow the jury to award it.”); *Dollar v. Smithway Motor Express, Inc.*, 710 F.3d 798, 809 (8th Cir. 2013).

In *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 854 (2001), the Supreme Court ruled that front pay is not subject to the statutory limit on compensatory damages provided for in 42 U.S.C. § 1981a(b)(3).

## 12.71 DAMAGES: NOMINAL (42 U.S.C. § 1983)

If you find in favor of the plaintiff under Instruction \_\_\_\_\_<sup>1</sup> and if you answer “no” in response to Instruction \_\_\_\_\_<sup>2</sup>, but you find that the plaintiff’s damages have no monetary value, then you must return a verdict for the plaintiff in the nominal amount of One Dollar (\$1.00).<sup>3</sup>

### Notes on Use

1. Insert the number of the “elements of claim” instruction.
2. Insert the number of the “same decision” instruction.
3. One Dollar (\$1.00) arguably is the required amount in cases in which nominal damages are appropriate. *Corpus v. Bennett*, 430 F.3d 912, 917 (8th Cir. 2005). Nominal damages are appropriate when the jury is unable to place a monetary value on the harm that the plaintiff suffered from the violation of his rights. See *Thurairajah v. City of Fort Smith, Arkansas*, 3 F.4th 1017, 1026 (8th 2021); *Bailey v. Runyon*, 220 F.3d 879, 882 (8th Cir. 2000) (Title VII) (citing *Parton v. GTE North Inc.*, 971 F.2d 150, 154 (8th Cir. 1992)); cf. *Corpus*, 430 F.3d at 917 (in Section 1983 action, nominal damages are appropriate where the jury cannot place a monetary value on the harm suffered by the plaintiff).

### Committee Comments

Most employment discrimination cases involve lost wages and benefits. In some cases, however, the jury may be permitted to return a verdict for only nominal damages. For example, if the plaintiff was given severance pay and was able to secure a better paying job, the evidence may not support an award of back pay, but may support an award of compensatory damages. This instruction is designed to submit the issue of nominal damages in appropriate cases.

## **12.72 DAMAGES: PUNITIVE (42 U.S.C. § 1983)**

In addition to the damages mentioned in other instructions, the law permits the jury under certain circumstances to award punitive damages.

If you find in favor of the plaintiff and against defendant [name]<sup>+</sup>, [and if it has been proved<sup>1</sup> that the plaintiff's firing was motivated by evil motive or intent, or that the defendant was recklessly indifferent to the plaintiff's rights]<sup>2</sup>, then in addition to any other damages that you find the plaintiff entitled to, you may, but are not required to, award the plaintiff an additional amount as punitive damages for the purposes of punishing the defendant for engaging in such misconduct and deterring the defendant and others from engaging in such misconduct in the future. You should presume that a plaintiff has been made whole for [his, her, its] injuries by the damages awarded under Instruction \_\_\_\_\_.<sup>3</sup>

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. How reprehensible the defendant's conduct was.<sup>4</sup> In this regard, you may consider [whether the harm suffered by the plaintiff was physical or economic or both; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether the defendant's conduct that harmed the plaintiff also posed a risk of harm to others; whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed the plaintiff].<sup>5</sup>

2. How much harm the defendant's wrongful conduct caused the plaintiff [and could cause the plaintiff in the future].<sup>6</sup> [You may not consider harm to others in deciding the amount of punitive damages to award.]<sup>7</sup>

3. What amount of punitive damages, in addition to the other damages already awarded, is needed, considering the defendant's financial condition, to punish the

defendant for [his, her, its] wrongful conduct toward the plaintiff and to deter the defendant and others from similar wrongful conduct in the future.

4. [The amount of fines and civil penalties applicable to similar conduct].<sup>8</sup>

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to the plaintiff.<sup>9</sup>

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against those defendants may be the same or they may be different.]<sup>10</sup>

[You may not award punitive damages against the defendant[s] for conduct in other states.]<sup>11</sup>

#### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Punitive damages are allowed when the threshold for liability requires reckless conduct. If the threshold for the underlying tort liability is less than “reckless,” the bracketed language correctly states the standard for punitive damages under 42 U.S.C. § 1983. *Smith v. Wade*, 461 U.S. 30 (1983). See *Kolstad v. American Dental Ass’n*, 527 U.S. 526, 535, 536 (1999), and *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 903 (8th Cir. 2006), discussing the meaning of “malice” and “reckless indifference.” If the threshold for liability is “malice” or “reckless indifference” or something more culpable, no additional finding should be necessary because the language in the issue/element instruction requires the jury to find the culpability necessary for imposing punitive damages. However, it is recommended that the punitive damages instruction include such language to be sure the jury focuses on that issue.

3. Fill in the number or title of the actual damages or nominal damages instruction here.

4. The word “reprehensible” is used in the same sense as it is used in common parlance. The Supreme Court, in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003), stated: “It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” In *Philip Morris USA v. Williams*, 549 U.S. 346, 355, 127 S. Ct. 1057, 1064-65 (2007), the Supreme Court held that, while harm to persons other

than the plaintiff may be considered in determining reprehensibility, a jury may not punish for the harm caused to persons other than the plaintiff. The Court stated that procedures were necessary to assure “that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.” *Id.* at 355.

5. Any item not supported by the evidence, of course, should be excluded.

6. This sentence may be used if there is evidence of future harm to the plaintiff.

7. A paragraph instructing the jury that any punitive damages award should not include an amount for harm suffered by persons who are not parties to the case may be necessary if evidence concerning harm suffered by nonparties has been introduced. *See Philip Morris USA v. Williams*, 549 U.S. at 355, 127 S. Ct. at 1064-65; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-24 (2003); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004).

8. Insert this phrase only if evidence has been introduced, or the court has taken judicial notice, of fines and penalties for similar conduct. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996), noting “civil penalties authorized or imposed in comparable cases” as a guidepost to be considered. *See also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003).

9. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (stating that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process” and observing that: “Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1 [citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996)] or, in this case, of 145 to 1.”).

10. The bracketed language is available for use if punitive damages claims are submitted against more than one defendant.

11. If evidence has been introduced concerning conduct by the defendant that was legal in the state where it was committed, the jury must be told that they cannot award punitive damages against the defendant for such conduct. *See State Farm Mut. Auto. Inc. Co. v. Campbell*, 538 U.S. 408, 422 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572-73 (1996); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004). This issue normally will not come up in cases under federal law. In any case where evidence is admitted for some purposes but may not be considered by the jury in awarding punitive damages, the court should give an appropriate limiting instruction.

### **Committee Comments**

This instruction attempts to incorporate the constitutionally relevant principles set forth by the Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459-62 (1993). In *State Farm*, 538 U.S. at 417, the Court observed: “We have admonished that ‘[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and 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 Motor*, 512 U.S. at 432). See *Baker v. John Morrell & Co.*, 266 F. Supp. 2d 909, 961 (N.D. Iowa 2003), *aff’d*, 382 F.3d 816 (8th Cir. 2004), and *In Re Exxon Valdez*, 296 F. Supp. 2d 1071, 1080 (D. Alaska 2004) judgment vacated by 490 F.3d 1066 (9th Cir. 2007), for examples of punitive damages instructions in which the court attempted to incorporate constitutional standards.

The last paragraph is based on *State Farm*, 538 U.S. at 421, where the Court held: “A state cannot punish a defendant for conduct that may have been lawful where it occurred. . . . Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.” The Court specifically mandated that: “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 422.

**12.80 GENERAL VERDICT FORM (42 U.S.C. § 1983)**

**VERDICT**

**Note:** Complete the following paragraph by writing in the name required by your verdict.

On the [(sex)<sup>1</sup> discrimination]<sup>2</sup> claim of plaintiff [Jane Doe], [as submitted in Instruction \_\_\_\_\_]<sup>3</sup>, we find in favor of:

---

(Plaintiff Jane Doe)                      or                      (Defendant XYZ, Inc.)

**Note:** Answer the next question only if the above finding is in favor of the plaintiff. If the above finding is in favor of the defendant, have your foreperson sign and date this form because you have completed your deliberations on this claim.

[Has it been proved<sup>4</sup> that the defendant would have [discharged] the plaintiff regardless of [(his) (her)] (sex)?

\_\_\_\_\_ Yes                      \_\_\_\_\_ No  
(Mark an “X” in the appropriate space)

**Note:** Complete the following paragraphs only if your answer to the preceding question is “no.” If you answered “yes” to the preceding question, have your foreperson sign and date this form because you have completed your deliberations on this claim.]<sup>5</sup>

We find the plaintiff’s lost wages and benefits through the date of this verdict to be:

\$ \_\_\_\_\_ (stating the amount or, if none, write the word “none”).

We find the plaintiff's other damages, excluding lost wages and benefits, to be:

\$ \_\_\_\_\_ (stating the amount [or, if you find that the plaintiff's damages do not have a monetary value, write in the nominal amount of One Dollar (\$1.00)]).

[We assess punitive damages against the defendant, as submitted in Instruction \_\_\_\_\_, as follows:

\$ \_\_\_\_\_ (stating the amount or, if none, write the word "none").]<sup>6</sup>

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Foreperson

Dated: \_\_\_\_\_

#### Notes on Use

1. Use the protected classification at issue (race, color, religion, sex, or national origin).
2. The bracketed phrase should be submitted when the plaintiff submits multiple claims to the jury.
3. The number of the "elements of claim" instruction may be inserted here. *See* Model Instruction 12.40.
4. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.
5. This question should be used to submit the "same decision" issue to the jury. *See* Model Instruction 12.01.
6. This paragraph should be included if the evidence is sufficient to support an award of punitive damages. *See* Model Instruction 12.72.

## 13. EMPLOYMENT—FIRST AMENDMENT RETALIATION (42 U.S.C. § 1983)

### 13.00 OVERVIEW

The legal theory underlying First Amendment retaliation cases is that “a State cannot condition public employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression.” *Connick v. Myers*, 461 U.S. 138, 142 (1983); *see also Pickering v. Board of Educ.*, 391 U.S. 563, 568-74 (1968); *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972); *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 283-84 (1977); *Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987); *Waters v. Churchill*, 511 U.S. 661 (1994). Although most First Amendment retaliation cases relate to the termination of the plaintiff’s employment, they can involve demotions, suspensions, and other employment-related actions. *See, e.g., Stever v. Independent School Dist. No. 625*, 943 F.2d 845 (8th Cir. 1991) (transfer); *Powell v. Basham*, 921 F.2d 165, 167-68 (8th Cir. 1990) (denial of promotion); *Duckworth v. Ford*, 995 F.2d 858, 860-61 (8th Cir. 1993) (harassment).

In view of the Supreme Court’s decision in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977), the model instruction on liability utilizes a motivating- factor/same-decision burden-shifting format in all First Amendment retaliation cases.

Public employers may not retaliate against their employees for speaking out on matters of public concern unless their speech contains knowingly or recklessly false statements, undermines the ability of the employee to function, or interferes with the operation of the governmental entity. *McGee v. South Pemiscot School Dist.*, 712 F.2d 339, 342 (8th Cir. 1983); *see also Duckworth v. Ford*, 995 F.2d 858, 861 (8th Cir. 1993) (holding that the defendants were not entitled to qualified immunity in First Amendment case); *Shands v. City of Kennett*, 993 F.2d 1337, 1344-46 (8th Cir. 1993) (affirming j.n.o.v. for employer where the plaintiff’s comments regarding personnel and safety issues were not protected by First Amendment); *Bausworth v. Hazelwood School Dist.*, 986 F.2d 1197 (8th Cir. 1993) (affirming summary judgment for employer where the plaintiff’s comments regarding school district policy were not “protected activity”); *Buzek v. County of Saunders*, 972 F.2d 992 (8th Cir. 1992) (individual defendant was not entitled to qualified immunity defense in First Amendment case); *Bartlett v. Fischer*, 972 F.2d 911 (8th Cir. 1992) (approving qualified immunity defense in First Amendment case); *Stever v. Independent School Dist. No. 625*, 943 F.2d 845 (8th Cir. 1991) (analyzing “protected speech” and “causation” issues); *Powell v. Basham*, 921 F.2d 165 (8th Cir. 1990) (holding that public employee’s criticism of employer’s promotion process was “protected activity”); *Crain v. Board of Police Comm’rs*, 920 F.2d 1402 (8th Cir. 1990) (affirming summary judgment where the plaintiffs’ internal grievances did not rise to the level of “protected speech”); *Hoffmann v. Mayor of City of Liberty*, 905 F.2d 229 (8th Cir. 1990) (employee grievance was not protected by the First Amendment); *Darnell v. Ford*, 903 F.2d 556 (8th Cir. 1990) (ruling that state police officer’s support of a certain candidate for the position of Highway Patrol Superintendent was “protected activity”).

#### PRIMARY ISSUES IN FIRST AMENDMENT CASES

Generally, there are four primary issues in First Amendment retaliation cases: (1) whether the plaintiff’s complained of employment decision constitutes an “adverse employment

action”; (2) whether the plaintiff’s speech was “protected activity” under the First Amendment; (3) whether the plaintiff’s protected activity was a substantial or motivating factor in the defendant’s decision to take the adverse employment action; and (4) whether the defendant would have taken the same action irrespective of the plaintiff’s protected activity. *Lyons v. Vaught*, 781 F.3d 958, 961 (8th Cir. 2015); *Rowles v. Curators of the University of Missouri, et al.*, 983 F.3d 345, 357 (8th Cir. 2020); *Hamer v. Brown*, 831 F.2d 1398, 1401 (8th Cir. 1987); *Lewis v. Harrison School Dist.*, 805 F.2d 310, 313 (8th Cir. 1986); *Cox v. Dardanelle Public School Dist.*, 790 F.2d 668, 672 (8th Cir. 1986). The determination of whether the plaintiff’s speech was “protected” presents a question of law for the court. *E.g.*, *Bausworth v. Hazelwood School Dist.*, 986 F.2d 1197, 1198 (8th Cir. 1993); *Lewis v. Harrison School Dist.*, 805 F.2d 310, 313 (8th Cir. 1986).

### SECONDARY ISSUES RELATING TO “PROTECTED SPEECH” DETERMINATION

In general, the question of whether the plaintiff’s speech was “protected” depends upon two sub-issues: (1) whether the plaintiff’s speech addressed a matter of “public concern”; and (2) whether, in balancing the competing interests, the plaintiff’s interest in commenting on matters of public concern outweighs the government’s interest in rendering efficient services to its constituents. *Waters v. Churchill*, 511 U.S. 661 (1994); *Hamer v. Brown*, 831 F.2d 1398, 1401-02 (8th Cir. 1987); *Cox v. Dardanelle Public School Dist.*, 790 F.2d 668, 672 (8th Cir. 1986). In many cases, the trial court will be able to determine whether the plaintiff’s speech was protected without much difficulty. However, as discussed below, complicated issues can arise when there are factual disputes underlying this issue. *See Shands v. City of Kennett*, 993 F.2d 1337, 1342 (8th Cir. 1993).

#### *a. Public Concern*

Analysis of whether the plaintiff’s speech addressed a matter of “public concern” requires consideration of the plaintiff’s role in conveying the speech, whether the plaintiff attempted to communicate to the public at large, and whether the plaintiff was attempting to generate public debate or merely pursuing personal gain. *Bausworth v. Hazelwood School Dist.*, 986 F.2d 1197 (8th Cir. 1993); *but cf. Derrickson v. Board of Educ.*, 703 F.2d 309, 316 (8th Cir. 1983) (speech can be protected even if it was “privately express[ed]” to the plaintiff’s superiors); *Darnell v. Ford*, 903 F.2d 556, 563 (8th Cir. 1990) (speech was protected even if it was motivated by the plaintiff’s self-interest); *see generally Connick v. Myers*, 461 U.S. 138, 147 (1983) (speech is not protected by First Amendment if the plaintiff speaks merely as an employee upon matters only of personal interest). Determination of whether the plaintiff’s speech addressed a matter of public concern appears to fall exclusively within the province of the court. *See Lewis v. Harrison School Dist.*, 805 F.2d 310, 312-13 (8th Cir. 1986) (trial court erred in following jury’s finding that the plaintiff’s speech did not address a matter of public concern).

#### *b. Balancing of Interests*

Analysis of the “balancing” issue depends upon a variety of factors, which traditionally have included the following: the need for harmony in the workplace; whether the governmental entity’s mission required a close working relationship between the plaintiff and his or her co-workers when the speech in question has caused or could have caused deterioration in the

plaintiff's work relationships; the time, place, and manner of the speech; the context in which the dispute arose; the degree of public interest in the speech; and whether the speech impaired the plaintiff's ability to perform his or her duties. *Shands v. City of Kennett*, 993 F.2d 1337, 1344 (8th Cir. 1993); *Hamer v. Brown*, 831 F.2d 1398, 1402 (8th Cir. 1987); see generally *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). This balancing process is flexible, and the weight to be given to any one factor depends upon the specific circumstances of each case. *Shands v. City of Kennett*, 993 F.2d 1337, 1344 (8th Cir. 1993).

### *c. Balancing and Jury Instructions*

Although the balancing process ultimately is a function for the court, Eighth Circuit case law indicates that subsidiary factual issues must be submitted to the jury. For example, in *McGee v. South Pemiscot School Dist.*, 712 F.2d 339, 342 (8th Cir. 1983), the court stated that “[i]t was for the jury to decide whether the [plaintiff’s] letter [to the editor] created disharmony between McGee and his immediate supervisors.” Likewise, in *Lewis v. Harrison School Dist.*, 805 F.2d 310, 315 (8th Cir. 1986), the Eighth Circuit ruled that it was error for the trial court to disregard the jury’s special interrogatory findings on certain balancing issues. In *Shands v. City of Kennett*, 993 F.2d 1337 (8th Cir. 1993), the court stated that:

Any underlying factual disputes concerning whether the plaintiff’s speech is protected . . . should be submitted to the jury through special interrogatories or special verdict forms. For example, the jury should decide factual questions such as the nature and substance of the plaintiff’s speech activity, and whether the speech created disharmony in the work place. The trial court should then combine the jury’s factual findings with its legal conclusions in determining whether the plaintiff’s speech is protected.

*Id.* at 1342-43 (citations omitted). Accordingly, this model instruction may be supplemented with a set of special interrogatories or it may require modification to elicit specific jury findings on critical balancing issues such as “disharmony.” See Model Instruction 13.91 n.2. The use of these special interrogatories was approved in *Cook v. Tadros*, 312 F.3d 386, 388 (8th Cir. 2002). Although the plaintiff appears to have the burden of proof as to whether the speech was “constitutionally protected,” see *Cox v. Miller County R-1 School Dist.*, 951 F.2d 927, 931 (8th Cir. 1991) and *Stever v. Independent School Dist. No. 625*, 943 F.2d 845, 849-50 (8th Cir. 1991), it is unclear whether the plaintiff bears the burden of proof as to each subsidiary factor.

When the trial court submits special interrogatories to the jury, it bears emphasis that the ultimate decision as to whether the plaintiff’s speech was protected is a question of law for the court. *E.g.*, *Lewis v. Harrison School Dist.*, 805 F.2d 310, 312-13 (8th Cir. 1986) (trial court erred in following jury’s finding that speech did not address matter of public concern); *Bowman v. Pulaski County Special School Dist.*, 723 F.2d 640, 644-45 (8th Cir. 1983) (the plaintiff’s speech was protected even though it “contributed to the turmoil” at the workplace). It also bears emphasis that the defendant’s reasonable perception of the critical events is controlling; the jury cannot be allowed to substitute its judgment as to what “really happened” for the honest and reasonable belief of the defendant. *Waters v. Churchill*, 511 U.S. 661 (1994.)

#### *d. Balancing and Qualified Immunity*

The need to address the balancing issue in jury instructions is most likely to arise in cases brought against municipalities, school districts, and other local governmental bodies that are not entitled to qualified immunity or Eleventh Amendment immunity. In contrast, Eighth Circuit case law suggests that *individual defendants* may have qualified immunity with respect to any jury-triable damages claims if the “balancing issue” becomes critical in a First Amendment case. See *Grantham v. Trickey*, 21 F.3d 289, 295 (8th Cir. 1994) (holding that individual defendants are entitled to qualified immunity where there is specific and unrefuted evidence that the employee’s speech affected morale and substantially disrupted the work environment); *Bartlett v. Fisher*, 972 F.2d 911, 916 (8th Cir. 1992) (suggesting that qualified immunity from damages will apply whenever a First Amendment retaliation case involves the “balancing test”). *But cf.* *Duckworth v. Ford*, 995 F.2d 858, 861 (8th Cir. 1993) (rejecting individual defendants’ qualified immunity defense in First Amendment case); *Buzek v. County of Saunders*, 972 F.2d 992 (8th Cir. 1992) (rejecting qualified immunity in First Amendment case where the defendant failed to introduce evidence sufficient to invoke the balance test); *Powell v. Basham*, 921 F.2d 165, 167-68 (8th Cir. 1990) (rejecting qualified immunity defense in First Amendment wrongful discharge cases); *Lewis v. Harrison School Dist.*, 805 F.2d 310, 318 (8th Cir. 1986) (same). In *Waters v. Churchill*, 511 U.S. 661 (1994), the Supreme Court declined to address the issue of qualified immunity in First Amendment cases. In addition, state governmental bodies typically have Eleventh Amendment immunity from damages claims. *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). Accordingly, when balancing issues arise in a case brought by a state employee, the defendants may have immunity from a claim for damages and, as a result, there would be no need for a jury trial or jury instructions.

#### *MOTIVATION AND CAUSATION*

If a plaintiff can make the required threshold showing that he or she engaged in protected activity, the remaining issues focus on the questions of motivation and causation: was the plaintiff’s employment terminated or otherwise impaired because of his or her protected activity? In *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977), the Supreme Court introduced the “motivating-factor”/“same-decision” burden shifting format in First Amendment retaliation cases. On the issue of causation, it also should be noted that the Eighth Circuit has allowed a claim against a defendant who recommended the plaintiff’s dismissal but lacked final decision-making authority. *Darnell v. Ford*, 903 F.2d 556, 561-62 (8th Cir. 1990). The Eighth Circuit also has allowed a claim against a school board for unknowingly carrying out a school principal’s retaliatory recommendation. *Cox v. Dardanelle Pub. School Dist.*, 790 F.2d 668, 676 (8th Cir. 1986). In *Waters v. Churchill*, 511 U.S. 661 (1994), the Supreme Court ruled that a public employer does not violate the First Amendment if it honestly and reasonably believes reports by coworkers of unprotected conduct by the plaintiff; the Supreme Court did not address the situation where the public employer relied upon the tainted recommendation of a management-level employee.

## CHAPTER 13 INSTRUCTIONS AND VERDICT FORMS

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**13.40 ELEMENTS OF CLAIM: FIRST AMENDMENT RETALIATION  
(42 U.S.C. § 1983)**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all the following elements have been proved<sup>1</sup>:

*First*, the defendant [here describe the adverse employment action; ex: discharged]<sup>2</sup> the plaintiff; and

*Second*, the plaintiff [here specifically describe the plaintiff's protected activity under the First Amendment; ex., sent a letter to the local newspaper complaining about "X"]<sup>3</sup>;

*Third*, [here state the protected activity e.g., plaintiff's letter to the local newspaper] [was a motivating factor]<sup>4</sup> [played a part]<sup>5</sup> in the defendant's decision [to discharge]<sup>6</sup> the plaintiff; and

*Fourth*, [the defendant was acting under color of law].

However, your verdict must be for the defendant if any of the above elements has not been proved, or if it has been proved that the defendant would have [discharged] the plaintiff regardless of [(his) (her)] (letter to the local newspaper).<sup>8</sup> [You may find that the plaintiff's [letter to a local newspaper] [was a motivating factor] [played a part] in the defendant's (decision)<sup>9</sup> if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] not the real reason, but [(is) (are)] a pretext to hide retaliation]<sup>10</sup>

**Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. This instruction is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See* Model Instruction 5.41.

3. To avoid difficult questions regarding causation, it is very important to specifically describe the speech/conduct that forms the basis for the claim. Vague references to “the plaintiff’s speech” or “the plaintiff’s statements to the school board” often will be inadequate; instead, specific reference to the time, place, and substance of the speech (*e.g.*, “the plaintiff’s comments criticizing teacher salaries at the April 1992 school board meeting”) is recommended. Whenever there is a genuine issue as to whether the plaintiff’s speech was “protected” by the First Amendment, the trial court should be extremely careful in making the record regarding this issue. If the trial court can readily determine that the plaintiff’s speech was “protected” by the First Amendment without resort to jury findings, a succinct description of the protected speech should be inserted in the elements instruction. By way of example, the model instruction references the plaintiff’s “letter to the local newspaper.” However, if there is an underlying factual dispute impacting whether the plaintiff’s speech was protected, any questions of fact should be submitted to the jury through special interrogatories or other special instructional devices. *See Cook v. Tadros*, 312 F.3d 386, 388 (8th Cir. 2002); *Shands v. City of Kennett*, 993 F.2d 1337, 1342-43 (8th Cir. 1993).

4. As suggested by *Shands v. City of Kennett*, 993 F.2d 1337, 1342-43 (8th Cir. 1993), the trial court may separately submit special interrogatories to elicit jury findings as to the relevant balancing factors, while reserving judgment on the legal impact of those findings. For a sample set of interrogatories, *see* Model Instruction 13.91. The use of special interrogatories on these model instructions was approved in *Cook v. Tadros*, 312 F.3d 386, 388 (8th Cir. 2002). If the trial court takes this approach, it should postpone its entry of judgment while it fully evaluates the implications of the jury’s findings of fact. *See* Model Instruction 13.90. Alternatively, if the essential jury issue can be crystallized in the form of a single essential element that the plaintiff must prove, it may be included in the elements instruction. For example, in *McGee v. South Pemiscot School Dist.*, 712 F.2d 339, 342 (8th Cir. 1983), the trial court instructed the jury that its verdict had to be for the defendants if it believed that the plaintiff’s “exercise of free speech had a disruptive impact upon the [school district’s] employees.”

5. The Committee believes that the term “motivating factor” should be defined. *See* Instruction 5.21.

6. *See* Model Instruction 5.21, which defines “motivating factor” in terms of whether the characteristic “played a part or a role” in the defendant’s decision. The phrase “motivating factor” need not be defined if the definition itself is used in the element instruction.

7. The bracketed term should be consistent with the first element. Accordingly, this instruction must be modified in a “failure-to-hire,” “failure-to-promote,” or “demotion” case.

8. Use this language if the issue of whether the defendant was acting under color of state law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, this element will be conceded by the defendant. If so, it need not be included in this instruction.

9. If appropriate, this instruction may be modified to include a “business judgment” and/or a “pretext” instruction. *See* Model Instructions 5.11, 5.20.

10. This instruction makes references to the defendant’s “decision.” It may be modified if another term--such as “actions” or “conduct”--would be more appropriate.

11. This sentence may be added, if appropriate. *See* Model Instruction 5.20 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states “[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.”

### **13.70 DAMAGES: ACTUAL (42 U.S.C. § 1983)**

If you find in favor of the plaintiff under Instruction \_\_\_\_\_,<sup>1</sup> then you must award the plaintiff such sum as you find will fairly and justly compensate the plaintiff for any actual damages you find the plaintiff sustained as a direct result of the defendant's conduct as submitted in Instruction \_\_\_\_\_.<sup>2</sup> The plaintiff's claim for damages includes two distinct types of damages and you must consider them separately:

First, you must determine the amount of any wages or fringe benefits you find the plaintiff would have earned in [(his) (her)] employment with the defendant if [(he) (she)] had not been discharged on [fill in date of discharge], through the date of your verdict, *minus* the amount of earnings and benefits that the plaintiff received from other employment during that time.<sup>3</sup>

Second, you must determine the amount of any other damages sustained by plaintiff as a direct result of the defendant's conduct [list damages supported by the evidence].<sup>4</sup> You must enter separate amounts for each category of damages in the verdict form and must not include the same items in more than one category. [You are also instructed that the plaintiff has a duty under the law to "mitigate" [(his) (her)] damages-- that is, to exercise reasonable diligence under the circumstances to minimize [(his) (her)] damages. Therefore, if you find<sup>5</sup> that the plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [(him) (her)], you must reduce [(his) (her)] damages by the amount [(he) (she)] reasonably could have avoided if [(he) (she)] had sought out or taken advantage of such an opportunity.]<sup>6</sup> [Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.]<sup>7</sup>

#### **Notes on Use**

1. Insert the number or title of the "elements of claim" instruction.
2. When certain benefits, such as employer-subsidized health insurance benefits, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. Claims for lost benefits often

present difficult issues as to the proper measure of recovery. *See EEOC v. Dial Corp.*, 469 F.3d 735, 744 (8th Cir. 2006) (discussing different approaches and holding district court did not err in awarding lost health insurance premiums). Some courts deny recovery for lost benefits unless the employee purchases substitute coverage, in which case the measure of damages is the employee's out-of-pocket expenses. *Id.* (citing *Galindo v. Stody Co.*, 793 F.2d 1502, 1517 (9th Cir. 1986)). Other courts permit the recovery of the amount the employer would have paid as premiums on the employee's behalf. *Id.* (citing *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 964-65 (4th Cir. 1985)). The Committee expresses no view as to what approach is proper. This instruction also may be modified to exclude certain items that were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law.

3. This sentence should be used to guide the jury in calculating the plaintiff's economic damages. In section 1983 cases, however, a prevailing plaintiff may recover actual damages for emotional distress and other personal injuries. *See Carey v. Piphus*, 435 U.S. 247 (1978). The words following "minus" are accurate only to the extent that they refer to employment that has been taken in lieu of the employment with the defendant. That is significant where, for example, the plaintiff had a part-time job with someone other than the defendant *before* the discharge and retained it after the discharge. In that circumstance, the amount of earnings and benefits from that part-time employment received after the discharge should not be deducted from the wages or fringe benefits the plaintiff would have earned with the defendant if he or she had not have been discharged, unless the part-time job was enlarged after the discharge. In such a case, the instruction should be modified to make it clear to the jury that income may be used to reduce the plaintiff's recovery.

4. In section 1983 cases, a prevailing plaintiff may recover damages for mental anguish and other personal injuries. The specific elements of damages that may be set forth in this instruction are similar to those found in the Civil Rights Act of 1991. *See* 42 U.S.C. § 1981a(b)(3). *See* Model Instructions 5.70 n.7 and 4.70.

5. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

6. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Wages v. Stuart Mgmt. Corp.*, 798 F.3d 675, 682 (8th Cir. 2015) ("For example, a jury should have determine[d] whether [plaintiff] mitigated damages (and to what extent)..."); *Canny v. Dr. Pepper/Seven-Up Bottling Grp., Inc.*, 439 F.3d 894, 905 (8th Cir. 2006) (noting district court's issuance of jury instruction on mitigation of damages).

7. This paragraph may be given at the trial court's discretion.

### **Committee Comments**

This instruction is designed to submit the standard back pay formula of lost wages and benefits reduced by interim earnings and benefits. *See Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808 (8th Cir. 1982). Moreover, because section 1983 damages are not limited to back pay, the instruction also permits the recovery of general damages for pain, suffering, humiliation, and the like.

In some cases, a retaliation plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy “in lieu of” reinstatement, front pay is an issue for the court, not the jury. *Excel Corp. v. Bosley*, 165 F.3d 635, 639 (8th Cir. 1999); *see also MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1060 (8th Cir. 1988); *Newhouse v. McCormick & Co.*, 110 F.3d 635, 641-43 (8th Cir. 1997) (front pay is an issue for the court, not the jury, in ADEA cases). If the trial court submits the issue of front pay to the jury, the jury’s determination may be binding. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (ADEA case).

This instruction may be modified to articulate the types of interim earnings that should be offset against the plaintiff’s back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *See Krause v. Dresser Indus., Inc.*, 910 F.2d 674, 680 (10th Cir. 1990); *Cornetta v. United States*, 851 F.2d 1372, 1381 (Fed. Cir. 1988); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985). Unemployment compensation, Social Security benefits or pension benefits ordinarily are not offset against a back pay award. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (holding that pension benefits are a “collateral source benefit”); *Dreyer v. Arco Chemical Co.*, 801 F.2d 651, 653 n.1 (3d Cir. 1986) (Social Security and pension benefits received are not deductible) overruled on other grounds by *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1099 n.10 (3d Cir. 1995); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 138-39 (3d Cir. 1986) (unemployment benefits received are not deductible); *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 627 (6th Cir. 1983) (same) *but cf. Blum v. Witco Chemical Corp.*, 829 F.2d 367, 374-75 (3d Cir. 1987) (pension benefits received as a result of subsequent employment considered in offsetting damages award); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989) (deductibility of unemployment compensation is within trial court’s discretion); *Horn v. Duke Homes*, 755 F.2d 599, 607 n.12 (7th Cir. 1985) (same); *EEOC v. Enterprise Ass’n Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976) (same).

This instruction is designed to encompass a situation where the defendant asserts some independent post-discharge reason--such as a plant closing or sweeping reduction in force--why the plaintiff would have been terminated in any event before trial. *See, e.g., Cleverly v. Western Elec. Co.*, 450 F. Supp. 507 (W.D. Mo. 1978), *aff’d*, 594 F.2d 638 (8th Cir. 1979). Nevertheless, the trial court may give a separate instruction that submits this issue in more direct terms.

### 13.71 DAMAGES: NOMINAL (42 U.S.C. § 1983)

If you find in favor of the plaintiff under Instruction \_\_\_\_\_,<sup>1</sup> but you find that the plaintiff's damages have no monetary value, then you must return a verdict for the plaintiff in the nominal amount of One Dollar (\$1.00).<sup>2</sup>

#### Notes on Use

1. Insert the number or title of the “elements of claim” instruction.
2. One Dollar (\$1.00) arguably is the required amount in cases where nominal damages are appropriate. *Corpus v. Bennett*, 430 F.3d 912, 917 (8th Cir. 2005). Nominal damages are appropriate when the jury is unable to place a monetary value on the harm that the plaintiff suffered from the violation of his or her rights. *Cf. Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988) (in prisoner civil rights action, nominal damages are appropriate where the jury cannot place a monetary value on the harm suffered by the plaintiff); *Haley v. Wyrick*, 740 F.2d 12 (8th Cir. 1984).

#### Committee Comments

Most employment discrimination/retaliation cases involve lost wages and benefits. Nevertheless, a nominal damage instruction should be given in appropriate cases, such as where a plaintiff claiming retaliation did not sustain any loss of earnings. *Goodwin v. Circuit Court of St. Louis County*, 729 F.2d 541, 542-43, 548 (8th Cir. 1984).

An award of nominal damages can support a punitive damage award. *See Goodwin v. Circuit Court of St. Louis County*, 729 F.2d at 548.

If nominal damages are submitted, the verdict form must contain a line where the jury can make that finding.

### 13.72 DAMAGES: PUNITIVE (42 U.S.C. § 1983)

In addition to the damages mentioned in other instructions, the law permits the jury under certain circumstances to award punitive damages.

If you find in favor of the plaintiff under Instruction(s) [insert the number of the “elements of claim” instruction] [and against the defendant [name]],<sup>1</sup> [and if it has been proved<sup>2</sup> that the plaintiff’s firing was motivated by evil motive or intent, or that the defendant acted with reckless indifference to the plaintiff’s rights],<sup>3</sup> then in addition to any other damages to which you find the plaintiff entitled, you may, but are not required to, award the plaintiff an additional amount as punitive damages for the purposes of punishing the defendant for engaging in such misconduct and deterring the defendant and others from engaging in such misconduct in the future. The defendant acted with reckless indifference if:

it has been proved that [insert the name(s) of the defendant or manager<sup>4</sup> who terminated<sup>5</sup> the plaintiff’s employment] knew that the (termination) was in violation of the law prohibiting retaliation or acted with reckless disregard of that law.<sup>6</sup>

You should presume that a plaintiff has been made whole for [his, her, its] injuries by the damages awarded under Instruction \_\_\_\_\_.<sup>7</sup>

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. How reprehensible the defendant’s conduct was.<sup>8</sup> In this regard, you may consider [whether the harm suffered by the plaintiff was physical or economic or both; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether the defendant’s conduct that harmed the plaintiff also posed a risk of harm to others; whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed the plaintiff].<sup>9</sup>

2. How much harm the defendant's wrongful conduct caused the plaintiff [and could cause the plaintiff in the future].<sup>10</sup> [You may not consider harm to others in deciding the amount of punitive damages to award.]<sup>11</sup>

3. What amount of punitive damages, in addition to the other damages already awarded, is needed, considering the defendant's financial condition, to punish the defendant for [his, her, its] wrongful conduct toward the plaintiff and to deter the defendant and others from similar wrongful conduct in the future.

4. [The amount of fines and civil penalties applicable to similar conduct].<sup>12</sup>

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to the plaintiff.<sup>13</sup>

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.]<sup>14</sup>

[You may not award punitive damages against the defendant[s] for conduct in other states.]<sup>15</sup>

#### **Notes on Use**

1. Public entities, such as cities, cannot be sued for punitive damages under section 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). Consequently, the target of a punitive damage claim must be an individual defendant, sued in his or her individual capacity.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. See Model Instruction 11.72 n.3.

4. Use the name of the defendant, the manager who took the action, or other descriptive phrase such as "the manager who fired the plaintiff."

5. This language is designed for use in a discharge case. In a “failure to hire,” “failure to promote,” “demotion,” or “constructive discharge” case, the language must be modified.

6. See *Kolstad v. American Dental Ass’n*, 527 U.S. 526, 535, 536 (1999) (holding that “‘malice’ or ‘reckless indifference’ pertain to the employer’s knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination” and that “an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages”); *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 903 (8th Cir. 2006) (citing *Kolstad* and observing that an award of punitive damages may be inappropriate when the underlying theory of discrimination is novel or poorly recognized or “when the employer (1) is unaware federal law prohibits the relevant conduct, (2) believes the discriminatory conduct is lawful, or (3) reasonably believes there is a bona fide occupational qualification defense for the discriminatory conduct”).

7. Fill in the number or title of the actual damages or nominal damages instruction.

8. The word “reprehensible” is used in the same sense as it is used in common parlance. The Supreme Court, in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003), stated: “It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” In *Philip Morris USA v. Williams*, 549 U.S. 346, 355, 127 S. Ct. 1057, 1064-65 (2007), the Supreme Court held that, while harm to persons other than the plaintiff may be considered in determining reprehensibility, a jury may not punish for the harm caused to persons other than the plaintiff. The Court stated that procedures were necessary to assure “that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.” *Id.* at 355.

9. Any item not supported by the evidence, of course, should be excluded.

10. This sentence may be used if there is evidence of future harm to the plaintiff.

11. A paragraph instructing the jury that any punitive damages award should not include an amount for harm suffered by persons who are not parties to the case may be necessary if evidence concerning harm suffered by nonparties has been introduced. See *Philip Morris USA v. Williams*, 549 U.S. at 355, 127 S. Ct. at 1064-65; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-24 (2003); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004).

12. Insert this phrase only if evidence has been introduced, or the court has taken judicial notice, of fines and penalties for similar conduct. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996), noting “civil penalties authorized or imposed in comparable cases” as a guidepost to be considered. See also *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003).

13. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (stating that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process” and observing that: “Single-digit

multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 [citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996)] or, in this case, of 145 to 1.”).

14. The bracketed language is available for use if punitive damages claims are submitted against more than one defendant.

15. If evidence has been introduced concerning conduct by the defendant that was legal in the state where it was committed, the jury must be told that they cannot award punitive damages against the defendant for such conduct. See *State Farm Mut. Auto. Inc. Co. v. Campbell*, 538 U.S. 408, 422 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572-73 (1996); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004). This issue normally will not come up in cases under federal law. In any case where evidence is admitted for some purposes but may not be considered by the jury in awarding punitive damages, the court should give an appropriate limiting instruction.

### **Committee Comments**

Punitive damages are recoverable under 42 U.S.C. § 1983. *Smith v. Wade*, 461 U.S. 30 (1983).

This instruction attempts to incorporate the constitutionally relevant principles set forth by the Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459-62 (1993). In *State Farm*, 538 U.S. at 417, the Court observed: “We have admonished that “[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and 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 Motor*, 512 U.S. at 432). See *Baker v. John Morrell & Co.*, 266 F. Supp. 2d 909, 961 (N.D. Iowa 2003), *aff’d*, 382 F.3d 816 (8th Cir. 2004), and *In Re Exxon Valdez*, 296 F. Supp. 2d 1071, 1080 (D. Alaska 2004) ( judgment vacated by 490 F.3d 1066 (9th Cir. 2007)), for examples of punitive damages instructions where the court attempted to incorporate constitutional standards.

The last paragraph is based on *State Farm*, 538 U.S. at 421, where the Court held: “A state cannot punish a defendant for conduct that may have been lawful where it occurred. . . . Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.” The Court specifically mandated that: “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.” *State Farm*, 538 U.S. at 422.

**13.80 GENERAL VERDICT FORM (42 U.S.C. § 1983)**

**VERDICT**

**Note:** Complete this form by writing in the names required by your verdict.

On the [First Amendment retaliation]<sup>1</sup> claim of the plaintiff [John Doe], as submitted in Instruction \_\_\_\_\_,<sup>2</sup> we find in favor of

---

(Plaintiff John Doe) or (Defendant Sam Smith)

**Note:** Complete the following paragraphs only if the above finding is in favor of the plaintiff. If the above finding is in favor of the defendant, have your foreperson sign and date this form because you have completed your deliberation on this claim.

We find plaintiff's (name) lost wages and benefits as defined in Instruction \_\_\_\_\_<sup>3</sup> to be:

\$ \_\_\_\_\_ (stating the amount or, if none, write the word "none")<sup>4</sup>

We find plaintiff's (name) other damages, excluding lost wages and benefits, as defined in Instruction \_\_\_\_\_<sup>3</sup> to be:

\$ \_\_\_\_\_ (stating the amount or, if you find that the plaintiff's damages have no monetary value, set forth a nominal amount such as \$1.00).

We assess punitive damages against defendant (name), as submitted in Instruction \_\_\_\_\_,<sup>6</sup> as follows:

\$ \_\_\_\_\_ (stating the amount or, if none, write the word "none").

## Foreperson

Date: \_\_\_\_\_

### **Notes on Use**

1. The bracketed language should be included when the plaintiff submits multiple claims to the jury.
2. The number or title of the “elements of claim” instruction should be inserted.
3. The number or title of the “actual damages” instruction should be inserted.
4. The number or title of the “punitive damages” instruction should be inserted.

**13.90 SPECIAL VERDICT FORM: PROTECTED ACTIVITY**  
**SUPPLEMENTAL VERDICT FORM**

As directed in Instruction No. \_\_\_\_\_,<sup>1</sup> we find as follows:

**Question No. 1:** Did the plaintiff's [memo to Principal Jones]<sup>2</sup> cause, or could it have caused, disharmony or disruption in the workplace?

\_\_\_\_\_Yes                      \_\_\_\_\_No  
(Mark an "X" in the appropriate space)

**Question No. 2:** Did the plaintiff's [memo to Principal Jones] impair [(his) (her)] ability to perform [(his) (her)] duties?

\_\_\_\_\_Yes                      \_\_\_\_\_No  
(Mark an "X" in the appropriate space)

\_\_\_\_\_  
Foreperson

Date: \_\_\_\_\_

**Notes on Use**

1. The number or title of the special interrogatory instruction should be inserted. *See* Model Instruction 13.91.

2. Describe the speech upon which the plaintiff bases his or her claim. This description should be identical to the phrase used in the special interrogatory instruction. *See* Model Instruction 13.91.

**Committee Comments**

*See* Committee Comments to Instruction No. 13.91. These special interrogatories are available for use when there are factual disputes underlying the determination of whether or not the plaintiff's speech was protected by the First Amendment. This supplemental verdict form should never be used alone; it always should accompany Model Instructions 13.40, 13.91 and 13.80.

The questions listed in this model instruction are for illustration only; in every case, the list of relevant questions must be tailored to the particular situation. It also bears emphasis that the ultimate question of whether the plaintiff's speech was protected is for the Court and that no single factor is dispositive. Accordingly, when this supplemental verdict form is used, the trial court should receive all of the jury's findings and it should postpone its entry of judgment while it fully evaluates the implications of those findings.

### **13.91 SPECIAL VERDICT FORM: INTERROGATORIES REGARDING “PROTECTED SPEECH” BALANCING ISSUES (42 U.S.C. § 1983)**

To assist the Court in determining whether the plaintiff’s [describe the speech upon which the plaintiff’s claim is based--*e.g.*, “memo to Principal Jones dated January 24, 1989”]<sup>1</sup> was protected by the First Amendment to the United States Constitution, you are directed to consider and answer the following questions:

1. Did the plaintiff’s [memo to Principal Jones dated January 24, 1989] cause, or could it have caused, disharmony or disruption in the workplace?<sup>2</sup>
2. Did the plaintiff’s [January 24, 1989, memo to Principal Jones] impair [(his) (her)] ability to perform [(his) (her)] duties?<sup>3</sup>

Please use the Supplemental Verdict Form to indicate your answers to these questions.<sup>4</sup>

#### **Notes on Use**

1. Describe the speech upon which the plaintiff bases his or her claim.
2. The first two factors mentioned in *Shands* relate to “the need for harmony in the office or work place” and “whether the government’s responsibilities required a close working relationship to exist between the plaintiff and co-workers.” *Shands*, 993 F.2d at 1344. The second factor mentioned in *Shands* addresses whether the plaintiff’s speech caused or could have caused deterioration in the plaintiff’s working relationships. *Shands*, 993 F.2d at 1344. This question is designed to test this issue.
3. Yet another balancing factor mentioned in *Shands* is whether the speech at issue impaired the plaintiff’s ability to perform his or her assigned duties. *See Shands*, 993 F.2d at 1344. This question is designed to test this issue. As discussed in the Committee Comments, this list of questions is not required in all cases, nor is it all-inclusive. If other issues exist concerning the context or content of the plaintiff’s speech, additional questions should be included.
4. The jury’s answers to the special interrogatories should be recorded on a Supplemental Verdict Form. *See Model Instruction 13.90*.

#### **Committee Comments**

The Eighth Circuit has indicated that, whenever the *Pickering* balancing process must be invoked to determine whether the plaintiff’s speech was protected by the First Amendment, “[a]ny underlying factual disputes . . . should be submitted to the jury through special

interrogatories or special verdict forms.” *Shands v. City of Kennett*, 993 F.2d 1337, 1342 (8th Cir. 1993). This instruction is designed to meet the mandate of *Shands* and the use of special interrogatories based on these model instructions was approved in *Cook v. Tadros*, 312 F.3d 386, 388 (8th Cir. 2002). *See generally* Committee Comments to Model Instruction 13.40.

If there is a material dispute over the precise content of the plaintiff’s speech, it appears that the issue must be resolved by the jury. In resolving any such factual dispute, deference must be given to the honest and reasonable perception of the defendant. *Waters v. Churchill*, 511 U.S. 661 (1994). Thus, if the defendant takes the position that it terminated the plaintiff based on a third-party report that the plaintiff engaged in unprotected insubordination, the following sequence of interrogatories may be appropriate:

1. Did the plaintiff say that [(his) (her)] supervisor was incompetent?

Yes \_\_\_\_\_ No \_\_\_\_\_

**Note:** If your answer is “yes,” you should not answer Question No. 2. If your answer is “no,” continue on the Question No. 2.

2. Did the defendant honestly and reasonably believe the report of [name the plaintiff’s coworker or other source of third-party report] that the plaintiff had referred to [(his) (her)] supervisor as incompetent?

Yes \_\_\_\_\_ No \_\_\_\_\_

In general, it appears that the plaintiff has the burden of showing that his or her speech was constitutionally protected. *See Cox v. Miller County R-1 School Dist.*, 951 F.2d 927, 931 (8th Cir. 1991); *Stever v. Independent School Dist. No. 625*, 943 F.2d 845, 849-50 (8th Cir. 1991). However, it is unclear whether the plaintiff should bear the risk of nonpersuasion on every subsidiary factual issue. Accordingly, this instruction does not include any “burden of proof” language. It also should be noted that the ultimate balancing test rests within the province of the Court and that no particular factor is dispositive. *See Shands*, 993 F.2d at 1344, 1346.

## 14. EMPLOYMENT—FAMILY AND MEDICAL LEAVE ACT

### 14.00 OVERVIEW

These instructions are for use with cases brought under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 - 2654. The purposes of the FMLA are to balance the demands on the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. 29 U.S.C. § 2601(b).

The Act entitles eligible employees to take up to twelve workweeks of unpaid leave because of a serious health condition that makes the employee unable to perform the functions of his or her position; because of the birth of a son or daughter and to care for the newborn child; for placement with the employee of a son or daughter for adoption or foster care; to care for the employee's spouse, son, daughter, or parent who has a serious health condition; or because of a qualifying exigency of a covered military member. 29 U.S.C. § 2612; 29 C.F.R. § 825.112.

Additionally, eligible employees are entitled to up to 26 workweeks of leave to care for a covered service member with a serious injury or illness. 29 U.S.C. § 2612; 29 C.F.R. § 825.112.

The statute of limitations for FMLA claim is two years, and three years for willful violations. *Weatherly v. Ford Motor Company*, 994 F.3d 940, 942 (8th Cir. 2021) citing 29 U.S.C. § 2617(c)(1)-(2). Willfulness is established when “the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.” *Id.* quoting *Hanger v. Lake Cty.*, 390 F.3d 579, 583 (8th Cir. 2004.)

#### *Employers Covered by the FMLA*

A covered employer under the Act is one engaged in commerce or in an industry affecting commerce who employs fifty or more employees for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year. 29 U.S.C. § 2611(4)(A); 29 C.F.R. § 825.104(a); *Beal v. Rubbermaid Commercial Products, Inc.*, 972 F. Supp. 1216, 1222 n.13 (S.D. Iowa 1997), *aff'd*, 149 F.3d 1186 (8th Cir. 1998.) The Eighth Circuit has also held that public officials in their individual capacities are “employers” under the FMLA. *Darby v. Bratch*, 287 F.3d 673, 680-81 (8th Cir. 2002). In addition, the Supreme Court has held that states are employers under the FMLA. *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721, 725 (2003).

#### *Employees Eligible for Leave*

Not all employees are entitled to leave under FMLA. Before an employee can take leave to care for himself or herself, or a family member, the following eligibility requirements must be met: he or she must work in an area where the employer employs fifty or more employees within a 75-mile radius, 29 U.S.C. § 2611(2)(B)(ii) and 29 C.F.R. § 825.110(a)(3), and he or she must have been employed by the employer for at least twelve months and must have worked at least 1,250 hours during the previous twelve-month period. 29 U.S.C. § 2611(2)(A).

### *Military Caregiver and Qualifying Exigency Leave*

Amendments in 2008 to the FMLA provide two new leave entitlements: military caregiver leave and qualifying exigency leave. The Department of Labor issued revised implementing regulations effective January 16, 2009, allowing family members of wounded military personnel to take up to six months of unpaid leave to care for them during their rehabilitation process. 29 C.F.R. § 825 *et seq.*; see 73 FR 67934 *et seq.* Eligible employees who are family members of covered service members will be able to take up to 26 workweeks of leave in a single twelve-month period to care for a service member who has a serious illness or injury that was incurred in the line of duty while on active duty. That twelve-month period begins when the employee starts using military caregiver leave. Employers will not have the option of using the calendar-year method as they do for other types of FMLA leave. Entitlement to 26 weeks of military caregiver leave is provided for each service member and for each illness or injury, and covers more extended family members than those who may take FMLA leave for other reasons.

Qualifying exigency leave is intended to help the families of members of the National Guard and Reserves manage the members' affairs while they are on active duty or called to active duty status in support of a contingency operation. Family members may use all or part of the regular allotment of twelve weeks of FMLA leave. The final rule defines "any qualifying exigency" to include a number of broad categories of reasons and activities, including short-notice deployment, military events and related activities, child care and school activities, financial and legal arrangements, counseling, rest and recuperation, post-development activities, and any additional activities agreed to by the employer and the employee.

The Regulations should be consulted for appropriate guidance and jury instructions concerning the military family leave provisions.

### *Family Members Contemplated by the FMLA*

Employees are eligible for leave when certain family members – his or her spouse, son, daughter, or parent – have serious health conditions. Spouse means a husband or wife as defined or recognized under state law where the employee resides, including common law spouses in states where common law marriages are recognized. 29 U.S.C. § 2611(13); 29 C.F.R. § 825.122(a).

Parent means a biological parent of an employee or an individual who stood *in loco parentis* to an employee when the employee was a child. 29 U.S.C. § 2611(7). The term "parent" does not include grandparents or parents-in-law unless a grandparent or parent-in-law meets the *in loco parentis* definition. *Krohn v. Forsting*, 11 F. Supp. 2d 1082, 1091 (E.D. Mo. 1998).

For the purposes of leave taken for birth or adoption or to care for a family member with a serious health condition, a son or daughter means a biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is either under age 18, or who is age 18 or older but is incapable of self-care because of a mental or physical disability. 29 U.S.C. § 2611(12); 29 C.F.R. § 825.122(c). Persons with "*in loco parentis*" status

under the FMLA include those who have day-to-day responsibility to care for and financially support a child. 29 C.F.R. § 825.122(c)(3).

“Incapable of self-care” means that the individual requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living. 29 C.F.R. § 825.122(c)(1).

“Activities of daily living” include adaptive activities such as caring appropriately for one’s grooming and hygiene, bathing, dressing, and eating. *Id.* “Instrumental activities of daily living” include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. *Id.* “Physical or mental disability” means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. 29 C.F.R. § 825.122(c)(2). These terms are defined in the same manner as they are under the Americans with Disabilities Act. *Id.*

For the purposes of FMLA qualifying exigency leave, “son or daughter on active duty or call to active duty status” mean “the employee’s biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age.” 29 C.F.R. § 825.122(g).

For the purposes of leave to care for a covered service member with a serious injury or illness, “son or daughter of a covered service member” means the “service member’s biological, adopted, or foster child, stepchild, legal ward, or a child for whom the service member stood *in loco parentis*, and who is of any age.” 29 C.F.R. § 825.122(h). A “parent of a covered service member” is “a covered service member’s biological, adoptive, step or foster father or mother, or any other individual who stood *in loco parentis* to the covered service member.” 29 C.F.R. § 825.122(i).

#### *Leave for Birth, Adoption or Foster Care*

The FMLA permits an employee to take leave for the birth of the employee’s son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement. 29 U.S.C. § 2612(a); 29 C.F.R. § 825.100.

An expectant mother may take leave for pregnancy, prenatal care, or for her own serious health condition following the birth of the child. 29 C.F.R. § 825.120(a)(4). Circumstances may require that the FMLA leave begin before the actual date of the birth of a child or the actual placement for adoption of a child. For example, an expectant mother may need to be absent from work for prenatal care, or her condition may make her unable to work. 29 C.F.R. § 825.120(a)(4). The expectant mother “is entitled to leave for incapacity even though she does not receive treatment from a health care provider during the absence and even if the absence does not last for more than three consecutive calendar days.” 29 C.F.R. § 825.120(a)(4). An expectant father “is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for the spouse following the birth of a child if the spouse has a serious health condition.” 29 C.F.R. § 825.120(a)(5).

Likewise, prospective adoptive or foster parents “may take leave before the actual placement or adoption of a child if absence from work is required for the placement for adoption or foster care to proceed.” 29 C.F.R. § 825.121(a)(1).

“A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the birth of the employee’s son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement, or to care for the employee’s parent with a serious health condition.” 29 C.F.R. § 825.120(a)(3).

An employee’s entitlement to leave for a birth or placement for adoption or foster care expires at the end of the twelve-month period beginning on the date of the birth or placement unless state law allows, or the employer permits, leave to be taken for a longer period. 29 C.F.R. § 825.120(a)(2). Any such FMLA leave must be concluded during this one-year period. *Id.* An employee is not required to designate whether the leave the employee is taking is FMLA leave or leave under state law. 29 C.F.R. § 825.701. If an employee’s leave qualifies for FMLA and state-law leave, the leave used counts against the employee’s entitlement under both laws. *Id.*

#### *What Constitutes a “Serious Health Condition?”*

One of the more frequently litigated aspects of the FMLA is the issue of what type of condition constitutes a “serious health condition” under the Act. The concept of “serious health condition” was meant to be construed broadly, so that the FMLA’s provisions are interpreted to effect the Act’s remedial purpose. *Stekloff v. St. John’s Mercy Health Systems*, 218 F.3d 858, 862 (8th Cir. 2000). The phrase is defined in the regulations as an illness, injury, impairment or physical or mental condition that involves inpatient care, a period of incapacity combined with treatment by a health care provider, pregnancy or prenatal care, chronic conditions, long-term incapacitating conditions, and conditions requiring multiple treatments. 29 C.F.R. § 825.113(a); 29 C.F.R. § 825.115; see, 29 U.S.C. § 2611(11).

Specifically, inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity (inability to work, attend school or perform other regular daily activities), or any subsequent treatment in connection with the inpatient care. 29 C.F.R. § 825.114.

Incapacity plus treatment means a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three full consecutive days, including any subsequent treatment or period of incapacity relating to the same condition, that also involves: 1) treatment two or more times by a health care provider, by a nurse or physician’s assistant under direct supervision of a health care provider, or by a provider of health services (for example, a physical therapist) under orders of, or on referral by, a health care provider; the two visits must occur within thirty days of the start of the period of incapacity, 29 C.F.R. § 825.115(a)(1); or 2) treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment under the supervision of the health care provider, with the first visit to the health care provider taking place within seven days of the incapacity. 29 C.F.R. § 825.115(a)(2) and (3). In some circumstances, the regulatory definition of incapacity offers limited guidance.

*See, e.g., Caldwell v. Holland of Texas*, 208 F.3d 671, 675 (8th Cir. 2000) (in situation where three-year-old child did not work or attend school, the FMLA regulations offered insufficient guidance for determining whether child was incapacitated and fact finder must determine whether the child’s illness demonstrably affected his or her normal activity). Note that under the FMLA, a demonstration that an employee is unable to work in his or her current job due to a serious health condition is enough to show the employee is incapacitated even if that job is the only one the employee is unable to perform. *Stekloff*, 218 F.3d at 861. However, in order to constitute a serious health condition necessitating FMLA leave, the conditions must affect the employee’s ability to perform the functions of the position. *Dalton v. Manorcare of Des Moines of IA, LLC*, 782 F.3d 955, 961 (8th Cir. 2015). “Where absences are not attributable to a serious health condition ... FMLA is not implicated and does not protect an employee against disciplinary action based upon such absences.” 782 F.3d at 962 citing *Rankin v. Seagate Tech., Inc.*, 246 F.3d 1145, 1147–48 (8th Cir. 2001). Thus, an employee may be terminated for performance deficiencies unrelated to the employee’s need for medical care. *Id.* Using FMLA leave “does not give an employee any greater protection against termination for reasons unrelated to the FMLA than was available before.” *Malloy v. U.S. Postal Serv.*, 756 F.3d 1088, 1090 (8th Cir. 2014).

The “time for determining whether a particular condition qualifies as a serious health condition is the time that leave is requested or taken.” *Smith v. AS America, Inc.* 829 F.3d. 616, 622 (8th Cir. 2016) citing *Navarro v. Pfitzer Corp.*, 261 F.3d 90, 96 (1st Cir. 2001). Pregnancy or prenatal care includes any period of incapacity due to the pregnancy or prenatal care, such as time off from work for doctors’ visits. 29 C.F.R. § 825.115(b).

A chronic health condition means a condition that requires periodic visits for treatment by a health care provider, or by a nurse or physician’s assistant under direct supervision of a health care provider, that continues over an extended period of time (including recurring episodes of a single underlying condition), and may cause episodes of incapacity (inability to work, attend school or perform other regular daily activities) rather than continuing incapacity. 29 C.F.R. § 825.115(c). To qualify as a chronic serious health condition, the employee must make at least two visits to a health care provider per year. 29 C.F.R. § 825.115(c)(1).

Long-term incapacitating conditions are those for which treatment may not be effective, but require continuing supervision of a health care provider, even though the patient may not be receiving active treatment. 29 C.F.R. § 825.115(d).

Conditions requiring multiple treatments include any period of absence to receive multiple treatments (including any period of recovery from the treatments) by a health care provider, or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive calendar days in the absence of medical intervention or treatment. 29 C.F.R. § 825.115(e).

The FMLA regulations provide some guidance concerning what is and is not a serious health condition. For example, the following generally do not fall within the definition of a serious health condition: routine physical, eye or dental examinations; treatments for acne or

plastic surgery; common ailments such as a cold or the flu, ear aches, upset stomach, minor ulcers, headaches (other than migraines); and treatment for routine dental or orthodontic problems or periodontal disease. 29 C.F.R. § 825.113(c)(d). While the above conditions are not generally considered “serious,” the Eighth Circuit has held that some conditions, such as upset stomach or a minor ulcer, could still be “serious health conditions” if they meet the regulatory criteria, for example, an incapacity of more than three consecutive calendar days that also involved qualifying treatment. *Thorson v. Gemini, Inc.*, 205 F.3d 370, 379 (8th Cir. 2000), *cert. denied*, 531 U.S. 871 (2000).

In addition, the regulations provide guidance regarding what conditions commonly are considered serious health conditions. For example, chronic conditions could include asthma, diabetes, or epilepsy; long-term incapacitating conditions could include Alzheimer’s, a severe stroke, or the terminal stages of a disease; and conditions requiring multiple treatments could include cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis). 29 C.F.R. § 825.115.

Courts in the Eighth Circuit have provided additional guidance regarding what constitutes a serious health condition. In *Beal v. Rubbermaid Commercial Products, Inc.*, 972 F. Supp. 1216 (S.D. Iowa 1997), *aff’d*, 149 F.3d 1186 (8th Cir. 1998), the court analyzed several conditions against the regulatory definition. The court found that a minor back ailment, eczema, and non-incapacitating bronchitis were not serious health conditions under the FMLA. *Id.* at 1223-25. The court also held that an employee was not entitled to FMLA leave subsequent to her son’s death noting “[l]eave is not meant to be used for bereavement because a deceased person has no basic medical, nutritional, or psychological needs which need to be cared for.” *Id.* at 1226.

In addition, the Eighth Circuit has held that examinations and evaluations given to an employee’s child to determine whether the child had been sexually molested did not amount to treatment for a serious health condition covered by the FMLA. *Martyszenko v. Safeway, Inc.*, 120 F.3d 120, 123-24 (8th Cir. 1997). The alleged molestation did not create a mental condition that hindered the child’s ability to participate in any activity at all and did not restrict any of the child’s daily activities. *Id.*

The regulations also provide that the phrase “continuing treatment” as used in the definition of serious health condition, includes a course of prescription medication and therapy, but not over-the-counter medications, bed-rest or exercise. 29 C.F.R. § 825.113(c).

The regulations also provide that the employee must obtain a medical certification regarding a serious health care condition. 29 C.F.R. § 825.305. If the employer views one medical certification form as incomplete or insufficient, the regulations require the employer to notify the employee, in writing, and give the employee seven calendar days to provide additional information. 29 C.F.R. § 825.305(c).

Requiring an employee to take FMLA leave when it is disputed whether an employee has a serious health condition is not a violation of the FMLA. *Walker v. Trinity Marine Products, Inc.*, 721 F.3d 542, 544-545 (8th Cir. 2013)

### *Restoration to Position After FMLA Leave*

The FMLA requires the employer to reinstate the employee to her original position or to an “equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment,” 29 U.S.C. § 2614(a)(1)(B); *Dollar v. Smithway Motor Xpress, Inc.*, 710 F.3d 798, 807 (8th Cir. 2013); *Walker v. Trinity Marine Products, Inc.*, 721 F.3d 542, 544 (8th Cir. 2013); *Brown v. Diversified Distribution Systems, LLC*, 801 F.3d 901 (8th Cir. 2015). However, the FMLA does not require employers to restore employment following leave if “the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition.” *Dollar*, 710 F.3d at 807 quoting *Reynolds v. Phillips & Temro Indus., Inc.*, 195 F.3d 411, 414 (8th Cir. 1999); 29 U.S.C. § 2614(a) (1); 29 C.F.R. § 825.214.

If the employer can establish that the employee was terminated for reasons unrelated to an FMLA absence, a finding for the employer on an FMLA claim is appropriate even if that absence was FMLA-protected. *Dalton v. ManorCare of Des Moines of IA, LLC*, 782 F.3d 955, 961 (8th Cir. 2015).

#### *Separate Causes of Action Under the FMLA for Entitlement, Discrimination, and Retaliation*

The Eighth Circuit has recognized three categories of FMLA claims arising under 29 U.S.C. § 2615(a)(1)-(2): (i) entitlement claims, in which an employee alleges a denial of a benefit to which he was entitled under the statute; (ii) discrimination claims, in which an employee alleges that the employer discriminated against him in the terms and conditions of employment because the employee exercised rights to which he was entitled under the FMLA; and (iii) retaliation claims, in which an employee alleges that the employer took adverse action against him for opposing a practice made unlawful under the FMLA.<sup>1</sup> *Johnson v. Wheeling Mach. Prods.*, 779 F.3d 514, 517–18 (8th Cir. 2015); *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1006 (8th Cir. 2012).<sup>2</sup>

First, a plaintiff may pursue recovery under an “entitlement” theory.<sup>3</sup> *Pulczynski*, 691 F.3d at 1005-1006. This claim arises under 29 U.S.C. § 2615(a)(1), which makes it unlawful for an employer “to interfere with, restrain, or deny” an employee’s rights under the FMLA. *Scobey v. Nucor Steel–Arkansas*, 580 F.3d 781, 785 (8th Cir. 2009); *Wages v. Stuart Management Corp.*, 798 F.3d 675, 679 (8th Cir. 2015). Under an entitlement claim, it is the plaintiff’s burden to demonstrate that she was entitled to a benefit under the FMLA, but was denied or interfered with that entitlement. *Phillips v. Mathews*, 547 F.3d 905, 913-14 (8th Cir. 2008); *Wages v. Stuart Management Corp.*, 798 F.3d 675, 680 (8th Cir. 2015); see, *Thompson v. Kanabec County, et al*, 958 F.3d 698, 705 (8th Cir. 2020).

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<sup>1</sup> Some courts within the Eighth Circuit have treated discrimination and retaliation claims as the same since both are statutorily based on 29 U.S.C. § 2615(a)(2), *Lovland v. Employers Mutual Casualty Co.*, 674 F.3d 806, 812 (8th Cir.2012).

<sup>2</sup> Some courts in the Eighth Circuit have only two classifications of claims under the FMLA, namely “entitlement claims” under § 2615(a)(1) and “discrimination claims” under § 2615(a)(2). *Burciaga v. Ravago Americas LLC*, 791 F.3d 930, 934 (8th Cir. 2015); *Hudson v. Tyson Fresh Meats, Inc.*, 787 F.3d 861, 864–65 (8th Cir. 2015).

<sup>3</sup> Some courts in the Eighth Circuit refer to an “entitlement” claim as an “interference” claim. *Pulczynski*, 691 F.3d at 1005.

The employer's intent is immaterial to an FMLA entitlement claim. *Massey-Diez v. University of Iowa Community Medical Services, Inc.*, 826 F.3d 1149, 1158 (8th Cir. 2016); *Pulczynski*, 691 F.3d at 1005; *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2006).

The second type category of claims under the FMLA is “discrimination.” *Burciaga v. Ravago Americas LLC*, 791 F.3d at 934. A discrimination claim occurs when “an employer takes adverse action against an employee because the employee exercises rights to which he is entitled under the FMLA.” *Id. citing Pulczynski* 691 F.3d at 1006. An employee making this type of claim must prove that the employer was motivated by the employee's exercise of rights under the FMLA. *Sisk v. Picture People, Inc.*, 669 F.3d 896, 900 (8th Cir. 2012); *Pulczynski*, 691 F.3d at 1006. To establish a prima facie case of discrimination, an employee must show “(1) that [s]he engaged in activity protected under the Act, (2) that [s]he suffered a materially adverse employment action, and (3) that a causal connection existed between the employee’s action and the adverse employment action.” *Hasenwinkel v. Mosaic*, 809 F.3d 427, 433 (8th Cir. 2015) citing *Pulczynski*, 691 F.3d at 1007; *Button v. Dakota, Minn. & Eastern Railroad Corp.*, 963 F.3d. 824, 835 (8th Cir. 2020). A causal connection exists when the plaintiff shows that a discriminatory motive “played a part in the adverse employment action.” *Hasenwinkel*, 809 F.3d at 433 citing *Hite v. Vermeer Mfg. Co.*, 446 F.3d 858, 865 (8th Cir. 2006).

If the plaintiff makes a showing of discrimination, the burden then shifts to the employer to establish that there was a reason for terminating the employment that was unrelated to the employee exercising his FMLA rights. *Throneberry v. McGehee Desha Cnty. Hosp.*, 403 F.3d 972, 978–79 (8th Cir. 2005). “As long as an employer can show a lawful reason, i.e., a reason unrelated to an employee’s exercise of FMLA rights, for not restoring an employee on FMLA leave to her position, the employer will be justified to interfere with an employee’s FMLA leave rights.” *Id.* at 979; *Chappell v. Bilco Co*, 675 F.3d 1110 (8th Cir. 2012).

Unlike an entitlement claim under the FMLA, a discrimination claim rests on a connection between an adverse employment action and an illegal motive on the part of the employer.” *Pulczynski*, 691 F.3d at 1006. *Massey-Diez*, 826 F.3d at 1160.

The third type of recovery under the FMLA is the “retaliation” theory. This claim arises under 29 U.S.C. § 2615(a)(2). A retaliation claim occurs when an employer takes an adverse action against an employee who opposes any practice made unlawful under the FMLA. *Pulczynski*, 691 F.3d at 1006.

To establish a prima facie case of retaliation, an employee must show that: 1) he engaged in protected conduct; 2) he suffered a materially adverse employment action; and 3) the materially adverse action was causally linked to the protected conduct. *Chappell*, 675 F.3d at 1116-1117 citing *Wierman v. Casey's Gen. Stores*, 638 F.3d 984, 999 (8th Cir. 2011). An employee must establish a tangible injury or harm to prevail. *Beckley v. St. Luke’s Episcopal-Presbyterian Hospitals*, 923 F.3d 1157, 1161 (8th Cir. 2019). (Italics added.)

Retaliation claims are analyzed under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Id.* If the employer offers a legitimate, nondiscriminatory reason, the burden is shifted back to the plaintiff to establish that the employer’s reasons are pretextual. *Chappell*, 675 F.3d at 1115.

### *Notice of the Need for Leave*

In order to be entitled to leave under the FMLA, the employee must give timely notice of the need for leave and provide the employer sufficient information that leave is for a qualifying reason under the FMLA. *Scobey v. Nucor Steel-Arkansas*, 580 F.3d 781, 785-86 (8th Cir. 2009); *Phillips v. Matthews*, 547 F.3d 905, 909 (8th Cir. 2008); *Clinkscale v. St. Therese of New Hope*, 701 F.3d 825, 827 (8th Cir. 2012); *Bosley v. Cargill Meat Solutions Corp.*, 705 F.3d 777, 780 (8th Cir. 2013). “The FMLA regulations provide that an employee seeking leave for a qualifying reason ‘must specifically reference either the qualifying reason for leave or the need for FMLA leave.’” *Evans v. Cooperative Response Center, Inc.*, \_\_\_ F.3d \_\_\_ (8th Cir. May 4, 2021) quoting § 825.303(b). If the leave is foreseeable, the employee must provide at least thirty days advance notice before the leave is to begin. 29 C.F.R. § 825.302(a). If the leave is unforeseeable then the employee is to provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. Notice under the regulations takes into account the circumstances of the individual case, which in most cases would be that same day or the next business day. 29 C.F.R. § 825.302(b). Further, an employer may require that the employee comply with the employer’s notice requirements absent unusual circumstances. 29 C.F.R. § 825.302(d). Failure to follow an employer’s procedural requirements can result in FMLA being “delayed” or “denied.” *Id*; *Garrison v. Dolgencorp, LLC*, 939 F.3d 937, 944 (8th Cir. 2019).

Additionally, the employee must provide sufficient information about the reason for leave for the employer to reasonably determine the FMLA may apply to the leave request. 29 C.F.R. § 825.302(c) and 29 C.F.R. § 825.303(b); *Woods v. Daimler-Chrysler Corp.* 409 F.3d 984, 990 (8th Cir. 2005). “The employer’s duties arise ‘when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave.’” *Phillips*, 547 F.3d at 909 (quoting *Browning v. Liberty Mutual Ins. Co.*, 178 F.3d 1043, 1049 (8th Cir. 1999)). Thus, employees have an affirmative duty to timely advise the employer of the need and reason for leave. *Scobey*, 580 F.3d at 785-86; *Bosley v. Cargill Meat Solutions Corp.*, 705 F.3d 777, 780-781 (2013).

Notifying an employer of the intent to take FMLA leave is protected activity. *See, Hager v. Arkansas Dept. of Health*, 735 F.3d 1009, 1016 (8th Cir. 2013); *Marez v. Saint-Gobain Containers, Inc.*, 688 F.3d 958, 963 (8th Cir. 2012).

### *The Relationship Between the Fair Labor Standards Act (FLSA), Civil Rights Legislation, and the FMLA*

Although earlier cases suggested the FMLA was more akin to the FLSA than to Civil Rights legislation, *see, e.g., Morris v. VCW, Inc.*, 1996 WL 740544, \*2 (W.D. Mo. 1996), the Supreme Court has left no doubt that the FMLA is an anti-discrimination statute. *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721, 728-29 (2003) (holding the FMLA aims to protect the right to be free from gender-based discrimination in the workplace and such a statutory scheme is subject to heightened scrutiny). However, the FLSA can provide guidance for the interpretation of FMLA terms such as using FLSA “hours of service” to calculate FMLA eligibility for leave and determination of whether a supervisor is an “employer” for FMLA purposes. *See Morris* at \*2 and cases cited therein.

In retaliation cases under the FMLA, courts frequently borrow the framework and method of analysis in civil rights cases. *See, e.g., Phillips v. Mathews*, 547 F.3d 905, 913-14 (8th Cir. 2008) (FMLA makes it unlawful for an employer to discriminate against any individual for opposing any practice made unlawful by the Act; this opposition clause is derived from Title VII of the Civil Rights Act of 1964).

Nothing in the FMLA modifies or affects any federal or state law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (*e.g.*, Title VII, the Pregnancy Discrimination Act, the Rehabilitation Act, the ADA, etc.). 29 U.S.C. § 2651(a)(b); 29 C.F.R. § 825.702(a).

### *Damages*

The FMLA provides that an employer who violates the FMLA “shall be liable to any eligible employee affected” for lost wages, interest, and “an additional amount of liquidated damages equal to the sum of the amount” of lost wages and interest. 29 U.S.C. § 2617(a)(1)(A)(i) and (ii). While Title VII allows plaintiffs to recover non-pecuniary damages, the FMLA limits damages to actual monetary loss. 29 U.S.C. § 2617(a)(1)(A); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 739–40, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003); *Hasenwinkel*, 809 F.3d 434. An employer may avoid a liquidated damages award if it can show, to the court's satisfaction, that it “acted with subjective good faith and that it had an objectively reasonable belief that its conduct did not violate the law.” *Jackson v. City of Hot Springs*, 751 F.3d 855, 866 (8th Cir. 2014). Liquidated damages are mandatory unless the employer shows the good faith exception applies. *Smith*, 829 F.3d. at 623. The FMLA provides for reasonable attorney's fees to be awarded to a prevailing plaintiff.” *Marez*, 688 F.3d at 965 *citing* 29 U.S.C. § 2617(a)(3).

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## 14.01 EXPLANATORY: “SAME DECISION”

If you find in favor of the plaintiff under Instruction \_\_\_\_\_,<sup>1</sup> then you must answer the following question in the verdict form[s]: Has it been proved<sup>2</sup> that the defendant would have [describe employment action taken, e.g., discharged]<sup>3</sup> the plaintiff even if the defendant had not considered the plaintiff’s [absence from work].<sup>4,5</sup>

### Notes on Use

1. Insert the number or title of the essential elements Instruction here.
2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.
3. Select the language that corresponds to the facts of the case.
4. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee whose leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.
5. The Eighth Circuit has held that the FMLA does not impose strict liability for all interferences with an employee’s FMLA rights; an employer will not be held liable for interference with an employee’s FMLA rights if the employer can prove it would have made the same decision had the employee not exercised rights under the FMLA. *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 977 (8th Cir. 2005).

### Committee Comments

A defendant may avoid liability in a FMLA case if it convinces a jury that the plaintiff would have suffered the same adverse employment action even if he or she had not taken or requested FMLA leave. *Dalton v. ManorCare of Des Moines of IA, LLC*, 782 F.3d 955, 961 (8th Cir. 2015).

## **14.20 DEFINITION: “NEEDED TO CARE FOR”**

An employee is “needed to care for” a spouse, son, daughter or parent with a serious health condition (as defined in Instruction \_\_\_\_\_)<sup>1</sup> or a covered servicemember (as defined in Instruction \_\_\_\_\_)<sup>2</sup> who is the employee’s spouse, son, daughter, parent, or next of kin (as defined in Instruction \_\_\_\_\_)<sup>3</sup> when the family member or covered servicemember is unable to care for [(his) (her)] own basic medical, hygienic or nutritional needs or safety; or is unable to transport [(himself) (herself)] to the doctor. [The phrase also includes providing psychological comfort and reassurance that would be beneficial to a child, spouse, or parent with a serious health condition (as defined in Instruction \_\_\_\_\_)<sup>1</sup> who is receiving inpatient or home care. The phrase also includes situations where the employee may be needed to fill in for others who are caring for the family member or covered servicemember, or to make arrangements for changes in care, such as transfer to a nursing home.<sup>4</sup>] The employee need not be the only individual or family member available to care for the family member or covered servicemember.

### **Notes on Use**

1. Insert the number of the Instruction defining “serious health condition.”
2. Insert the number of the Instruction defining “covered servicemember.”
3. Insert the number of the Instruction defining “next of kin.”
4. The definition of “needed to care for” is more expansive than it first appears for it includes situations in which the employee’s presence or assistance would provide psychological comfort or assurance to a family member, and instances in which the employee may need to make arrangements for care. In cases in which any of these situations are applicable, this Instruction should be modified to include the additional definition(s). *See* 29 C.F.R. § 825.124(a), (b).

### **Committee Comments**

This definition is taken from the FMLA regulations. 29 C.F.R. § 825.124(a)-(b).

### **14.21 DEFINITION: “SERIOUS HEALTH CONDITION”**

A “serious health condition” means an illness, injury, impairment or physical or mental condition that involves either 1) inpatient care in a hospital, hospice, or residential medical care facility, or 2) continuing treatment by a health care provider (as defined in Instruction \_\_\_\_\_)<sup>1</sup>.

#### **Notes on Use**

1. Insert the number of the Instruction defining “health care provider.”

#### **Committee Comments**

This relatively brief definition is the statutory definition. 29 U.S.C. § 2611(11). A more detailed definition is supplied by the FMLA regulations and included as an alternate definition in these model instructions. 29 C.F.R. § 825.113. *See* Model Instruction 14.22.

**14.22 DEFINITION: “SERIOUS HEALTH CONDITION” (alternate)**

The phrase a “serious health condition” as used in these instructions means an illness, injury, impairment, or physical or mental condition that involves:

[Inpatient care, which is an overnight stay,<sup>1</sup> in a hospital, hospice, or residential medical care facility, including any period of incapacity (inability to work, attend school or perform other regular daily activities), or any subsequent treatment in connection with the inpatient care)];

OR

[Incapacity plus treatment, which means a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive full, calendar days, including any subsequent treatment or period of incapacity relating to the same condition that also involves:

1) In-person<sup>2</sup> treatment two or more times<sup>3</sup> by a health care provider (as defined in Instruction \_\_\_\_\_)<sup>4</sup>, by a nurse under direct supervision of a health care provider (as defined in Instruction \_\_\_\_\_)<sup>4</sup>, or by a provider of health services (for example, a physical therapist) under orders of, or on referral by, a health care provider (as defined in Instruction \_\_\_\_\_)<sup>4</sup>; or

2) In-person<sup>2</sup> treatment by a health care provider (as defined in Instruction \_\_\_\_\_)<sup>2</sup> on at least one occasion that results in a regimen of continuing treatment under the supervision of the health care provider (as defined in Instruction \_\_\_\_\_)<sup>2</sup>];

OR

[Any period of incapacity (inability to work, attend school or perform other regular daily activities) due to pregnancy or for prenatal care];

OR

[A chronic health condition, which means a condition that requires periodic visits (at least two visits per year) for treatment by a health care provider (as defined in Instruction \_\_\_\_\_)<sup>2</sup>, or by a nurse or physician’s assistant under direct supervision of a health care provider (as defined in Instruction \_\_\_\_\_)<sup>2</sup>, that continues over an extended period of time (including recurring episodes of a single underlying condition), and may cause episodes of incapacity (inability to work, attend school or perform other regular daily activities) rather than continuing incapacity];

OR

[A period of incapacity (inability to work, attend school or perform other regular daily activities) that is permanent or long-term due to a condition for which treatment may not be effective, but requires continuing supervision of a health care provider (as defined in Instruction \_\_\_\_\_)<sup>2</sup>, even though the patient may not be receiving active treatment];

OR

[Any period of absence to receive multiple treatments (including any period of recovery from the treatments) by a health care provider (as defined in Instruction \_\_\_\_\_)<sup>2</sup>, or by a provider of health care services under orders of, or on referral by, a health care provider (as defined in Instruction \_\_\_\_\_)<sup>2</sup>, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three full consecutive calendar days in the absence of medical intervention or treatment.]<sup>2</sup>

#### **Notes to Use**

1. The overnight stay requirement is included in 29 C.F.R. § 825.114.
2. The in-person requirement is included in 29 C.F.R. § 825.115(a)(3).
3. Unless extenuating circumstances exist, this treatment must be within 30 days of the first day of incapacity.

4. Select the language that corresponds to the facts of the case. Within each optional definition, the language also may need to be adjusted on a case-by-case basis due to varying facts. For example, the court may wish to delete the language “or by a nurse or physician’s assistant under direct supervision of a health care provider” if the facts of the case do not indicate that treatment was provided by someone other than the health care provider.

#### **Committee Comments**

This instruction is based on the definition of “serious health condition” as set forth in the FMLA regulations at 29 C.F.R. § 825.113. See comments in section 14.00 for further discussion of the definition of a serious health condition.

### **14.23 DEFINITION: “HEALTH CARE PROVIDER”**

As used in these instructions the phrase “health care provider” includes [doctor of medicine, doctor of osteopathy, podiatrist, dentist, clinical psychologist, optometrist, nurse practitioner, nurse-midwife, or clinical social worker]<sup>1</sup>, so long as the provider is authorized to practice in the State and is performing within the scope of [(his) (her)] practice.

#### **Notes on Use**

1. The bracketed language is not exhaustive of the types of health care workers who can meet the regulatory definition of a health care provider. For a full discussion, see the Committee Comments. Insert the appropriate language to include the type of health provider(s) relevant to the case.

#### **Committee Comments**

The FMLA defines “health care provider” as:

(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(B) any other person determined by the Secretary [of Labor] to be capable of providing health care services.

29 C.F.R. § 825.125(a)(1)(2).

The regulations promulgated by the Department of Labor define additional persons “capable of providing health care services” to include the workers described in the model Instruction as well as 1) chiropractors, if treatment is limited to “manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist;” 2) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts; 3) any health care provider from whom an employer or the employer’s group health plan’s benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and 4) a health care provider who falls within one of the specifically mentioned categories who practices in a country other than the United States, so long as he or she is authorized to practice in accordance with the law of that country and is performing within the scope of his or her practice. The regulations state that “authorized to practice in the State” means that the health care provider must be authorized to diagnose and treat physical or mental health conditions without supervision by a doctor or other health care provider. 29 C.F.R. § 825.125(b).

#### **14.24 DEFINITION: “TIMELY NOTICE”—LEAVE FORESEEABLE<sup>1</sup>**

The phrase “timely notice” as used in these instructions means that [(he) (she)] must have notified the defendant of [(his) (her)] need for leave at least 30 days before the leave was to begin. Absent unusual circumstances, the plaintiff must comply with the defendant’s usual and customary notice requirements for requesting leave.

#### **Notes on Use**

1. This Instruction should be used in situations where the plaintiff’s need for leave was foreseeable.

#### **Committee Comments**

In order to be entitled to leave under the FMLA, the employee must give timely notice of the need for leave and provide the employer sufficient information that leaves is for a qualifying reason under the FMLA. *Scobey v. Nucor Steel-Arkansas*, 580 F.3d 781, 785-86 (8th Cir. 2009); *Phillips v. Matthews*, 547 F.3d 905, 909 (8th Cir. 2008); *Clinkscale v. St. Therese of New Hope*, 701 F.3d 825, 827 (8th Cir. 2012); *Bosley v. Cargill Meat Solutions Corp.*, 705 F.3d 777, 780 (8th Cir. 2013). If the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment, an employee must give the employer at least 30 days advance notice before the leave is to begin. 29 C.F.R. § 825.302(a). *See also Bailey v. Amsted Industries Inc.*, 172 F.3d 1041 (8th Cir. 1999). An employee need not invoke the FMLA by name in order to put an employer on notice that the FMLA may have relevance to the employee’s absence from work. *Thorson v. Gemini, Inc.*, 205 F.3d 370, 381 (8th Cir. 2000). *Nelson v. Arkansas Pediatric Facility*, 1 Fed. Appx. 561, 2001 WL 13291 (8th Cir. 2001). The adequacy of the employee’s notice in a FMLA context is a fact issue, not a question of law. *Sanders v. May Dep’t Stores Co.*, 315 F.3d 940, 947 (8th Cir. 2003).

“The employer’s duties arise ‘when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave.’” *Phillips*, 547 F.3d at 909 (quoting *Browning v. Liberty Mutual Ins. Co.*, 178 F.3d 1043, 1049 (8th Cir. 1999)).

## **14.25 DEFINITION: “TIMELY NOTICE”—LEAVE UNFORESEEABLE<sup>1</sup>**

The phrase “timely notice” as used in these instructions means that [(he) (she)] must have notified the defendant of [(his) (her)] need for leave as soon as practicable after [(he) (she)] learned of the need to take leave. Absent unusual circumstances, the plaintiff must comply with the defendant’s usual and customary notice requirements for requesting leave.

### **Notes on Use**

1. This Instruction should be used in situations where the plaintiff’s need for leave was unforeseeable.

### **Committee Comments**

The FMLA requires that employees provide adequate notice to their employers of the need to take leave. In the case of unexpected absences where 30 days advance notice is not possible, the regulations require the employee to give the employer notice “as soon as practicable.” 29 C.F.R. § 825.302(a). *See also Bailey v. Amsted*, 172 F.3d 1041 (8th Cir. 1999). The regulations further state that ordinarily “as soon as practicable” requires the employee to give at least verbal notification within one or two business days after the employee learns of the need for leave. 29 C.F.R. § 825.302(b). *See also Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043, 1049 (8th Cir. 1999); *Carter v. Ford Motor Co.*, 121 F.3d 1146 (8th Cir. 1997). An employee need not invoke the FMLA by name in order to put an employer on notice that the FMLA may have relevance to the employee’s absence from work. *Thorson v. Gemini, Inc.*, 205 F.3d 370, 381 (8th Cir. 2000). *Nelson v. Arkansas Pediatric Facility*, 1 Fed. Appx. 561, 2001 WL 13291 (8th Cir. 2001).

Additionally, the employee must provide sufficient information about the reason for leave for the employer to reasonably determine the FMLA may apply to the leave request. 29 C.F.R. § 825.302(c) and 29 C.F.R. § 825.303(b); *Woods v. Daimler-Chrysler Corp.* 409 F.3d 984, 990 (8th Cir. 2005). The adequacy of the employee’s notice in a FMLA context is a fact issue, not a question of law. *Sanders v. May Dep’t Stores Co.*, 315 F.3d 940, 947 (8th Cir. 2003).

“The employer’s duties arise ‘when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave.’” *Phillips v. Matthews*, 547 F.3d 905, 909 (8th Cir. 2008)(quoting *Browning v. Liberty Mutual Ins. Co.*, 178 F.3d 1043, 1049 (8th Cir. 1999)); 29 C.F.R § 825.301(a).

## **14.26 DEFINITION: “EQUIVALENT POSITION”**

An “equivalent position” means a position that is virtually identical to the employee’s former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties or responsibilities, that entail substantially equivalent skill, effort, responsibility, and authority.

### **Committee Comments**

This definition is taken from the FMLA regulations at 29 C.F.R. § 825.215(a). The FMLA requires the employer to reinstate the employee to her original position or to an “equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment,” 29 U.S.C. § 2614(a)(1)(B); *Dollar v. Smithway Motor Xpress, Inc.*, 710 F.3d 798, 807 (8th Cir. 2013); *Walker v. Trinity Marine Products, Inc.*, 721 F.3d 542, 544 (8th Cir. 2013); *Brown v. Diversified Distribution Systems, LLC*, 801 F.3d 901 (8th Cir. 2015). However, the FMLA does not require employers to restore employment following leave if “the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition.” *Dollar*, 710 F.3d at 807 quoting *Reynolds v. Phillips & Temro Indus., Inc.*, 195 F.3d 411, 414 (8th Cir. 1999); 29 U.S.C. § 2614(a) (1); 29 C.F.R. § 825.214.

#### **14.27 DEFINITION: “QUALIFYING EXIGENCY”**

A “qualifying exigency” is:

1. Short notice deployment which is when the covered family member is notified of an impending call or order to active duty in support of a contingency operation seven or less calendar days prior to the date of deployment; or

2. Attending military events and related activities such as official ceremonies, programs, or other military-sponsored events related to the active duty or call to active duty status of the covered military member; or

3. Attending family support or assistance programs and information briefings sponsored or promoted by the military, military service organizations, or the American Red Cross when such programs or briefings are related to the active duty or call to active duty status of the covered military member; or

4. Childcare and school activities (a) when the active duty or call to active duty status of the covered military member necessitates a change in the existing childcare arrangements; (b) to provide childcare on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need for such care arises from the active duty or call to active duty of the covered military member; (c) to enroll or transfer a child of the covered military member when the enrollment or transfer is necessitated by the active duty or call to active duty status of the covered military member; or (d) to attend meetings with the staff at a school or daycare facility of the child of the covered military member when the meetings are necessary due to circumstance arising from the active duty or call to active duty status of the covered military member; or

5. Making or updating financial or legal arrangements to address the covered military member’s absence while on active duty or call to active duty status; or

6. Acting as the covered military member's representative before a federal, state, or local agency to obtain, arrange, or appeal military service benefits while the covered military member is on active duty or call to active duty status and for ninety days following the termination of the covered military member's active duty status; or

7. Attending counseling for oneself, the covered military member, or the covered military member's child if the counseling is provided by someone other than a health care provider and the need for counseling arises from the active duty or call to active duty status of the covered military member; or

8. Spending up to five days with a covered military member for each short-term, temporary, rest and recuperation leave during deployment of the covered military member; or

9. Attending post deployment activities such as arrival ceremonies, reintegration briefings and events, and other military-sponsored official ceremonies or program for a period of ninety days following the termination of the covered family member's active duty status; or

10. Addressing issues that arise from the death of a covered military member while on active duty status; or

11. Addressing other events that arise out of the covered family member's active duty or call to active duty status provided that the employer and employee agree that such leave qualifies as an exigency and agree to both the timing and duration of the leave.

#### **Committee Comments**

This definition is taken from the FMLA regulations. 29 C.F.R. § 825.126.

**14.28 DEFINITION: “NEXT OF KIN” FOR LEAVE TO CARE FOR A COVERED SERVICEMEMBER WITH A SERIOUS INJURY OR ILLNESS**

For the purposes of determining entitlement to leave to care for a covered servicemember with a serious injury or illness, “next of kin” means nearest blood relative other than the covered servicemember’s spouse, parent, son, or daughter in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made and there are multiple family members with the same level of relationship to the covered servicemember, all such family members are deemed considered the covered servicemember’s next of kin. When such designation has been made, the designated individual is deemed the covered servicemember’s only next of kin.

**Committee Comments**

This definition is taken from the FMLA regulations. 29 C.F.R. § 825.122(d).

**14.29 DEFINITION: “COVERED SERVICEMEMBER” FOR LEAVE TO CARE FOR A COVERED SERVICEMEMBER WITH A SERIOUS INJURY OR ILLNESS**

A “covered servicemember” is a current member of the Armed Forces (including a member of the National Guard or Reserves) or a member of the Armed Forces, the National Guard or Reserves who is on the temporary disability retired list, who has a serious injury or illness incurred in the line of duty on active duty for which he or she is undergoing medical treatment, recuperation, or therapy; or otherwise in outpatient<sup>1</sup> status; or otherwise on the temporary disability retired list. This definition does not include former members of the Armed Forces, former members of the National Guard and Reserves, or members on the permanent disability retired list.

**Notes on Use**

1. Outpatient status refers to the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

**Committee Comments**

This definition is taken from the FMLA regulations. 29 C.F.R. § 825.127(a).

**14.30 DEFINITION: “SERIOUS INJURY OR ILLNESS” FOR LEAVE TO CARE  
FOR A COVERED SERVICEMEMBER WITH A SERIOUS INJURY OR  
ILLNESS**

A “serious injury or illness” means an injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.

**Committee Comments**

This definition is taken from the FMLA regulations. 29 C.F.R. § 825.127(a)(1).

### **14.31 DEFINITION: “CONTINGENCY OPERATION”**

A “contingency operation” means a military operation 1) that is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force, or 2) that results in the call or order to, or retention on, active duty of members of the uniformed services during a war or during a national emergency declared by the President or Congress.

#### **Committee Comments**

This definition is taken from the FMLA regulations. 29 C.F.R. § 825.126(b)(3).

**14.32 DEFINITION: “AS SOON AS PRACTICABLE”**

The phrase “as soon as practicable” as used in these instructions means as soon as possible and practical, taking into account all of the facts and circumstances of the individual case.

**Committee Comments**

This definition is taken from the FMLA regulations. 29 C.F.R. § 825.302(b).

**14.40 ELEMENTS OF CLAIM: ENTITLEMENT—TRADITIONAL INTERFERENCE (Employee with a Serious Health Condition)**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all the following elements have been proved<sup>1</sup>:

[*First*, the plaintiff was eligible for leave<sup>2</sup> and;]

[*Second*, the plaintiff had a serious health condition (as defined in Instruction \_\_\_\_\_)<sup>3</sup>; and

[*Third*, the plaintiff attempted to take a leave because of that serious health condition; and

[*Fourth*, the plaintiff gave the defendant timely notice (as defined in Instruction \_\_\_\_\_)<sup>4</sup> of [(his) (her)] need to be [absent from work]<sup>5</sup>; and

[*Fourth*, as soon as practicable (as defined in Instruction \_\_\_\_\_)<sup>6</sup>, the plaintiff gave the defendant sufficient information so that the defendant knew or should have known the absence was for a serious health condition]<sup>7</sup>; and

[*Fifth*, the defendant interfered with plaintiff taking that leave by [describe the action taken,]<sup>8</sup>; and

[*Sixth*, the plaintiff was not able to take the leave entitled to because of defendant's interference with taking the leave.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction \_\_\_\_\_)<sup>9</sup>].

**Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Before an employee can exercise rights under the FMLA, he or she must be “eligible” for leave. *See supra* “Employees Eligible for Leave” section in 14.00. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

3. Insert the number of the Instruction defining “serious health condition.”

4. Reference to the instruction relating to the definition of “Timely Notice” should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a) or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

5. Insert the language that corresponds to the facts of the case.

6. Insert the number of the Instruction defining “as soon as practicable.”

7. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant “knew” or “should have known” that the requested leave was FMLA qualifying leave may not be a fact issue. See §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

8. Insert language with respect to the nature of the conduct that corresponds to the facts of the case.

9. This language should be used when the defendant submits an affirmative defense.

### **Committee Comments**

29 USC §2612(a)(1)(D) allows an employee leave for a serious health condition.

This instruction is for an entitlement claim based upon 29 USC § 2615(a)(1), which provides for a cause of action when an employer refuses to authorize leave under the FMLA that the employee was entitled to. *Brown v. Diversified Distrib. Sys., LLC*, 801 F.3d 901, 907 (8th Cir. 2015).

The employer's intent is immaterial to an FMLA entitlement claim. *Massey-Diez v. University of Iowa Community Medical Services, Inc.*, 826 F.3d 1149, 1158 (8th Cir. 2016); *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1005 (8th Cir. 2012); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2006).

**14.41 ELEMENTS OF CLAIM: ENTITLEMENT—TRADITIONAL INTERFERENCE (Employee Needed to Care for Spouse, Parent, Son or Daughter with a Serious Health Condition)<sup>1</sup>**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all the following elements have been proved<sup>2</sup>:

[*First*, the plaintiff was eligible for leave; and]<sup>3</sup>

*Second*, the plaintiff's [identify family member] had a serious health condition (as defined in Instruction \_\_\_\_\_)<sup>4</sup>; and

*Third*, the plaintiff was needed to care for [identify family member]; and

*Fourth*, the plaintiff was [absent from work]<sup>5</sup> to care for [identify family member]; and

[*Fifth*, the plaintiff gave the defendant timely notice (as defined in Instruction \_\_\_\_\_)<sup>6</sup> of [(his) (her)] need to be [absent from work]; and

[*Fifth*, as soon as practicable (as defined in Instruction \_\_\_\_\_)<sup>7</sup>, the plaintiff gave the defendant sufficient information so that the defendant knew or should have known the absence was for a serious health condition of [identify family member]<sup>8</sup>; and

*Sixth*, the defendant interfered with plaintiff taking that leave by [describe the action taken,]<sup>9</sup>; and

*Seventh*, the plaintiff was not able to take the leave entitled to because of defendant's interference with taking the leave.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction \_\_\_\_\_)<sup>10</sup>].

## Notes on Use

1. This Instruction is for use in cases in which the employee's family member had a serious health condition. Model Instruction 14.41 should be used for cases in which the employee needed leave because of a birth, adoption or foster care.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See supra* "Employees Eligible for Leave" in section 14.00. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

4. Insert the number of the Instruction defining "serious health condition."

5. Insert the language that corresponds to the facts of the case.

6. Reference to the instruction relating to the definition of "Timely Notice" should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a) or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

7. Insert the number of the Instruction defining "as soon as practicable."

8. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant "knew" or "should have known" that the requested leave was FMLA qualifying leave may not be a fact issue. See §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

9. Insert language with respect to the nature of the conduct that corresponds to the facts of the case.

10. This language should be used when the defendant submits an affirmative defense.

## Committee Comments

29 USC §2612(a)(1)(C) allows an employee to take leave to care for spouse, parent, son or daughter with a serious health condition.

This instruction is for an entitlement claim based upon 29 USC § 2615(a)(1), which provides for a cause of action when an employer refuses to authorize leave under the FMLA that the employee was entitled to. *Brown v. Diversified Distrib. Sys., LLC*, 801 F.3d 901, 907 (8th Cir. 2015).

The employer's intent is immaterial to an FMLA entitlement claim. *Massey-Diez v. University of Iowa Community Medical Services, Inc.*, 826 F.3d 1149, 1158 (8th Cir. 2016);

*Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1005 (8th Cir. 2012); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2006).

**14.42 ELEMENTS OF CLAIM: ENTITLEMENT—TRADITIONAL INTERFERENCE (Employee Leave for Birth, Adoption or Foster Care)<sup>1</sup>**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all the following elements have been proved<sup>2</sup>:

[*First*, the plaintiff was eligible for leave<sup>3</sup>; and]

*Second*, the plaintiff was [absent from work] because of [the birth of a son or daughter, or for placement with the plaintiff of a son or daughter for adoption or foster care]; and

[*Third*, the plaintiff gave the defendant timely notice (as defined in Instruction \_\_\_\_\_)<sup>4</sup> of [(his) (her)] need to be [absent from work]<sup>5</sup>; and

[*Third*, as soon as practicable (as defined in Instruction \_\_\_\_\_)<sup>6</sup>, the plaintiff gave the defendant sufficient information so that the defendant knew or should have known the absence was for [the birth of a son or daughter, or for placement with the plaintiff of a son or daughter for adoption or foster care]]<sup>7</sup>; and

*Fourth*, the defendant interfered with plaintiff taking that leave by [describe the action taken,]<sup>8</sup>; and

*Fifth*, the plaintiff was not able to take the leave entitled to because of defendant's interference with taking the leave.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction \_\_\_\_\_)<sup>9</sup>].

**Notes on Use**

1. This Instruction is for use in cases in which the employee needed leave because of a birth, adoption or foster care. Model Instruction 14.44 should be used for cases in which the employee's family member had a serious health condition. This Instruction differs from Instruction 14.44, in that it does not include an element requiring the plaintiff to show that he or she was

“needed to care for” the newborn, adopted child or foster child. One of the purposes of the FMLA is to provide time for early parent-child bonding. 1993 U.S. Code Cong. and Admin. News 3, 11; 139 Cong. Rec. H 319, 384, 387, 396; *Kelley Co. v. Marquardt*, 172 Wis. 2d 234, 493 N.W.2d 68, 75 (Wis. 1992).

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. Before an employee can exercise rights under the FMLA, he or she must be “eligible” for leave. *See supra* “Employees Eligible for Leave” section in 14.00. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

4. Reference to the instruction defining “timely notice” should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a), or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

5. Insert the language that corresponds to the facts of the case.

6. Insert the number of the Instruction defining “as soon as practicable.”

7. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant “knew” or “should have known” that the requested leave was FMLA qualifying leave may not be a fact issue. See 29 C.F.R. §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

8. Insert language with respect to the nature of the conduct that corresponds to the facts of the case.

9. This language should be used when the defendant is submitting an affirmative defense.

### **Committee Comments**

29 USC §2612(a)(1)(A) allows an employee leave for the of a birth of a son or daughter or to care for a son or daughter. 29 USC §2612(a)(1)(B) allows an employee leave for placement with of a son or daughter with the employee for adoption or foster care.

This instruction is for an entitlement claim based upon 29 USC § 2615(a)(1), which provides for a cause of action when an employer refuses to authorize leave under the FMLA that the employee was entitled to. *Brown v. Diversified Distrib. Sys., LLC*, 801 F.3d 901, 907 (8th Cir. 2015).

The employer's intent is immaterial to an FMLA entitlement claim. *Massey-Diez v. University of Iowa Community Medical Services, Inc.*, 826 F.3d 1149, 1158 (8th Cir. 2016);

*Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1005 (8th Cir. 2012); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2006).

**14.43 ELEMENTS OF CLAIM: ENTITLEMENT—TRADITIONAL  
INTERFERENCE  
(Qualifying Exigency Leave Related to Covered Military Member)**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all the following elements have been proved<sup>1</sup>:

[*First*, the plaintiff was eligible for leave<sup>2</sup>; and]

*Second*, a qualifying exigency (as defined in Instruction \_\_\_\_\_)<sup>3</sup> existed; and

*Third*, such qualifying exigency arose out of the fact that the plaintiff's [spouse, son, daughter, or parent] was on active duty or call to active duty status in support of a contingency operation (as defined in Instruction \_\_\_\_\_)<sup>4</sup>; and

*Fourth*, such [spouse, son, daughter, or parent] was a member of the [Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve, or Coast Guard Reserve or was retired member of the Regular Armed Forces or Reserve]; and

*Fifth*, the plaintiff was [absent from work]<sup>5</sup> because of such qualifying exigency<sup>6</sup>; and

[*Sixth*, the plaintiff gave the defendant timely notice (as defined in Instruction \_\_\_\_\_)<sup>7</sup> of [(his) (her)] need to be [absent from work]] and

[*Sixth*, as soon as practicable (as defined in Instruction \_\_\_\_\_)<sup>8</sup>, the plaintiff gave sufficient information so that the defendant knew or should have known that the absence was for a qualifying exigency arising out of the fact that the plaintiff's [spouse, son, daughter, or parent] was on active duty or call to active duty status in support of a contingency operation; ]<sup>9</sup> and

*Seventh*, the defendant interfered with plaintiff taking that leave by [describe the action taken,]<sup>10</sup>; and

*Eighth*, the plaintiff was not able to take the leave entitled to because of defendant's interference with taking the leave.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction \_\_\_\_\_)<sup>11</sup>].

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. See *supra* "Employees Eligible for Leave" section in 14.00. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

3. Insert the number of the Instruction defining "qualifying exigency."

4. "The active duty orders of a covered military member will generally specify if the servicemember is serving in support of a contingency operation by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation." 29 C.F.R. §825.126(b)(3).

5. Insert the language that corresponds to the facts of the case.

6. Qualifying Exigency leave is not available where the family member is on active duty or call to active duty status in support of a contingency operation as a member of the Regular Armed Forces.

7. Reference to the instruction defining "timely notice" should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a) or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

8. Insert the number of the Instruction defining "as soon as practicable."

9. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant "knew" or "should have known" that the requested leave was FMLA qualifying leave may not be a fact issue. See §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

10. Insert language with respect to the nature of the conduct that corresponds to the facts of the case

11. This language should be used when the defendant is submitting an affirmative defense.

### **Committee Comments**

29 USC §2612(a)(1)(E) allows an employee leave for any qualifying exigency arising out a spouse, or a son, daughter, or parent of the employee being on covered active duty.

This instruction is for an entitlement claim based upon 29 USC § 2615(a)(1), which provides for a cause of action when an employer refuses to authorize leave under the FMLA that the employee was entitled to. *Brown v. Diversified Distrib. Sys., LLC*, 801 F.3d 901, 907 (8th Cir. 2015).

The employer's intent is immaterial to an FMLA entitlement claim. *Massey-Diez v. University of Iowa Community Medical Services, Inc.*, 826 F.3d 1149, 1158 (8th Cir. 2016); *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1005 (8th Cir. 2012); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2006).

**14.44 ELEMENTS OF CLAIM: ENTITLEMENT—TRADITIONAL  
INTERFERENCE  
(Employee Needed to Care for Covered Servicemember with  
a Serious Injury or Illness)**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all the following elements have been proved<sup>1</sup>:

[*First*, the plaintiff was eligible for leave; and]<sup>2</sup>

*Second*, the plaintiff [(is)(was)] the [spouse, son, daughter, parent, or next of kin (as defined in Instruction \_\_\_\_)]<sup>3</sup> of a covered servicemember (as defined in Instruction \_\_\_\_)<sup>4</sup>; and

*Third*, such covered servicemember [(has)(had)] a serious injury or illness (as defined in Instruction \_\_\_\_)<sup>5</sup>; and

*Fourth*, the employee was needed to care for (as defined in Instruction \_\_\_\_)<sup>6</sup> such covered servicemember; and

*Fifth*, the plaintiff was [absent from work]<sup>8</sup> to care for such covered servicemember; and

[*Sixth*, the plaintiff gave the defendant timely notice (as defined in Instruction \_\_\_\_)]<sup>7</sup> of [(his) (her)] need to be [absent from work]<sup>9</sup> and

[*Sixth*, as soon as practicable (as defined in Instruction \_\_\_\_)]<sup>10</sup>, the plaintiff gave sufficient information so that the defendant knew or should have known that the absence was for the need to care for a covered servicemember]; and

*Seventh*, the defendant interfered with plaintiff taking that leave by [describe the action taken,]; and

*Eighth*, the plaintiff was not able to take the leave entitled to because of defendant's interference with taking the leave.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction \_\_\_\_)].

#### **Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See supra* "Employees Eligible for Leave" section in 14.00. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

3. Insert the number of the Instruction defining "next of kin" for a covered military member.

4. Insert the number of the Instruction defining "covered servicemember" for leave to care for a covered servicemember with a serious injury or illness.

5. Insert the number of the Instruction defining a "serious injury or illness" of a covered servicemember.

6. Insert the number of the Instruction defining "needed to care for."

7. Reference to the instruction defining "timely notice" should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a), or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

8. Insert language with respect to the nature of the leave that corresponds to the facts of the case.

9. This element is bracketed because "timely notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

10. Insert the number of the Instruction defining "as soon as practicable." This element is bracketed because the sufficiency of the information or content of the notice so that the defendant "knew" or "should have known" that the requested leave was FMLA qualifying leave may not be a fact issue. See §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

11. Insert the number of the Instruction defining “equivalent position.”
12. This language should be used when the defendant is submitting an affirmative defense.

### **Committee Comments**

29 USC §2612(a)(3) allows an employee, who is the spouse, son, daughter, parent, or next of kin of a covered servicemember, leave to care for the servicemember.

This instruction is for an entitlement claim based upon 29 USC § 2615(a)(1), which provides for a cause of action when an employer refuses to authorize leave under the FMLA that the employee was entitled to. *Brown v. Diversified Distrib. Sys., LLC*, 801 F.3d 901, 907 (8th Cir. 2015).

The employer's intent is immaterial to an FMLA entitlement claim. *Massey-Diez v. University of Iowa Community Medical Services, Inc.*, 826 F.3d 1149, 1158 (8th Cir. 2016); *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1005 (8th Cir. 2012); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2006).

**14.45 ELEMENTS OF CLAIM: ENTITLEMENT—FAILURE TO REINSTATE  
(Employee with a Serious Health Condition)**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all the following elements have been proved<sup>1</sup>:

[*First*, the plaintiff was eligible for leave <sup>2</sup>; and]

[*Second*, the plaintiff had a serious health condition (as defined in Instruction \_\_\_\_\_)<sup>3</sup>; and]

[*Third*, the plaintiff gave the defendant timely notice (as defined in Instruction \_\_\_\_\_)<sup>4</sup> of [(his) (her)] need to be [absent from work]] <sup>5, 6</sup>; and]

[*Third*, as soon as practicable (as defined in Instruction \_\_\_\_\_) <sup>7</sup>, the plaintiff gave sufficient information so that the defendant knew or should have known that the absence was for a serious health condition] <sup>8</sup>; and]

[*Fourth*, the plaintiff was absent from work because of that serious health condition; and]

[*Fifth*, the plaintiff received treatment and was able to return to work and perform the functions of [(his) (her)] job at the expiration of the leave period <sup>9</sup>; and]

[*Sixth*, the defendant refused to reinstate the plaintiff to the same or an equivalent position (as defined in Instruction \_\_\_\_\_) <sup>10</sup> held by the plaintiff when the absence began.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction \_\_\_\_\_)]<sup>11</sup>.

**Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Before an employee can exercise rights under the FMLA, he or she must be “eligible” for leave. *See supra* “Employees Eligible for Leave” section in 14.00. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

3. Insert the number of the Instruction defining “serious health condition.”

4. Reference to the instruction relating to the definition of “Timely Notice” should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a) or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

5. Insert language with respect to the nature of the leave that corresponds to the facts of the case.

6. This element is bracketed because “timely notice” may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

7. Insert the number of the Instruction defining “as soon as practicable.”

8. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant “knew” or “should have known” that the requested leave was FMLA qualifying leave may not be a fact issue. See §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

9. Define the “leave period” or use the date of the expiration of the leave period

10. Insert number of the instruction defining “equivalent position.”

11. This language should be used when the defendant submits an affirmative defense.

### **Committee Comments**

29 USC §2612(a)(1)(D) allows an employee leave for a serious health condition.

The FMLA entitles an employee on leave to be reinstated to the same or an equivalent position upon return from leave. 29 U.S.C. § 2614(a)(1); 29 C.F.R. § 825.214; *Dollar v. Smithway Motor Xpress, Inc.*, 710 F.3d 798, 807 (8th Cir. 2013). 29 USC §2612(a)(1)(D) allows an employee leave for a serious health condition.

The employer's intent is immaterial to an FMLA entitlement claim. *Massey-Diez v. University of Iowa Community Medical Services, Inc.*, 826 F.3d 1149, 1158 (8th Cir. 2016); *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1005 (8th Cir. 2012); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2006).

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period. 29 U.S.C. § 2614(a)(3)(B); 29 C.F.R. § 825.216(a). For example, if the employer can prove that during the FMLA leave the employee would have been laid off and not entitled to job restoration

regardless of that leave, the employee cannot prevail. *Dalton v. ManorCare of Des Moines of IA, LLC*, 782 F.3d 955, 961 (8th Cir. 2015); *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 978 (8th Cir. 2005). See Model Instruction 14.61.

**14.46 ELEMENTS OF CLAIM: ENTITLEMENT—FAILURE TO REINSTATE  
(Employee Needed to Care for a Spouse, Son or Daughter  
with a Serious Health Condition)<sup>1</sup>**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all the following elements have been proved <sup>2</sup>:

*First*, the plaintiff was eligible for leave <sup>3</sup>; and

*Second*, the plaintiff's [identify family member] had a serious health condition (as defined in Instruction \_\_\_\_\_) <sup>4</sup>; and

*Third*, the plaintiff was needed to care for (as defined in Instruction (\_\_\_\_\_) <sup>5</sup> [(his) (her)]) [identify family member] because of that serious health condition; and

*Fourth*, the plaintiff gave the defendant timely notice (as defined in Instruction \_\_\_\_\_) <sup>6</sup> of [(his) (her)] need to be [absent from work] <sup>7</sup> ] <sup>8</sup>; and

*Fourth*, as soon as practicable (as defined in Instruction \_\_\_\_\_) <sup>9</sup>, the plaintiff gave sufficient information so that the defendant knew or should have known that the absence was for a serious health condition of [identify family member]] <sup>10</sup>; and

*Fifth*, the plaintiff was absent from work because [(he) (she)] was caring for [(his) (her)] [identify family member] with the serious health condition; and

*Sixth*, the plaintiff was able to return to [(his) (her)] job at the expiration of the leave period <sup>11</sup>; and

*Seventh*, the defendant refused to reinstate the plaintiff to the same or an equivalent position (as defined by Instruction \_\_\_\_\_) <sup>12</sup> held by the plaintiff when the absence began.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction \_\_\_\_\_)]<sup>13</sup>.

### Notes on Use

1. This Instruction is for use in cases in which the employee's family member had a serious health condition. Model Instruction 14.45 should be used for cases in which the employee needed leave because of a birth, adoption or foster care.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See supra* "Employees Eligible for Leave" in section 14.00. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

4. Insert the number of the Instruction defining "serious health condition."

5. Insert the number of the Instruction defining "needed to care for."

6. Reference to the instruction defining "timely notice" should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a), or unforeseeable, less than 30 days pursuant to 29 C.F.R. 825.303(a).

7. Insert language with respect to the nature of the leave that corresponds to the facts of the case.

8. This element is bracketed because "timely notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

9. Insert the number of the Instruction defining "as soon as practicable."

10. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant "knew" or "should have known" that the requested leave was FMLA qualifying leave may not be a fact issue. See §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

11. Define the "leave period" or use the actual date of the expiration of the leave period.

12. Insert the number of the Instruction defining "equivalent position."

13. This language should be used when the defendant is submitting an affirmative defense.

## Committee Comments

29 USC §2612(a)(1)(C) allows an employee to take leave to care for spouse, parent, son or daughter with a serious health condition. The FMLA entitles an employee on leave to be reinstated to the same or an equivalent position upon return from leave. 29 U.S.C. § 2614(a)(1); 29 C.F.R. § 825.214; *Dollar v. Smithway Motor Xpress, Inc.*, 710 F.3d 798, 807 (8th Cir. 2013).

The employer's intent is immaterial to an FMLA entitlement claim. *Massey-Diez v. University of Iowa Community Medical Services, Inc.*, 826 F.3d 1149, 1158 (8th Cir. 2016); *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1005 (8th Cir. 2012); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2006).

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period. 29 U.S.C. § 2614(a)(3)(B); 29 C.F.R. § 825.216(a). For example, if the employer can prove that during the FMLA leave the employee would have been laid off and not entitled to job restoration regardless of that leave, the employee cannot prevail. *Dalton v. ManorCare of Des Moines of IA, LLC*, 782 F.3d 955, 961 (8th Cir. 2015); *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 978 (8th Cir. 2005). See Model Instruction 14.61.

**14.47 ELEMENTS OF CLAIM: ENTITLEMENT—FAILURE TO REINSTATE  
(Employee Leave for Birth, Adoption or Foster Care)<sup>1</sup>**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all the following elements have been proved <sup>2</sup>:

[*First*, the plaintiff was eligible for leave <sup>3</sup>; and]

*Second*, the plaintiff was absent from work because of [the birth of a son or daughter, or for placement with the plaintiff of a son or daughter for adoption or foster care] <sup>4</sup>; and

[*Third*, the plaintiff gave the defendant timely notice (as defined in Instruction \_\_\_\_\_)<sup>5</sup> of [(his) (her)] need to be [absent from work] <sup>6</sup> <sup>7</sup>; and

[*Third*, as soon as practicable (as defined in Instruction \_\_\_\_\_) <sup>8</sup>, the plaintiff gave sufficient information so that the defendant knew or should have known that the absence was for [the birth of a son or daughter, or for placement with the plaintiff of a son or daughter for adoption or foster care]]<sup>9</sup>; and

*Fourth*, the plaintiff was able to return to [(his) (her)] job at the expiration of the leave period<sup>10</sup>; and

*Fifth*, the defendant refused to reinstate the plaintiff to the same or an equivalent position (as defined by Instruction \_\_\_\_\_)<sup>11</sup> held by the plaintiff when the absence began.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction \_\_\_\_\_)]<sup>12</sup>.

**Notes on Use**

1. This Instruction is for use in cases in which the employee needed leave because of a birth, adoption or foster care. Model Instruction 14.44 should be used for cases in which the employee's family member had a serious health condition. This Instruction differs from Instruction 14.44, in that it does not include an element requiring the plaintiff to show that he or

she was “needed to care for” the newborn, adopted child or foster child. One of the purposes of the FMLA is to provide time for early parent-child bonding. 1993 U.S. Code Cong. and Admin. News 3, 11; 139 Cong. Rec. H 319, 384, 387, 396; *Kelley Co. v. Marquardt*, 172 Wis. 2d 234, 493 N.W.2d 68, 75 (Wis. 1992).

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. Before an employee can exercise rights under the FMLA, he or she must be “eligible” for leave. *See supra* “Employees Eligible for Leave” section in 14.00. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

4. Insert the language that corresponds to the facts of the case.

5. Reference to the instruction defining “timely notice” should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a), or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

6. Insert language with respect to the nature of the leave that corresponds to the facts of the case.

7. This element is bracketed because “timely notice” may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

8. Insert the number of the Instruction defining “as soon as practicable.”

9. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant “knew” or “should have known” that the requested leave was FMLA qualifying leave may not be a fact issue. See 29 C.F.R. §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

10. Define the “leave period” or use the actual date of the expiration of the leave period.

11. Insert the number of the Instruction defining “equivalent position.”

12. This language should be used when the defendant is submitting an affirmative defense.

### **Committee Comments**

29 USC §2612(a)(1)(A) allows an employee leave for the of a birth of a son or daughter or to care for a son or daughter. 29 USC §2612(a)(1)(B) allows an employee leave for placement with of a son or daughter with the employee for adoption or foster care.

The FMLA entitles an employee on leave to be reinstated to the same or an equivalent position upon return from leave. 29 U.S.C. § 2614(a)(1); 29 C.F.R. § 825.214; *Dollar v. Smithway Motor Xpress, Inc.*, 710 F.3d 798, 807 (8th Cir. 2013).

The employer's intent is immaterial to an FMLA entitlement claim. *Massey-Diez v. University of Iowa Community Medical Services, Inc.*, 826 F.3d 1149, 1158 (8th Cir. 2016); *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1005 (8th Cir. 2012); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2006).

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period. 29 U.S.C. § 2614(a)(3)(B); 29 C.F.R. § 825.216(a). For example, if the employer can prove that during the FMLA leave the employee would have been laid off and not entitled to job restoration regardless of that leave, the employee cannot prevail. *Dalton v. ManorCare of Des Moines of IA, LLC*, 782 F.3d 955, 961 (8th Cir. 2015); *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 978 (8th Cir. 2005). See Model Instruction 14.61.

**14.48 ELEMENTS OF CLAIM: ENTITLEMENT—FAILURE TO REINSTATE  
(Qualifying Exigency Leave Related to Covered Military Member)**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all the following elements have been proved<sup>1</sup>:

*First*, the plaintiff was eligible for leave <sup>2</sup>; and]

*Second*, a qualifying exigency (as defined in Instruction \_\_\_\_\_) <sup>3</sup> existed; and

*Third*, such qualifying exigency arose out of the fact that the plaintiff's [spouse, son, daughter, or parent] was on active duty or call to active duty status in support of a contingency operation <sup>4</sup> (as defined in Instruction \_\_\_\_\_); and

*Fourth*, such [spouse, son, daughter, or parent] was a member of the [Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve, or Coast Guard Reserve or was retired member of the Regular Armed Forces or Reserve];<sup>5</sup> and

[*Fifth*, the plaintiff gave the defendant timely notice (as defined in Instruction \_\_\_\_\_)<sup>6</sup> of [(his) (her)] need to be [absent from work] <sup>7</sup> <sup>8</sup>; and

[*Fifth*, as soon as practicable (as defined in Instruction \_\_\_\_\_)<sup>9</sup>, the plaintiff gave sufficient information so that the defendant knew or should have known that the absence was for a qualifying exigency arising out of the fact that the plaintiff's [spouse, son, daughter, or parent] was on active duty or call to active duty status in support of a contingency operation]]<sup>10</sup>; and

*Sixth*, the plaintiff was absent from work because of such qualifying exigency;

*Seventh*, the plaintiff was able to return to [(his) (her)] job at the expiration of the leave period<sup>11</sup>; and

*Eighth*, the defendant refused to reinstate the plaintiff to the same or an equivalent position (as defined by Instruction \_\_\_\_\_)<sup>12</sup> held by the plaintiff when the absence began.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction \_\_\_\_\_)].<sup>13</sup>

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Before an employee can exercise rights under the FMLA, he or she must be “eligible” for leave. *See supra* “Employees Eligible for Leave” section in 14.00. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

3. Insert the number of the Instruction defining “qualifying exigency.”

4. “The active duty orders of a covered military member will generally specify if the servicemember is serving in support of a contingency operation by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation.” 29 C.F.R. §825.126(b)(3).

5. Qualifying Exigency leave is not available where the family member is on active duty or call to active duty status in support of a contingency operation as a member of the Regular Armed Forces.

6. Reference to the instruction defining “timely notice” should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a) or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

7. Insert language with respect to the nature of the leave that corresponds to the facts of the case.

8. This element is bracketed because “timely notice” may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

9. Insert the number of the Instruction defining “as soon as practicable.”

10. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant “knew” or “should have known” that the requested leave was FMLA qualifying leave may not be a fact issue. See §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

11. Define the “leave period” or use the actual date of the expiration of the leave period.
12. Insert the number of the Instruction defining “equivalent position.”
13. This language should be used when the defendant is submitting an affirmative defense.

### **Committee Comments**

29 USC §2612(a)(1)(E) allows an employee leave for any qualifying exigency arising out a spouse, or a son, daughter, or parent of the employee being on covered active duty.

The FMLA entitles an employee on leave to be reinstated to the same or an equivalent position upon return from leave. 29 U.S.C. § 2614(a)(1); 29 C.F.R. § 825.214; *Dollar v. Smithway Motor Xpress, Inc.*, 710 F.3d 798, 807 (8th Cir. 2013).

The employer's intent is immaterial to an FMLA entitlement claim. *Massey-Diez v. University of Iowa Community Medical Services, Inc.*, 826 F.3d 1149, 1158 (8th Cir. 2016); *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1005 (8th Cir. 2012); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2006).

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period. 29 U.S.C. § 2614(a)(3)(B); 29 C.F.R. § 825.216(a). For example, if the employer can prove that during the FMLA leave the employee would have been laid off and not entitled to job restoration regardless of that leave, the employee cannot prevail. *Dalton v. ManorCare of Des Moines of IA, LLC*, 782 F.3d 955, 961 (8th Cir. 2015); *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 978 (8th Cir. 2005). See Model Instruction 14.61.

**14.49 ELEMENTS OF CLAIM: ENTITLEMENT—FAILURE TO REINSTATE  
(Employee Needed to Care for Covered Servicemember with a Serious Injury or  
Illness)**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all the following elements have been proved <sup>1</sup>:

[*First*, the plaintiff was eligible for leave <sup>2</sup>; and]

[*Second*, the plaintiff [(is)(was)] the [spouse, son, daughter, parent, or next of kin (as defined in Instruction \_\_\_\_\_)<sup>3</sup>] of a covered servicemember (as defined in Instruction \_\_\_\_\_)<sup>4</sup>; and]

[*Third*, such covered servicemember [(has)(had)] a serious injury or illness (as defined in Instruction \_\_\_\_\_)<sup>5</sup>; and]

[*Fourth*, the plaintiff was needed to care for (as defined in Instruction \_\_\_\_\_) <sup>6</sup> such covered servicemember; and]

[*Fifth*, the plaintiff gave the defendant timely notice (as defined in Instruction \_\_\_\_\_)<sup>7</sup> of [(his) (her)] need to be [absent from work] <sup>8</sup> ] <sup>9</sup> ; and]

[*Fifth*, as soon as practicable (as defined in Instruction \_\_\_\_\_), the plaintiff gave sufficient information so that the defendant knew or should have known that the absence was for the need to care for a covered servicemember]<sup>10</sup>; and]

[*Sixth*, the plaintiff was absent from work because [(he)(she)] was caring for such covered service member; and]

[*Seventh*, the plaintiff was able to return to [(his) (her)] job at the expiration of the leave period<sup>11</sup>; and]

*Eighth*, the defendant refused to reinstate the plaintiff to the same or an equivalent position (as defined by Instruction \_\_\_\_\_)<sup>12</sup> held by the plaintiff when the absence began.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction \_\_\_\_\_)].<sup>13</sup>

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Before an employee can exercise rights under the FMLA, he or she must be “eligible” for leave. *See supra* “Employees Eligible for Leave” section in 14.00. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

3. Insert the number of the Instruction defining “next of kin” for a covered military member.

4. Insert the number of the Instruction defining “covered servicemember” for leave to care for a covered servicemember with a serious injury or illness.

5. Insert the number of the Instruction defining a “serious injury or illness” of a covered servicemember.

6. Insert the number of the Instruction defining “needed to care for.”

7. Reference to the instruction defining “timely notice” should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a), or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

8. Insert language with respect to the nature of the leave that corresponds to the facts of the case.

9. This element is bracketed because “timely notice” may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

10. Insert the number of the Instruction defining “as soon as practicable.” This element is bracketed because the sufficiency of the information or content of the notice so that the defendant “knew” or “should have known” that the requested leave was FMLA qualifying leave may not be a fact issue. See §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

11. Define the “leave period” or use the actual date of the expiration of the leave period.
12. Insert the number of the Instruction defining “equivalent position.”
13. This language should be used when the defendant is submitting an affirmative defense.

### **Committee Comments**

29 USC §2612(a)(3) allows an employee, who is the spouse, son, daughter, parent, or next of kin of a covered servicemember, leave to care for the servicemember.

The FMLA entitles an employee on leave to be reinstated to the same or an equivalent position upon return from leave. 29 U.S.C. § 2614(a)(1); 29 C.F.R. § 825.214; *Dollar v. Smithway Motor Xpress, Inc.*, 710 F.3d 798, 807 (8th Cir. 2013).

The employer's intent is immaterial to an FMLA entitlement claim. *Massey-Diez v. University of Iowa Community Medical Services, Inc.*, 826 F.3d 1149, 1158 (8th Cir. 2016); *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1005 (8th Cir. 2012); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2006).

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period. 29 U.S.C. § 2614(a)(3)(B); 29 C.F.R. § 825.216(a). For example, if the employer can prove that during the FMLA leave the employee would have been laid off and not entitled to job restoration regardless of that leave, the employee cannot prevail. *Dalton v. ManorCare of Des Moines of IA, LLC*, 782 F.3d 955, 961 (8th Cir. 2015); *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 978 (8th Cir. 2005). See Model Instruction 14.61.

**14.50 ELEMENTS OF CLAIM: DISCRIMINATION OR RETALIATION  
(Employee with a Serious Health Condition)**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all the following elements have been proved<sup>1</sup>:

[*First*, the plaintiff was eligible for leave<sup>2</sup> and]

[*Second*, the plaintiff had a serious health condition (as defined in Instruction \_\_\_\_\_)<sup>3</sup>; and

[*Third*, the plaintiff was [absent from work]<sup>4</sup> because of that serious health condition; and

[*Fourth*, the plaintiff gave the defendant timely notice (as defined in Instruction \_\_\_\_\_)<sup>5</sup> of [(his) (her)] need to be [absent from work]<sup>6</sup> ; and

[*Fourth*, as soon as practicable (as defined in Instruction \_\_\_\_\_)<sup>7</sup>, the plaintiff gave the defendant sufficient information so that the defendant knew or should have known the absence was for a serious health condition]<sup>8</sup>; and

[*Fifth*, the defendant [describe employment action taken, e.g., discharged]<sup>9</sup> the plaintiff; and

[*Sixth*, the plaintiff's [absence from work] was a [(motivating)]<sup>10</sup> factor in the defendant's decision to [describe employment action taken, e.g., discharge]<sup>11</sup> the plaintiff.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction \_\_\_\_\_)]<sup>12</sup>.

[You may find that the plaintiff’s [absence from work] was a [(motivating) ] factor in the defendant’s (decision)<sup>13</sup> if it has been proved that the defendant’s stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.]<sup>14</sup>

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Before an employee can exercise rights under the FMLA, he or she must be “eligible” for leave. *See supra* “Employees Eligible for Leave” section in 14.00. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

3. Insert the number of the Instruction defining “serious health condition.”

4. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee whose leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

5. Reference to the instruction relating to the definition of “Timely Notice” should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a) or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

6. This element is bracketed because “timely notice” may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

7. Insert the number of the Instruction defining “as soon as practicable.”

8. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant “knew” or “should have known” that the requested leave was FMLA qualifying leave may not be a fact issue. See §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

9. Insert language that corresponds to the facts of the case. In addition to protecting employees from retaliatory termination, the FMLA prohibits employers from interfering with or retaliating against employees who attempt to exercise rights under the FMLA. *See Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 977 (8th Cir. 2005) (“The FMLA makes it ‘unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under’ the FMLA, 29 U.S.C. § 2615(a)(1). A violation of this provision creates what is commonly known as the interference theory of recovery. 29 U.S.C. § 2617. . . . The FMLA also makes it ‘unlawful for any employer to discharge or in any other manner discriminate against

any individual for opposing any practice made unlawful by' the FMLA. 29 U.S.C. § 2615(a)(2). A violation of this provision creates what is commonly known as the discrimination theory of recovery. 29 U.S.C. § 2617.”)

10. See the Introduction for a discussion of whether the term “determining” factor or “motivating” factor should be used.

11. Insert language with respect to the nature of the leave that corresponds to the facts of the case.

12. This language should be used when the defendant is submitting an affirmative defense.

13. This instruction makes references to the defendant’s “decision.” It may be modified if another term--such as “actions” or “conduct”--would be more appropriate.

14. This sentence may be added, if appropriate. *See* Model Instruction 5.20 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states “[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.”

### **Committee Comments**

29 USC §2612(a)(1)(D) allows an employee leave for a serious health condition.

The FMLA prohibits an employer from discriminating or retaliating against an employee because the employee exercised rights or attempted to exercise rights under the FMLA. 29 USC § 2615(a)(2). The FMLA also prohibits an employer from retaliating against an employee because the employee participated in a proceeding to enforce rights under the FMLA. 29 USC § 2615(b).

This instruction is for discrimination or retaliation based upon 29 USC § 2615(a)(2) for exercising a right under the FMLA. *Burciaga v. Ravago Americas LLC*, 791 F.3d 930, 934 (8th Cir. 2015); *Chappell v. Bilco Co.*, 675 F.3d 1110, 1116-1117 (8th Cir. 2012).

An employee making a discrimination or retaliation claim must prove that the employer was motivated by the employee's exercise of rights under the FMLA. *Sisk v. Picture People, Inc.*, 669 F.3d 896, 900 (8th Cir. 2012); *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1006 (8th Cir. 2012).

If the plaintiff is alleging the defendant’s stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.20 may be used.

**14.51 ELEMENTS OF CLAIM: DISCRIMINATION OR RETALIATION  
(Employee Needed to Care for Spouse, Parent, Son or Daughter with a Serious  
Health Condition)**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all the following elements have been proved<sup>1</sup>:

[*First*, the plaintiff was eligible for leave<sup>2</sup>; and]

[*Second*, the plaintiff's [identify family member] had a serious health condition (as defined in Instruction \_\_\_\_\_)<sup>3</sup>; and]

[*Third*, the plaintiff was needed to care for [identify family member]; and]

[*Fourth*, the plaintiff was [absent from work]<sup>4</sup> to care for [identify family member]; and]

[*Fifth*, the plaintiff gave the defendant timely notice (as defined in Instruction \_\_\_\_\_)<sup>5</sup> of [(his) (her)] need to be [absent from work]<sup>6</sup> and]

[*Fifth*, as soon as practicable (as defined in Instruction \_\_\_\_\_)<sup>7</sup>, the plaintiff gave the defendant sufficient information so that the defendant knew or should have known the absence was for a serious health condition of [identify family member] <sup>8</sup>; and]

[*Sixth*, the defendant [describe employment action taken, e.g., discharged]<sup>9</sup> the plaintiff; and]

[*Seventh*, the plaintiff's [absence from work] was a [(motivating)]<sup>10</sup> factor in the defendant's decision to [describe employment action taken, e.g., discharge] the plaintiff.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction \_\_\_\_\_)]<sup>11</sup>. [You may find that the plaintiff's [absence from work] was a [(motivating) ] factor in the

defendant's (decision)<sup>12</sup> if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.]<sup>13</sup>

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See supra* "Employees Eligible for Leave" section in 14.00. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

3. Insert the number of the Instruction defining "serious health condition."

4. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee whose leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

5. Reference to the instruction relating to the definition of "Timely Notice" should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a) or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

6. This element is bracketed because "timely notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

7. Insert the number of the Instruction defining "as soon as practicable."

8. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant "knew" or "should have known" that the requested leave was FMLA qualifying leave may not be a fact issue. See 29 C.F.R. §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

9. Insert the language that corresponds to the facts of the case.

10. See the Introduction for a discussion of whether the term "determining" factor or "motivating" factor should be used.

11. This language should be used when the defendant is submitting an affirmative defense.

12. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

13. This sentence may be added, if appropriate. See Model Instruction 5.20 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states “[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.”

### **Committee Comments**

29 USC §2612(a)(1)(C) allows an employee to take leave to care for spouse, parent, son or daughter with a serious health condition.

The FMLA prohibits an employer from discriminating or retaliating against an employee because the employee exercised rights or attempted to exercise rights under the FMLA. 29 USC § 2615(a)(2). The FMLA also prohibits an employer from retaliating against an employee because the employee participated in a proceeding to enforce rights under the FMLA. 29 USC § 2615(b).

This instruction is for discrimination or retaliation based upon 29 USC § 2615(a)(2) for exercising a right under the FMLA. *Burciaga v. Ravago Americas LLC*, 791 F.3d 930, 934 (8th Cir. 2015); *Chappell v. Bilco Co.*, 675 F.3d 1110, 1116-1117 (8th Cir. 2012).

An employee making a discrimination or retaliation claim must prove that the employer was motivated by the employee's exercise of rights under the FMLA. *Sisk v. Picture People, Inc.*, 669 F.3d 896, 900 (8th Cir. 2012); *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1006 (8th Cir. 2012).

If the plaintiff is alleging the defendant’s stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.20 may be used.

**14.52 ELEMENTS OF CLAIM: DISCRIMINATION OR RETALIATION  
(Employee Leave for Birth, Adoption or Foster Care)<sup>1</sup>**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all the following elements have been proved<sup>2</sup>:

[*First*, the plaintiff was eligible for leave <sup>3</sup>; and]

*Second*, the plaintiff was [absent from work] <sup>4</sup> because of [the birth of a son or daughter, or for placement with the plaintiff of a son or daughter for adoption or foster care] <sup>5</sup>; and

[*Third* , the plaintiff gave the defendant timely notice (as defined in Instruction \_\_\_\_\_) of [(his) (her)] need to be [absent from work]<sup>6</sup>; and

[*Third*, as soon as practicable (as defined in Instruction \_\_\_\_\_)<sup>7</sup>, the plaintiff gave the defendant sufficient information so that the defendant knew or should have known the absence was for [the birth of a son or daughter, or for placement with the plaintiff of a son or daughter for adoption or foster care]] <sup>8</sup> ;and

*Fourth*, the defendant [describe employment action taken, e.g., discharged] <sup>9</sup> the plaintiff; and

*Fifth*, the plaintiff's [absence from work] was a [(motivating)]<sup>10</sup> factor in the defendant's decision to [describe employment action taken, e.g., discharge] the plaintiff.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction \_\_\_\_\_)]<sup>11</sup>.

[You may find that the plaintiff's [absence from work] was a [(motivating) ] factor in the defendant's (decision)<sup>12</sup> if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.]<sup>13</sup>

## Notes on Use

1. This Instruction is for use in cases in which the employee needed leave because of a birth, adoption or foster care. Model Instruction 14.91 should be used for cases in which the employee's family member had a serious health condition. This Instruction differs from Model Instruction 14.41 in that it does not include an element requiring the plaintiff to show that he or she was "needed to care for" the newborn, adopted child or foster child. One of the purposes of the FMLA is to provide time for early parent-child bonding. 1993 U.S. Code Cong. and Admin. News 3, 11; 139 Cong. Rec. H 319, 384, 387, 396; *Kelley Co. v. Marquardt*, 172 Wis. 2d 234, 493 N.W.2d 68, 75 (Wis. 1992).

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See supra* "Employees Eligible for Leave" section in 14.00. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

4. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee whose leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

5. Insert the language that corresponds to the facts of the case.

6. Reference to the instruction relating to the definition of "Timely Notice" should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a) or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a). This element is bracketed because "timely notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

7. Insert the number of the Instruction defining "as soon as practicable."

8. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant "knew" or "should have known" that the requested leave was FMLA qualifying leave may not be a fact issue. See 29 C.F.R. § 825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

9. Insert the language that corresponds to the facts of the case. In addition to protecting employees from retaliatory termination, the FMLA prohibits employers from interfering with or retaliating against employees who attempt to exercise rights under the FMLA. *See Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 977 (8th Cir. 2005) ("The FMLA makes it 'unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under' the FMLA, 29 U.S.C. § 2615(a)(1). A violation of this

provision creates what is commonly known as the interference theory of recovery. 29 U.S.C. § 2617. . . . The FMLA also makes it ‘unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by’ the FMLA. 29 U.S.C. § 2615(a)(2). A violation of this provision creates what is commonly known as the discrimination theory of recovery. 29 U.S.C. § 2617.”)

10. See the Introduction for a discussion of whether the term “determining” factor or “motivating” factor should be used.

11. This language should be used when the defendant is submitting an affirmative defense.

12. This instruction makes references to the defendant’s “decision.” It may be modified if another term--such as “actions” or “conduct”--would be more appropriate.

13. This sentence may be added, if appropriate. *See* Model Instruction 5.20 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states “[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.”

### **Committee Comments**

29 USC §2612(a)(1)(A) allows an employee leave for the of a birth of a son or daughter or to care for a son or daughter. 29 USC §2612(a)(1)(B) allows an employee leave for placement with of a son or daughter with the employee for adoption or foster care.

The FMLA prohibits an employer from discriminating or retaliating against an employee because the employee exercised rights or attempted to exercise rights under the FMLA. 29 USC § 2615(a)(2). The FMLA also prohibits an employer from retaliating against an employee because the employee participated in a proceeding to enforce rights under the FMLA. 29 USC § 2615(b).

This instruction is for discrimination or retaliation based upon 29 USC § 2615(a)(2) for exercising a right under the FMLA. *Burciaga v. Ravago Americas LLC*, 791 F.3d 930, 934 (8th Cir. 2015); *Chappell v. Bilco Co.*, 675 F.3d 1110, 1116-1117 (8th Cir. 2012).

An employee making a discrimination or retaliation claim must prove that the employer was motivated by the employee's exercise of rights under the FMLA. *Sisk v. Picture People, Inc.*, 669 F.3d 896, 900 (8th Cir. 2012); *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1006 (8th Cir. 2012).

If the plaintiff is alleging the defendant’s stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.20 may be used.

**14.53 ELEMENTS OF CLAIM: DISCRIMINATION OR RETALIATION  
(Qualifying Exigency Leave Related to Covered Military Member)**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all the following elements have been proved<sup>1</sup>:

*First*, the plaintiff was eligible for leave <sup>2</sup>; and]

*Second*, a qualifying exigency (as defined in Instruction \_\_\_\_\_)<sup>3</sup> existed; and

*Third*, such qualifying exigency arose out of the fact that the plaintiff's [spouse, son, daughter, or parent] was on active duty or call to active duty status in support of a contingency operation<sup>4</sup> (as defined in Instruction \_\_\_\_\_); and

*Fourth*, such [spouse, son, daughter, or parent] was a member of the [Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve, or Coast Guard Reserve or was retired member of the Regular Armed Forces or Reserve]<sup>5</sup>; and

*Fifth*, the plaintiff was [absent from work]<sup>6</sup> because of such qualifying exigency; and

*Sixth*, the plaintiff gave the defendant timely notice (as defined in Instruction \_\_\_\_\_)<sup>7</sup> of [(his) (her)] need to be [absent from work]<sup>8</sup> and

*Sixth*, as soon as practicable (as defined in Instruction \_\_\_\_\_)<sup>9</sup>, the plaintiff gave sufficient information so that the defendant knew or should have known that the absence was for a qualifying exigency arising out of the fact that the plaintiff's [spouse, son, daughter, or parent] was on active duty or call to active duty status in support of a contingency operation; ]<sup>10</sup> and

*Seventh*, the defendant [describe employment action taken, e.g., discharged] the plaintiff; and

*Ninth*, the plaintiff's [absence from work]<sup>11</sup> was a [(motivating)]<sup>12</sup> factor in the defendant's decision to [describe employment action taken, e.g., discharge] the plaintiff.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction \_\_\_\_\_)]<sup>13</sup>.

[You may find that the plaintiff's [absence from work] was a [(motivating) ] factor in the defendant's (decision)<sup>14</sup> if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.]<sup>15</sup>

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See supra* "Employees Eligible for Leave" section in 14.00. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

3. Insert the number of the Instruction defining "qualifying exigency."

4. "The active duty orders of a covered military member will generally specify if the servicemember is serving in support of a contingency operation by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation." 29 C.F.R. §825.126(b)(3).

5. Qualifying Exigency leave is not available where the family member is on active duty or call to active duty status in support of a contingency operation as a member of the Regular Armed Forces.

6. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee whose leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

7. Reference to the instruction relating to the definition of "Timely Notice" should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a) or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

8. This element is bracketed because "timely notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

9. Insert the number of the Instruction defining “as soon as practicable.”

10. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant “knew” or “should have known” that the requested leave was FMLA qualifying leave may not be a fact issue. See §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

11. Insert the language that corresponds to the facts of the case.

12. See the Introduction for a discussion of whether the term “determining” factor or “motivating” factor should be used.

13. This language should be used when the defendant is submitting an affirmative defense.

14. This instruction makes references to the defendant’s “decision.” It may be modified if another term--such as “actions” or “conduct”--would be more appropriate.

15. This sentence may be added, if appropriate. See Model Instruction 5.20 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states “[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.”

### **Committee Comments**

29 USC §2612(a)(1)(E) allows an employee leave for any qualifying exigency arising out a spouse, or a son, daughter, or parent of the employee being on covered active duty.

The FMLA prohibits an employer from discriminating or retaliating against an employee because the employee exercised rights or attempted to exercise rights under the FMLA. 29 USC § 2615(a)(2). The FMLA also prohibits an employer from retaliating against an employee because the employee participated in a proceeding to enforce rights under the FMLA. 29 USC § 2615(b).

This instruction is for discrimination or retaliation based upon 29 USC § 2615(a)(2) for exercising a right under the FMLA. *Burciaga v. Ravago Americas LLC*, 791 F.3d 930, 934 (8th Cir. 2015); *Chappell v. Bilco Co.*, 675 F.3d 1110, 1116-1117 (8th Cir. 2012).

An employee making a discrimination or retaliation claim must prove that the employer was motivated by the employee's exercise of rights under the FMLA. *Sisk v. Picture People, Inc.*, 669 F.3d 896, 900 (8th Cir. 2012); *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1006 (8th Cir. 2012).

If the plaintiff is alleging the defendant’s stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.20 may be used.

**14.54 ELEMENTS OF CLAIM: DISCRIMINATION OR RETALIATION  
(Employee Needed to Care for Covered Servicemember with  
a Serious Injury or Illness)**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all the following elements have been proved<sup>1</sup>:

[*First*, the plaintiff was eligible for leave<sup>2</sup>; and]

[*Second*, the plaintiff [(is)(was)] the [spouse, son, daughter, parent, or next of kin (as defined in Instruction \_\_\_\_\_)<sup>3</sup>] of a covered servicemember (as defined in Instruction \_\_\_\_\_)<sup>4</sup>; and]

[*Third*, such covered servicemember [(has)(had)] a serious injury or illness (as defined in Instruction \_\_\_\_\_)<sup>5</sup>; and]

[*Fourth*, the employee was needed to care for such covered servicemember (as defined in Instruction \_\_\_\_\_)<sup>6</sup>; and]

[*Fifth*, the plaintiff was [absent from work]<sup>7</sup> to care for such covered servicemember; and]

[*Sixth*, the plaintiff gave the defendant timely notice (as defined in Instruction \_\_\_\_\_)<sup>8</sup> of [(his) (her)] need to be [absent from work]<sup>9</sup> and]

[*Sixth*, as soon as practicable (as defined in Instruction \_\_\_\_\_)<sup>10</sup>, the plaintiff gave sufficient information so that the defendant knew or should have known that the absence was for the need to care for a covered servicemember];<sup>11</sup> and]

[*Seventh*, the defendant [describe employment action taken, e.g., discharged]<sup>12</sup> the plaintiff; and]

*Eighth*, the plaintiff's [absence from work] was a [(motivating) ]<sup>13</sup> factor in the defendant's decision to [describe employment action taken, e.g., discharge] the plaintiff.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction \_\_\_\_\_)]<sup>14</sup>.

[You may find that the plaintiff's [absence from work] was a [(motivating) ] factor in the defendant's (decision)<sup>15</sup> if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.]<sup>16</sup>

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See supra* "Employees Eligible for Leave" section in 14.00. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

3. Insert the number of the Instruction defining "next of kin" for a covered military member.

4. Insert the number of the Instruction defining "covered servicemember" for leave to care for a covered servicemember with a serious injury or illness.

5. Insert the number of the Instruction defining a "serious injury or illness" of a covered servicemember.

6. Insert the number of the Instruction defining "needed to care for."

7. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee whose leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

8. Reference to the instruction relating to the definition of "Timely Notice" should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a) or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

9. This element is bracketed because "timely notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

10. Insert the number of the Instruction defining “as soon as practicable.”

11. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant “knew” or “should have known” that the requested leave was FMLA qualifying leave may not be a fact issue. See §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

12. Insert the language that corresponds to the facts of the case.

13. See the Introduction for a discussion of whether the term “determining” factor or “motivating” factor should be used.

14. This language should be used when the defendant is submitting an affirmative defense.

15. This instruction makes references to the defendant’s “decision.” It may be modified if another term--such as “actions” or “conduct”--would be more appropriate.

16. This sentence may be added, if appropriate. See Model Instruction 5.20 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states “[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.”

### **Committee Comments**

29 USC §2612(a)(3) allows an employee, who is the spouse, son, daughter, parent, or next of kin of a covered servicemember, leave to care for the servicemember.

The FMLA prohibits an employer from discriminating or retaliating against an employee because the employee exercised rights or attempted to exercise rights under the FMLA. 29 USC § 2615(a)(2). The FMLA also prohibits an employer from retaliating against an employee because the employee participated in a proceeding to enforce rights under the FMLA. 29 USC § 2615(b).

This instruction is for discrimination or retaliation based upon 29 USC § 2615(a)(2) for exercising a right under the FMLA. *Burciaga v. Ravago Americas LLC*, 791 F.3d 930, 934 (8th Cir. 2015); *Chappell v. Bilco Co.*, 675 F.3d 1110, 1116-1117 (8th Cir. 2012).

An employee making a discrimination or retaliation claim must prove that the employer was motivated by the employee's exercise of rights under the FMLA. *Sisk v. Picture People, Inc.*, 669 F.3d 896, 900 (8th Cir. 2012); *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1006 (8th Cir. 2012).

If the plaintiff is alleging the defendant’s stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.20 may be used.

## **14.60 ELEMENTS OF DEFENSE: EXCEPTION TO JOB RESTORATION (Key Employee)**

Your verdict must be for the defendant if it has been proved<sup>1</sup> that the plaintiff was a key employee and that denying job restoration to the plaintiff was necessary to prevent substantial and grievous economic injury to the operations of the employer. In considering whether or not the plaintiff was a key employee you may consider factors such as whether the employer could replace the employee on a temporary basis, whether the employer could temporarily do without the employee, and if permanent replacement is unavoidable,<sup>2</sup> the cost of reinstating the employee.

### **Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. This section is based upon the FMLA regulation contained in 29 C.F.R. § 825.218(b).

### **Committee Comments**

An employer may deny job restoration to a “key employee” if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer. 29 C.F.R. § 825.216(b). In determining what constitutes a substantial and grievous economic injury, the focus should be on the extent of the injury to the employer’s operations, not whether the absence of the employee will cause the injury. 29 C.F.R. § 825.218(a). This standard is different and more stringent than the “undue hardship” test under the Americans with Disabilities Act. 29 § 825.218(d). While a precise definition is not provided in the regulations, factors to consider in making that determination are provided at 29 C.F.R. § 825.218(b). They include whether the employer could replace the employee on a temporary basis, whether the employer could temporarily do without the employee, and the cost of reinstating the employee. *Id.*

The court may wish to define “key employee,” that is defined by the FMLA regulation as a salaried employee who is eligible to take FMLA leave and who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employer’s worksite. 29 C.F.R. § 825.217(a). The method of determining whether the employee is “among the highest paid 10 percent” is described in the FMLA regulations. 29 C.F.R. § 825.217(c). No more than 10 percent of the employer’s employees within 75 miles of the worksite may be “key employees.” 29 C.F.R. § 825.217(c)(2). The term “salaried” has the same meaning under the FMLA as it does under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, as amended. 29 C.F.R. § 825.217(b); 29 C.F.R. § 541.118.

**14.61 ELEMENTS OF DEFENSE: EXCEPTION TO JOB RESTORATION  
(Employee would not have been Employed at Time of Reinstatement)**

Your verdict must be for the defendant if it has been proved<sup>1</sup> that the plaintiff would not have been employed by the defendant at the time job reinstatement was requested.

**Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

**Committee Comments**

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period. 29 U.S.C. § 2614(a)(3)(B); 29 C.F.R. § 825.216(a). For example, if the employer can prove that during the FMLA leave the employee would have been laid off and not entitled to job restoration regardless of that leave, the employee cannot prevail. *Dalton v. ManorCare of Des Moines of IA, LLC*, 782 F.3d 955, 961 (8th Cir. 2015); *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 978 (8th Cir. 2005); 29 C.F.R. § 825.216(a)(1).

## 14.70 DAMAGES: ACTUAL

If you find in favor of the plaintiff under Instruction \_\_\_\_\_<sup>1</sup> then you must award the plaintiff the amount of any wages, salary, employment benefits, and other compensation<sup>2</sup> the plaintiff would have earned in [(his) (her)] employment with the defendant if [(he) (she)] had not been discharged on [fill in date of discharge] through the date of your verdict, minus the amount of earnings and benefits from other employment received by the plaintiff during that time.

[You are also instructed that the plaintiff has a duty under the law to “mitigate” [(his) (her)] damages – that is, to exercise reasonable diligence under the circumstances to minimize [(his) (her)] damages. Therefore, if it has been proved<sup>3</sup> that the plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [(him) (her)], you must reduce [(his) (her)] damages by the amount [(he) (she)] reasonably could have avoided if [(he) (she)] had sought out or taken advantage of such an opportunity.]<sup>4</sup>

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.]<sup>5</sup>

### Notes on Use

1. Insert the number or title of the essential elements instruction here.
2. The entitlement to “other compensation” is based upon 29 C.F.R. §825.400(c).
3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.
4. This paragraph is designed to submit the issue of “mitigation of damages” in appropriate cases. *See Hartley v. Dillard’s, Inc.*, 310 F.3d 1054, 1061 (8th Cir. 2002); *Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983); *Fieldler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808-09 (8th Cir. 1982).
5. This paragraph may be given at the trial court’s discretion.

### Committee Comments

The FMLA provides that a prevailing plaintiff is entitled to recover actual damages and interest thereon plus an additional equal amount as liquidated damages. 29 U.S.C. § 2617(a)(1); 29 C.F.R. § 825.400(c); *Morris v. VCW, Inc.*, 1996 WL 740544 (W.D. Mo. 1996). In *Morris*, the court held that an employee could not recover interest because she failed to present evidence at trial regarding the method of calculating the amount of interest. *Id.* at \*16.

Where a prevailing plaintiff has not lost wages, salary or employment benefits, he or she may be entitled to other compensation. 29 U.S.C. § 2617; 29 C.F.R. § 825.400(c). For example, an employee who was denied FMLA leave may be able to recover any monetary losses incurred as a direct result of the FMLA violation, such as the cost of providing for a family member, up to an amount equal to 12 weeks of wages or salary for the employee. 29 U.S.C. § 2617(a)(1).

In the Eighth Circuit, damages for emotional distress are not permitted. *Rodgers v. City of Des Moines*, 435 F. 3d 904, 908-09 (8th Cir. 2006) (holding damages recoverable under the FMLA are strictly defined in the statute and measured by actual monetary losses).

### 14.80 GENERAL VERDICT FORM

**Note:** Complete the following paragraph by writing in the name required by your verdict.

On the [violation of the FMLA] claim of plaintiff [John Doe], [as submitted in Instruction \_\_\_\_\_], we find in favor of:

---

(Plaintiff John Doe)                      or                      (Defendant XYZ, Inc.)

**Note:** Answer the next question only if the above finding is in favor of the plaintiff. If the above finding is in favor of the defendant, have your foreperson sign and date this form because you have completed your deliberations on this claim.

Has it been proved that the defendant would have (describe employment action taken, e.g., discharged) the plaintiff regardless of [(his) (her)] (exercise of [(his) (her)] rights under the FMLA)?

\_\_\_\_\_Yes                      \_\_\_\_\_No  
(Mark an “X” in the appropriate space.)

**Note:** Complete the following paragraph only if your answer to the preceding question is “no.” If you answered “yes” to the preceding question, have your foreperson sign and date this form because you have completed your deliberations on this claim.

We find the plaintiff’s damages to be:

\$\_\_\_\_\_ (stating the amount or, if none, write the word (“none”).

---

Foreperson

Dated: \_\_\_\_\_

## 15. EMPLOYMENT—FEDERAL EMPLOYERS’ LIABILITY ACT

### 15.00 OVERVIEW (General)

The Federal Employers’ Liability Act, 45 U.S.C. § 51, *et seq.*, commonly referred to as “FELA,” makes railroads engaging in interstate commerce liable in damages to their employees for “injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.” 45 U.S.C. § 51 (1939).

The statute incorporates but does not define negligence; federal case law does so. *Urie v. Thompson*, 337 U.S. 163, 174 (1949). Generally, to prevail on a FELA claim, a plaintiff must prove the traditional common law components of negligence including duty, breach, foreseeability, and causation. *Adams v. CSX Transp. Inc.*, 899 F.2d 536, 539 (6th Cir. 1990); *Robert v. Consol. Rail Corp.*, 832 F.2d 3, 6 (1st Cir. 1987). This includes whether the railroad failed to use reasonable or ordinary care under the circumstances. *Davis v. Burlington N., Inc.*, 541 F.2d 182, 186 (8th Cir. 1976); *McGivern v. N. Pac. Ry. Co.*, 132 F.2d 213, 217 (8th Cir. 1942). Typically, it must be shown that the railroad either knew or should have known of the condition or circumstances that allegedly caused the plaintiff’s injury. *Miller v. Union Pac. R.R. Co.*, 972 F.3d 979, 988 (8th Cir. 2020). Ordinarily, the plaintiff must prove that the railroad, with the exercise of due care, could have reasonably foreseen that a particular condition could cause injury, *Davis*, 541 F.2d at 185, although the exact manner in which the injury occurs and the extent of the injury need not be foreseen, *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 120 (1963).

Although grounded in common law principles of negligence, FELA is “an avowed departure from the rules of the common law[.]” *Sinkler v. Mo. Pac. R.R. Co.*, 356 U.S. 326, 329 (1958). The most distinctive departure is in the area of causation. In 45 U.S.C. § 51, FELA establishes a standard of “in whole or in part” causation that replaces the common law standard of proximate causation. “[T]o impose liability on the defendant, the negligence need not be the proximate cause of the injury.” *Nicholson v. Erie R. Co.*, 253 F.2d 939, 940 (2d Cir. 1958). In *CSX Transportation Inc. v. McBride*, 564 U.S. 685 (2011), the United States Supreme Court reaffirmed the standard for causation in FELA cases set out in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957). The Court held that, “Juries in [FELA] cases are properly instructed that a defendant railroad ‘caused or contributed to’ a railroad worker’s injury ‘if [the railroad’s] negligence played a part—no matter how small—in bringing about the injury.’ That, indeed, is the test Congress prescribed for proximate causation in FELA cases.” *McBride* at 705. The Supreme Court has held that this causation standard applies to both a railroad’s negligence and a plaintiff’s contributory negligence. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007).

The quantum of proof necessary to submit the question of negligence to the jury and the quantum of proof necessary to sustain a jury finding of negligence are also modified under FELA:

It is well established that, under FELA, a case must go to the jury if there is any probative evidence to support a finding of even the slightest negligence on the part

of the employer, *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506–07 (1957), and that jury verdicts in favor of plaintiffs can be sustained upon evidence that would not support such a verdict in ordinary tort actions, *Heater v. Chesapeake & Ohio Railway*, 497 F.2d 1243, 1246 (7th Cir.), *cert. denied*, 419 U.S. 1013 (1974).

*Caillouette v. Balt. & Ohio Chi. Terminal R.R. Co.*, 705 F.2d 243, 246 (7th Cir. 1983).

As FELA has modified the common law negligence case, it has also “stripped” certain defenses from the FELA cause of action. *See Rogers*, 352 U.S. at 507-08 (1957). Assumption of risk is not a defense. 45 U.S.C. § 54 (1939). Contributory negligence is no bar to recovery. It may only be used to proportionately reduce the plaintiff’s damages. 45 U.S.C. § 53. Although assumption of risk is abolished as a defense, 45 U.S.C. § 54, evidence supporting the defense of contributory negligence should not be excluded merely because it also would support an assumption of risk argument. *Beanland v. Chi., Rock Island and Pac. R.R. Co.*, 480 F.2d 109, 116 n.5 (8th Cir. 1973).

Despite the foregoing authorities and FELA principles, it must be kept in mind that the provisions of 45 U.S.C. § 51 that establish a negligence cause of action do not establish an absolute-liability cause of action. FELA “does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.” *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994) (quoting *Ellis v. Union Pac. R.R. Co.*, 329 U.S. 649, 653 (1947)); *see also Tracy v. Terminal R.R. Ass’n of St. Louis*, 170 F.2d 635, 638 (8th Cir. 1948). The plaintiff has the burden to prove the elements of the FELA cause of action, including the railroad’s failure to exercise ordinary care, notice, reasonable foreseeability of harm, causation and damages.

The FELA “in whole or in part” causation standard applies to the question of the railroad’s liability for the injury or death at issue under 45 U.S.C. § 51, and it also applies to the question of the plaintiff’s contributory negligence liability for the injury or death at issue under 45 U.S.C. § 53. *Sorrell*, 549 U.S. 158. If the railroad is the “whole,” sometimes referred to as the “sole,” cause of the injury or death, this necessarily means that any contributory negligence on the part of the plaintiff or plaintiff’s decedent cannot be a cause “in whole or in part” of the injury or death. Likewise, if the plaintiff’s or plaintiff’s decedent’s contributory negligence was the “whole” or “sole” cause of the injury or death, this necessarily means that the railroad cannot have caused “in whole or in part” the injury or death. The question whether either party was the “whole” or “sole” cause of the injury or death is submitted in the liability and contributory negligence elements instructions where the “in whole or in part” standard is stated. While separate “whole” or “sole” cause instructions sometimes may be given, they are sometimes criticized as unnecessary and confusing. *See Flanigan v. Burlington N., Inc.*, 632 F.2d 880, 883 n.1 (8th Cir. 1980). The Committee takes no position on whether a separate “whole” or “sole” cause instruction should be given if requested by either or both parties in a particular case.

FELA provides for a cause of action based on negligence or on statutes or regulations enacted for the safety of railroad employees. Statutes that may serve as the basis for a FELA action include the Safety Appliance Act (formerly 45 U.S.C. §§ 1–16, recodified as 49 U.S.C. §§ 20301–20304, 21302, 21304 (1994)), or the Locomotive Inspection Act (formerly the Boiler Inspection Act 45 U.S.C. §§ 22–23, recodified as 49 U.S.C. §§ 20102, 20701 (1994)).

Regulations that may serve as the basis for a FELA action include those found in Title 49 of the United States Code of Federal Regulations.

In FELA actions based on the violation of statutes or regulations enacted for the safety of railroad employees, the employee is not required to prove negligence. The statutory or regulatory violation supplies “the wrongful act necessary to ground liability under the FELA” *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 434 (1949). Proof of the statutory or regulatory violation dispenses “with the necessity of proving that violations of the safety statutes constitute negligence; and making proof of such violations is effective to show negligence as a matter of law.” *Urie*, 337 U.S. at 189. In other words, in FELA cases brought for injury caused by violation of such statutes or regulations, care on the part of the railroad is immaterial. “The duty imposed is an absolute one, and the carrier is not excused by any showing of care, however assiduous.” *Brady v. Terminal R. Ass’n of St. Louis*, 303 U.S. 10, 15 (1938). Likewise, in statutory and regulatory cases, care on the part of the employee is immaterial insofar as the defense of contributory negligence is not available to bar the plaintiff’s action or to reduce the damages award. 45 U.S.C. § 53 (1908).

Despite the elemental differences between these types of cases, claims based on negligence and those based on a statutory or regulatory violation are often “mingled in a single mongrel cause of action.” *O’Donnell v. Elgin, Joliet & E. Ry. Co.*, 338 U.S. 384, 391 (1949). To avoid such mingling, claims brought under the general FELA negligence provisions and claims brought for statutory or regulatory violations should be submitted by separate elements instructions. See Model Instruction 15.40 (elements instruction for claims under the general FELA negligence provisions); Model Instruction 15.41 (elements instruction for claims for violation of the Locomotive Inspection Act); Model Instruction 15.42 (elements instruction for claims for violation of the Safety Appliance Act); and Model Instruction 15.43 (elements instruction for claims for regulatory violation).

Sometimes actions under FELA will be joined with actions under the Federal Railroad Safety Act, 49 U.S.C. § 20109, commonly referred to in the railroad industry as the “Whistleblower Law.” See Section 18, Employment – Federal Railroad Safety Act.

For a more thorough overview of FELA, see Richtera and Forer, *Federal Employers’ Liability Act*, 12 F.R.D. 13 (1951).

Finally, one of Congress’s motivating purposes in enacting FELA was to simplify the common law negligence action that had previously provided the injured railroad worker’s remedy:

The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant . . . . [F]or practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death [that] is the subject of the suit.

*Rogers*, 352 U.S. at 507–08 (footnotes omitted).

Given FELA’s purpose, and the nature of the FELA cause of action, the instructions in this section are drafted in the same format as the other instructions in this manual generally. They are drafted to present to the jury only those issues material to the questions the jury is to decide. Toward this goal, abstract statements of law and evidentiary detail are avoided.

A number of jurisdictions submit FELA cases by instruction schemes that present propositions of law and paraphrase the underlying statutes. Notable among the jurisdictions that instruct in this manner is Illinois. Although the Committee has adopted the ultimate issue instruction format for this manual in general and the FELA instructions in particular, the Committee recognizes that other instruction schemes are equally valuable. None of the instructions in this manual are mandatory, and any court that prefers to use another appropriate instruction set or system should do so.

## **CHAPTER 15 INSTRUCTIONS AND VERDICT FORMS**

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## 15.20 DEFINITION: “NEGLIGENT” OR “NEGLIGENCE”

The term “negligent” or “negligence” as used in these Instructions means the failure to use the degree of care that an ordinarily careful person would use under the same or similar circumstances. [The degree of care used by an ordinarily careful person depends on the circumstances that are known or should be known, and varies in proportion to the harm that person reasonably should foresee. In deciding whether a person was negligent, you must determine what that person knew or should have known, and the harm that should reasonably have been foreseen.]

### Committee Comments

When the term “negligent” or “negligence” is used, it must be defined. *Note* Model Instruction 15.21 (definition of “ordinary care”); *note also* Model Instruction 15.22 (combined definition of “ordinary care” and “negligent” or “negligence”).

Concerning the bracketed language, in order for the railroad to be found negligent under FELA, the jury must find that the railroad either knew or should have known of the condition or circumstance that is alleged to have caused the employee’s injury or death. This is referred to as the notice requirement. *See Siegrist v. Del., Lackawanna & W. R.R. Co.*, 263 F.2d 616, 619 (2d Cir. 1959) (referring to the “doctrine of notice”). Closely related to the notice requirement is the “essential ingredient” of reasonable foreseeability of harm. *Gallick v. Balt. & Ohio Ry. Co.*, 372 U.S. 108, 117 (1963). Given actual or constructive notice of the condition or circumstance alleged to have caused injury, “the defendant’s duty is measured by what a reasonably prudent person should or could have reasonably anticipated as occurring under like circumstances.” *Davis v. Burlington N., Inc.*, 541 F.2d 182, 185 (8th Cir. 1976). Thus, “the ultimate question of fact is whether the railroad exercised reasonable care,” and this involves “the question whether the railroad had notice of any danger.” *Bridger v. Union Ry. Co.*, 355 F.2d 382, 389 (6th Cir. 1966); *see also Miller v. Union Pac. R.R. Co.*, 972 F.3d 979, 988 (8th Cir. 2020).

The bracketed language of this instruction instructs the jury on notice and reasonable foreseeability of harm. *See Tiller v. Atl. Coast Line R.R. Co.*, 318 U.S. 54, 67 (1943); *Chi. & Nw. Ry. Co. v. Rieger*, 326 F.2d 329, 335 (8th Cir. 1964); W. Mathes, *Jury Instructions and Forms for Federal Civil Cases*, 28 F.R.D. 401, 495 (1962). The bracketed language may be included even when the defendant instructs on this issue in Model Instruction 15.61.

## 15.21 DEFINITION: “ORDINARY CARE”

The phrase “ordinary care” as used in these Instructions means that degree of care that an ordinarily careful person would use under the same or similar circumstances. [The degree of care used by an ordinarily careful person depends on the circumstances that are known or should be known, and varies in proportion to the harm that person reasonably should foresee. In deciding whether a person exercised ordinary care, you must consider what that person knew or should have known and the harm that should reasonably have been foreseen.]

### Committee Comments

When the phrase “ordinary care” is used, it must be defined. *Note* Model Instruction 15.20 (definition of term “negligent” or “negligence”); *note also* Model Instruction 15.22 (combined definition of terms “ordinary care” and “negligent” or “negligence”).

Concerning the bracketed language, in order for the railroad to be found negligent under FELA, the jury must find that the railroad either knew or should have known of the condition or circumstance that is alleged to have caused the employee’s injury or death. This is referred to as the notice requirement. *See Siegrist v. Del., Lackawanna & W. R.R. Co.*, 263 F.2d 616, 619 (2d Cir. 1959) (referring to the “doctrine of notice”). Closely related to the notice requirement is the “essential ingredient” of reasonable foreseeability of harm. *Gallick v. Balt. & Ohio Ry. Co.*, 372 U.S. 108, 117 (1963). Given actual or constructive notice of the condition or circumstance alleged to have caused injury, “the defendant’s duty is measured by what a reasonably prudent person should or could have reasonably anticipated as occurring under like circumstances.” *Davis v. Burlington N., Inc.*, 541 F.2d 182, 185 (8th Cir. 1976). Thus, “the ultimate question of fact is whether the railroad exercised reasonable care,” and this involves “the question whether the railroad had notice of any danger.” *Bridger v. Union Ry. Co.*, 355 F.2d 382, 389 (6th Cir. 1966); *see also Miller v. Union Pac. R.R. Co.*, 972 F.3d 979, 988 (8th Cir. 2020).

The bracketed language of this instruction instructs the jury on notice and reasonable foreseeability of harm. *See Tiller v. Alt. Coast Line R. Co.*, 318 U.S. 54, 67 (1943); *Chi. & Nw. Ry. Co. v. Rieger*, 326 F.2d 329, 335 (8th Cir. 1964); W. Mathes, *Jury Instructions and Forms for Federal Civil Cases*, 28 F.R.D. 401, 495 (1962). The bracketed language may be included even when the defendant instructs on this issue in Model Instruction 15.61.

## 15.22 DEFINITIONS: “NEGLIGENT” OR “NEGLIGENCE” AND “ORDINARY CARE” COMBINED

The term “negligent” or “negligence” as used in these Instructions means the failure to use ordinary care. The phrase “ordinary care” means that degree of care that an ordinarily careful person would use under the same or similar circumstances. [The degree of care used by an ordinarily careful person depends on the circumstances that are known or should be known, and varies in proportion to the harm that person reasonably should foresee. In deciding whether a person was negligent or failed to use ordinary care, you must consider what that person knew or should have known and the harm that should reasonably have been foreseen.]

### Committee Comments

Whenever the term “negligent” or “negligence” or the term “ordinary care” is used in these instructions, it must be defined. When these terms each appear in the same set of instructions, this instruction may be used as an alternative to submitting Model Instruction 15.20 (“negligent” or “negligence”) and Model Instruction 15.21 (“ordinary care”) individually.

Concerning the bracketed language, in order for the railroad to be found negligent under FELA, the jury must find that the railroad either knew or should have known of the condition or circumstance that is alleged to have caused the employee’s injury or death. This is referred to as the notice requirement. *See Siegrist v. Del., Lackawanna & W. R.R. Co.*, 263 F.2d 616, 619 (2d Cir. 1959) (referring to the “doctrine of notice”). Closely related to the notice requirement is the “essential ingredient” of reasonable foreseeability of harm. *Gallick v. Balt. & Ohio Ry. Co.*, 372 U.S. 108, 117 (1963). Given actual or constructive notice of the condition or circumstance alleged to have caused injury, “the defendant’s duty is measured by what a reasonably prudent person should or could have reasonably anticipated as occurring under like circumstances.” *Davis v. Burlington N., Inc.*, 541 F.2d 182, 185 (8th Cir. 1976). Thus, “the ultimate question of fact is whether the railroad exercised reasonable care,” and this involves “the question whether the railroad had notice of any danger.” *Bridger v. Union Ry. Co.*, 355 F.2d 382, 389 (6th Cir. 1966); *see also Miller v. Union Pac. R.R. Co.*, 972 F.3d 979, 988 (8th Cir. 2020).

The bracketed language of this instruction instructs the jury on notice and reasonable foreseeability of harm. *See Tiller v. Atl. Coast Line R. Co.*, 318 U.S. 54, 67 (1943); *Chi. & Nw. Ry. Co. v. Rieger*, 326 F.2d 329, 335 (8th Cir. 1964); W. Mathes, *Jury Instructions and Forms for Federal Civil Cases*, 28 F.R.D. 401, 495 (1962). The bracketed language may be included even when the defendant instructs on this issue in Model Instruction 15.61.

## 15.40 ELEMENTS OF CLAIM: GENERAL FELA NEGLIGENCE

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's [generally describe claim] if all of the following elements have been proved<sup>1</sup>:

*First*, [(the plaintiff) or (name of decedent)] was an employee of defendant [(name of the defendant)]; and<sup>2,3</sup>

*Second*, defendant [(name of the defendant)] failed to provide:<sup>4</sup>

(reasonably safe conditions for work [in that (describe the conditions at issue)] or)

(reasonably safe tools and equipment [in that (describe the tools and equipment at issue)] or)

(reasonably safe methods of work [in that (describe the methods at issue)] or)

(reasonably adequate help [in that (describe the inadequacy at issue)]); and

*Third*, defendant [(name of the defendant)] in any one or more of the ways described in Paragraph *Second* was negligent;<sup>5</sup> and <sup>6</sup>

*Fourth*, that negligence resulted in whole or in part in [injury to the plaintiff] [the death of (name of decedent)]. If any of the above elements has not been proved, then your verdict must be for defendant [(name of the defendant)].<sup>7</sup>

[Your verdict must be for (name of defendant) if you find in favor of (name of defendant) under Instruction \_\_\_\_\_ (insert number or title of affirmative defense instruction)].<sup>8</sup>

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds that it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if the court desires.

2. FELA provides that the railroad “shall be liable in damages to any person suffering injury *while he is employed* by such carrier . . . .” 45 U.S.C. § 51 (1939) (emphasis added). In the typical FELA case, there is no dispute about whether the injured or deceased person was an employee, and this language need not be included except to make the instruction more readable. However, when there is such a dispute in the case, the term “employee” must be defined. The definition must be carefully tailored to the specific factual question presented, and it is recommended that the Restatement (Second) of Agency be used as a guideline in a manner consistent with the federal authorities. *See Kelley v. S. Pac. Co.*, 419 U.S. 318, 324 (1974) (discussion of Restatement (Second) of Agency as authoritative concerning the meaning of “employee” and “employed” under FELA and as the source of a proper jury instruction). Generally, the plaintiff may be said to be employed by the railroad for FELA purposes if the railroad controlled or had the right to control the plaintiff’s work. *See Royal v. Mo. & N. Ark. R.R. Co.*, 857 F.3d 759, 763–64 (8th Cir. 2017); *Vanskike v. ACF Indus., Inc.*, 665 F.2d 188, 198–99, 200–02 (8th Cir. 1981).

3. It may be argued that the plaintiff, even though employed by the railroad, was not acting within the scope of that employment at the time of the incident. If there is a question whether the employee was acting within the scope of employment, paragraph *First* should provide as follows:

*First*, [plaintiff] [(name of decedent)] was an employee of defendant [(name of the defendant)] acting within the scope of [(his) (her)] employment at the time of [(his) (her)] [injury] [death] [(describe the incident alleged to have caused injury or death)], and

If this paragraph is included, the term “scope of employment” must be defined in relation to the factual issue in the case. The Restatement (Second) of Agency is recognized as a guide. *Wilson v. Chi., Milwaukee, St. Paul and Pac. R.R. Co.*, 841 F.2d 1347, 1352 (7th Cir. 1988), *cert. dismissed*, 487 U.S. 1244 (1988). In rare cases, it may be argued that the employee’s duties did not affect interstate commerce and thus are not covered by the Act. Usually, if the employee was acting within the scope and course of his or her employment for the railroad, his or her conduct will be sufficiently connected to interstate commerce to be included within the Act.

4. This paragraph of the elements instruction is designed to present descriptions of the conduct alleged to constitute breach of the railroad’s standard of care in the majority of FELA cases. These descriptions should focus the jurors’ attention on the evidence without belaboring the elements instruction with evidentiary detail. The description may consist of no more than the appropriate phrase or phrases “reasonably safe conditions for work,” “reasonably safe tools and equipment,” “reasonably safe methods of work,” or “reasonably adequate help.” *But if a more specific description will be helpful to the jury and is deemed by the court to be desirable in the particular case, a more specific description should be used.* The following are examples of ways the applicable phrase may be modified to provide further description:

*Second*, the defendant either failed to provide:

reasonably safe conditions for work in that there was oil on the walkway, or

reasonably safe tools and equipment in that it provided the plaintiff with a lining bar that had a broken claw, or

reasonably safe methods of work in that it failed to require the plaintiff to wear safety goggles while welding rail, or

reasonably adequate help in that it required the plaintiff to lift by himself a track saw that was too heavy to be lifted by one worker, and

5. The terms “negligent” and “negligence” must be defined. *See* Model Instructions 15.20, 15.21 and 15.22.

6. If only one phrase describing the railroad’s alleged breach of duty is submitted in Paragraph Second, then Paragraph Third should read as follows:

*Third*, defendant [(name of the defendant)] was thereby negligent, and

7. This paragraph should not be used if Model Instruction 15.60 or 15.61 is given.

8. Use Model Instruction 15.62 to submit affirmative defenses.

### **Committee Comments**

FELA uses the following causation language:

for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . equipment.

45 U.S.C. § 51.

In *CSX Transportation, Inc. v. McBride*, 564 U.S.685 (2011), the Supreme Court considered whether the Federal Employers’ Liability Act requires proof of proximate causation. The Court maintained its earlier ruling in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957). Justice Ginsburg, writing for the Court in *McBride*, summarized the Court’s holding:

[W]e conclude that [FELA] does not incorporate “proximate cause” standards developed in nonstatutory common-law tort actions. The charge proper in FELA cases, we hold, simply tracks the language Congress employed, informing juries that a defendant railroad caused or contributed to a plaintiff employee’s injury if the railroad’s negligence played any part in bringing about the injury.

*Id.* at 688. The Court in *McBride* also noted that it is unnecessary to use the label “proximate cause” when instructing the jury, and that “[j]uries in [FELA] cases are properly instructed that a defendant railroad caused or contributed to a railroad worker’s injury if [the railroad’s] negligence played a part—no matter how small—in bringing about the injury.” *Id.* at 705 (second alteration in original) (internal quotation marks omitted).

## 15.41 ELEMENTS OF CLAIM: LOCOMOTIVE INSPECTION ACT VIOLATION

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all of the following elements have been proved<sup>1</sup>:

*First*, [(the plaintiff) or (name of decedent)] was an employee of defendant [(name of the defendant)]<sup>2, 3</sup>; and

*Second*, the [locomotive] [boiler] [tender] [(identify part or appurtenance of locomotive, boiler or tender that is the subject of the claim)]<sup>4</sup> at issue in the evidence was not in proper condition and safe to operate without unnecessary danger of personal injury in that (identify the defect that is the subject of the claim);<sup>5</sup> and<sup>6</sup>

*Third*, this condition resulted in whole or in part<sup>7</sup> in [injury to the plaintiff] [death to (name of decedent)].

If any of the above elements has not been proved, then your verdict must be for defendant [(name of the defendant)].<sup>8</sup>

[Your verdict must be for the defendant if you find in favor of the defendant under Instruction \_\_\_\_\_ (insert number or title of affirmative defense instruction)].<sup>9</sup>

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds that it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if the court desires.

2. FELA provides that the railroad “shall be liable in damages to any person suffering injury *while he is employed* by such carrier . . .” 45 U.S.C. § 51 (1939) (emphasis added). In the typical FELA case, there is no dispute about whether the injured or deceased person was an employee, and this language need not be included except to make the instruction more readable. However, when there is such a dispute in the case, the term “employee” must be defined. The definition must be carefully tailored to the specific factual question presented, and it is recommended that the Restatement (Second) of Agency be used as a guideline in a manner consistent with the federal authorities. *See Kelley v. S. Pac. Co.*, 419 U.S. 318, 324 (1974) (discussion of Restatement (Second) of Agency as authoritative concerning the meaning of

“employee” and “employed” under FELA and as the source of a proper jury instruction). Generally, the plaintiff may be said to be employed by the railroad for FELA purposes if the railroad controlled or had the right to control the plaintiff’s work. *See Royal v. Mo. & N. Ark. R.R. Co.*, 857 F.3d 759, 763–64 (8th Cir. 2017); *Vanskike v. ACF Indus., Inc.*, 665 F.2d 188, 198–99, 200–02 (8th Cir. 1981).

3. It may be argued that the plaintiff, even though employed by the railroad, was not acting within the scope of that employment at the time of the incident. If there is a question whether the employee was acting within the scope of employment, paragraph *First* should provide as follows:

*First*, [plaintiff] [(name of decedent)] was an employee of defendant [(name of the defendant)] acting within the scope of [(his) (her)] employment at the time of [(his) (her)] [injury] [death] [(describe the incident alleged to have caused injury or death)], and

If this paragraph is included, the term “scope of employment” must be defined in relation to the factual issue in the case. The Restatement (Second) of Agency is recognized as a guide. *Wilson v. Chi., Milwaukee, St. Paul and Pac. R.R. Co.*, 841 F.2d 1347, 1352 (7th Cir. 1988), *cert. disp.*, 487 U.S. 1244 (1988). In rare cases, it may be argued that the employee’s duties did not affect interstate commerce and thus are not covered by the Act. Usually, if the employee was acting within the scope and course of his or her employment for the railroad, his or her conduct will be sufficiently connected to interstate commerce to be included within the Act.

4. The Locomotive Inspection Act language of 49 U.S.C. § 2701, formerly the Boiler Inspection Act, 45 U.S.C. § 23, refers to the “locomotive or tender and its parts and appurtenances.” The court should select the term that conforms to the case. The court may choose to specifically identify the part or appurtenance of the locomotive, boiler, or tender in a case where mere reference to the locomotive, boiler, or tender will not adequately present the theory of violation.

5. Counsel should draft a concise statement of the Locomotive Inspection Act violation alleged that is simple and free of unnecessary language. Examples that might be sufficient for a Locomotive Inspection Act violation are: “in that there was oil on the locomotive catwalk;” or “in that the ladder on the locomotive was bent;” or “in that the grab iron on the locomotive was loose.”

The Secretary of Transportation is authorized to establish standards for equipment covered under the Locomotive Inspection Act and the Safety Appliance Act. *Shields v. Atl. Coast Line R.R. Co.*, 350 U.S. 318, 320–25 (1956); *Lilly v. Grand Trunk W. R.R. Co.*, 317 U.S. 481, 486 (1943). Regulations promulgated pursuant to this authority are found in Title 49 of the Code of Federal Regulations under the Federal Railroad Administration (FRA) regulations. FRA regulations “acquire[] the force of law and become[] an integral part of the Act . . . .” *Lilly*, 317 U.S. at 488. Such regulations have “the same force as though prescribed in terms by the statute,” *Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett*, 300 U.S. 471, 474 (1937), and violation of such regulations “are violations of the statute, giving rise not only to damage suits by those injured, . . . but also to money penalties recoverable by the United States.” *Urie v. Thompson*, 337 U.S. 163,

191 (1949) (citations omitted). If the plaintiff’s case is based on a violation of such a regulation, Model Instruction 15.43 should be used.

6. Both the Locomotive Inspection Act and the Safety Appliance Act require that the equipment at issue be “in use” at the time of the subject incident. The purpose of the “in use” element is to “exclude those injuries directly resulting from the inspection, repair, or servicing of railroad equipment located at a maintenance facility.” *Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260, 262 (4th Cir. 1980); *Steer v. Burlington N., Inc.*, 720 F.2d 975, 976–77 (8th Cir. 1983).

Whether the equipment at issue is “in use” at the time of the subject incident is to be decided by the court as a question of law and not by the jury. *Pinkham v. Maine Cent. R.R. Co.*, 874 F.2d 875, 881 (1st Cir. 1989) (citing *Steer*, 720 F.2d at 977 n.4). Because the “in use” element is a question of law for the court, this instruction does not submit that question to the jury.

Numerous reported cases discuss this element of the Locomotive Inspection Act and Safety Appliance Act, and cases that construe the term “in use” under one act are authoritative for purposes of construing the term under the other. *Holfester v. Long Island R.R. Co.*, 360 F.2d 369, 373 (2d Cir. 1966). Any attempt to represent the cases on point is beyond the scope of these Notes on Use, and counsel are referred to the authorities for further discussion of this element.

7. The same standard of “in whole or in part” causation that applies to general FELA negligence cases under 45 U.S.C. § 51 also applies to Locomotive Inspection Act cases. *Green v. River Terminal Ry. Co.*, 763 F.2d 805, 810 (6th Cir. 1985) (citing *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 434 (1949)).

8. This paragraph should not be used if Model Instruction 15.60 or 15.61 is given.

9. Use Model Instruction 15.62 to submit affirmative defenses.

### **Committee Comments**

The introduction to Section 15 discusses the relationship among FELA, 45 U.S.C. § 51, *et seq.*, the Locomotive Inspection Act (formerly the Boiler Inspection Act, 45 U.S.C. §§ 22–23, recodified at 49 U.S.C. §§ 20102, 20701 (1994)), the Safety Appliance Act (formerly 45 U.S.C. §§ 1–16, recodified at 49 U.S.C. §§ 20301–20304, 21302, 21304 (1994)), and regulations enacted for the safety of railroad employees such as are found in Title 49 of the United States Code of Federal Regulations.

## 15.42 ELEMENTS OF CLAIM: SAFETY APPLIANCE ACT VIOLATION

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all of the following elements have been proved<sup>1</sup>:

*First*, [(the plaintiff) or (name of decedent)] was an employee of defendant [(name of the defendant)]<sup>2, 3</sup>; and

*Second*, (specify the alleged Safety Appliance Act violation);<sup>4</sup> and<sup>5</sup>

*Third*, the condition described in paragraph Second resulted in whole or in part<sup>6</sup> in [injury to the plaintiff] [death to (name of decedent)].

If any of the above elements has not been proved, then your verdict must be for defendant [(name of the defendant)].<sup>7</sup>

[Your verdict must be for the defendant if you find in favor of the defendant under Instruction \_\_\_\_\_ (insert number or title of affirmative defense instruction)].<sup>8</sup>

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds that it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if the court desires.

2. FELA provides that the railroad “shall be liable in damages to any person suffering injury *while he is employed* by such carrier . . .” 45 U.S.C. § 51 (1939) (emphasis added). In the typical FELA case, there is no dispute about whether the injured or deceased person was an employee, and this language need not be included except to make the instruction more readable. However, when there is such a dispute in the case, the term “employee” must be defined. The definition must be carefully tailored to the specific factual question presented, and it is recommended that the Restatement (Second) of Agency be used as a guideline in a manner consistent with the federal authorities. *See Kelley v. S. Pac. Co.*, 419 U.S. 318, 324 (1974) (discussion of Restatement (Second) of Agency as authoritative concerning the meaning of “employee” and “employed” under FELA and as the source of a proper jury instruction). Generally, the plaintiff may be said to be employed by the railroad for FELA purposes if the railroad controlled or had the right to control the plaintiff's work. *See Royal v. Mo. & N. Ark. R.R. Co.*, 857 F.3d 759, 763–64 (8th Cir. 2017); *Vanskike v. ACF Indus., Inc.*, 665 F.2d 188, 198–99, 200–02 (8th Cir. 1981).

3. It may be argued that the plaintiff, even though employed by the railroad, was not acting within the scope of that employment at the time of the incident. If there is a question whether the employee was acting within the scope of employment, paragraph *First* should provide as follows:

*First*, [plaintiff] [(name of decedent)] was an employee of defendant [(name of the defendant)] acting within the scope of [(his) (her)] employment at the time of [(his) (her)] [injury] [death] [(describe the incident alleged to have caused injury or death)], and

If this paragraph is included, the term “scope of employment” must be defined in relation to the factual issue in the case. The Restatement (Second) of Agency is recognized as a guide. *Wilson v. Chi., Milwaukee, St. Paul and Pac. R.R. Co.*, 841 F.2d 1347, 1352 (7th Cir. 1988), *cert. dismissed*, 487 U.S. 1244 (1988). In rare cases, it may be argued that the employee’s duties did not affect interstate commerce and thus are not covered by the Act. Usually, if the employee was acting within the scope and course of his or her employment for the railroad, his or her conduct will be sufficiently connected to interstate commerce to be included within the Act.

4. Counsel should draft a concise statement of the Safety Appliance Act violation alleged that is simple and free of unnecessary language. An example of a concise statement that might be sufficient in a case brought for violation of 49 U.S.C. § 20302(a)(2), formerly 45 U.S.C. § 4 (1988), is as follows: “*Second*, the grab iron at issue in the evidence was not secure, and . . . .”

The Secretary of Transportation is authorized to establish standards for equipment covered under the Locomotive Inspection Act and the Safety Appliance Act. *Shields v. Atl. Coast Line R.R. Co.*, 350 U.S. 318, 320–25 (1956); *Lilly v. Grand Trunk W. R.R. Co.*, 317 U.S. 481, 486 (1943). Regulations promulgated pursuant to this authority are found in Title 49 of the Code of Federal Regulations under the Federal Railroad Administration (FRA) regulations. FRA regulations “acquire[] the force of law and become[] an integral part of the Act . . . .” *Lilly*, 317 U.S. at 488. Such regulations have “the same force as though prescribed in terms by the statute,” *Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett*, 300 U.S. 471, 474 (1937), and violation of such regulations “are violations of the statute, giving rise not only to damage suits by those injured, but also to money penalties recoverable by the United States.” *Urie v. Thompson*, 337 U.S. 163, 191 (1949) (citations omitted). If the plaintiff’s case is based on a violation of such a regulation, Model Instruction 15.43 should be used.

5. Both the Locomotive Inspection Act and the Safety Appliance Act require that the equipment at issue be “in use” at the time of the subject incident. The purpose of the “in use” element is to “exclude those injuries directly resulting from the inspection, repair, or servicing of railroad equipment located at a maintenance facility.” *Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260, 262 (4th Cir. 1980); *Steer v. Burlington N., Inc.*, 720 F.2d 975, 976–77 (8th Cir. 1983).

Whether the equipment at issue is “in use” at the time of the subject incident is to be decided by the court as a question of law and not by the jury. *Pinkham v. Maine Cent. R.R. Co.*, 874 F.2d 875, 881 (1st Cir. 1989) (citing *Steer*, 720 F.2d at 977 n.4). Because the “in use” element is a question of law for the court, this instruction does not submit that question to the jury.

Numerous reported cases discuss this element of the Locomotive Inspection Act and Safety Appliance Act, and cases that construe the term “in use” under one act are authoritative for purposes of construing the term under the other. *Holfester v. Long Island R.R. Co.*, 360 F.2d 369, 373 (2d Cir. 1966). Any attempt to represent the cases on point is beyond the scope of these Notes on Use, and counsel are referred to the authorities for further discussion of this element.

6. The standard of “in whole or in part” causation that applies to general FELA negligence cases is the standard of causation that applies to FELA cases premised upon violation of the Safety Appliance Act. “Once this violation is established, only causal relation is an issue. And Congress has directed liability if the injury resulted ‘in whole or in part’ from defendant’s negligence or its violation of the Safety Appliance Act.” *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 434-35 (1949).

7. This paragraph should not be used if Model Instruction 15.60 or 15.61 is given.

8. Use Model Instruction 15.62 to submit affirmative defenses.

### **Committee Comments**

The introduction to Section 15 discusses the relationship among FELA, 45 U.S.C. § 51, *et seq.*, the Locomotive Inspection Act (formerly the Boiler Inspection Act, 45 U.S.C. §§ 22–23, recodified at 49 U.S.C. §§ 20102, 20701 (1994)), the Safety Appliance Act (formerly 45 U.S.C. §§ 1–16, recodified at 49 U.S.C. §§ 20301–20304, 21302, 21304 (1994)), and regulations enacted for the safety of railroad employees such as are found in Title 49 of the United States Code of Federal Regulations.

### 15.43 ELEMENTS OF CLAIM: VIOLATION OF REGULATION ENACTED FOR THE SAFETY OF RAILROAD EMPLOYEES

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all of the following elements have been proved<sup>1</sup>:

*First*, [(the plaintiff) or (name of decedent)] was an employee of defendant [(name of the defendant)]<sup>2, 3</sup>; and

*Second*, (specify the alleged regulation violation);<sup>4</sup> and<sup>5</sup>

*Third*, the condition described in paragraph Second resulted in whole or in part<sup>6</sup> in [injury to the plaintiff] [death to (name of decedent)].

If any of the above elements has not been proved, then your verdict must be for defendant [(name of the defendant)].<sup>7</sup>

[Your verdict must be for the defendant if you find in favor of the defendant under Instruction \_\_\_\_\_ (insert number or title of affirmative defense instruction)].<sup>8</sup>

#### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds that it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if the court desires.

2. FELA provides that the railroad “shall be liable in damages to any person suffering injury *while he is employed* by such carrier . . . .” 45 U.S.C. § 51 (1939) (emphasis added). In the typical FELA case, there is no dispute about whether the injured or deceased person was an employee, and this language need not be included except to make the instruction more readable. However, when there is such a dispute in the case, the term “employee” must be defined. The definition must be carefully tailored to the specific factual question presented, and it is recommended that the Restatement (Second) of Agency be used as a guideline in a manner consistent with the federal authorities. *See Kelley v. S. Pac. Co.*, 419 U.S. 318, 324 (1974) (discussion of Restatement (Second) of Agency as authoritative concerning the meaning of “employee” and “employed” under FELA and as the source of a proper jury instruction). Generally, the plaintiff may be said to be employed by the railroad for FELA purposes if the railroad controlled or had the right to control the plaintiff's work. *See Royal v. Mo. & N. Ark.*

*R.R. Co.*, 857 F.3d 759, 763–64 (8th Cir. 2017); *Vanskike v. ACF Indus., Inc.*, 665 F.2d 188, 198–99, 200–02 (8th Cir. 1981).

3. It may be argued that the plaintiff, even though employed by the railroad, was not acting within the scope of that employment at the time of the incident. If there is a question whether the employee was acting within the scope of employment, paragraph *First* should provide as follows:

*First*, [plaintiff] [(name of decedent)] was an employee of defendant [(name of the defendant)] acting within the scope of [(his) (her)] employment at the time of [(his) (her)] [injury] [death] [(describe the incident alleged to have caused injury or death)], and

If this paragraph is included, the term “scope of employment” must be defined in relation to the factual issue in the case. The Restatement (Second) of Agency is recognized as a guide. *Wilson v. Chi., Milwaukee, St. Paul and Pac. R.R. Co.*, 841 F.2d 1347, 1352 (7th Cir.), *cert. dismissed*, 487 U.S. 1244 (1988). In rare cases, it may be argued that the employee’s duties did not affect interstate commerce and thus are not covered by the Act. Usually if the employee was acting within the scope and course of his or her employment for the railroad, his or her conduct will be sufficiently connected to interstate commerce to be included within the Act

4. Counsel should draft a concise statement of the regulatory violation alleged that is simple and free of unnecessary language. An example of a concise statement that might be sufficient in a case brought for violation of 49 C.F.R. § 229.119 is as follows: “*Second*, the floor of the cab at issue was not kept free from oil, and....”

5. The standard of “in whole or in part” causation that applies to general FELA negligence cases is the standard of causation that applies to FELA cases premised upon violation of a regulation enacted for a railroad employee’s safety.

6. This paragraph should not be used if Model Instruction 15.60 or 15.61 is given.

7. Use Model Instruction 15.62 to submit affirmative defenses.

### **Committee Comments**

The introduction to Section 15 discusses the relationship among FELA, 45 U.S.C. § 51, *et seq.*, the Locomotive Inspection Act (formerly the Boiler Inspection Act, 45 U.S.C. §§ 22–23, recodified at 49 U.S.C. §§ 20102, 20701 (1994)), the Safety Appliance Act (formerly 45 U.S.C. §§ 1–16, recodified at 49 U.S.C. §§ 20301–20304, 21302, 21304 (1994)), and regulations enacted for the safety of railroad employees such as are found in Title 49 of the United States Code of Federal Regulations.

## 15.60 DEFENSE THEORY INSTRUCTIONS—THREE OPTIONS OVERVIEW

Eighth Circuit case law holds that the defendant in a FELA case, like any party in any other civil case, is entitled to a specific instruction on its theory of the case, if the instruction is “legally correct, supported by the evidence and brought to the court’s attention in a timely request.” *Bd. of Water Works, Trustees of the City of Des Moines v. Alvord, Burdick & Howson*, 706 F.2d 820, 823 (8th Cir. 1983). This proposition applies to FELA cases. *Chi. & N. W. Ry. Co. v. Green*, 164 F.2d 55, 61 (8th Cir. 1947); *see also Chi., Rock Island & Pac. R.R. Co. v. Lint*, 217 F.2d 279, 284–86 (8th Cir. 1954) (error to refuse the defendant’s foreseeability of harm instructions that, “more specifically” than the court’s instructions, presented the defendant’s theory of defense).

The 15.61 series of defense-theory instructions provides three alternative formats that a defendant may use to present its defense theory to the jury. If the defendant’s theory is that the plaintiff has failed to carry his or her burden of proof on one or more of the elements of his or her claim set forth in the elements instruction, the Model Instruction 15.61 format permits instructing the jury that their verdict must be for the defendant unless that element has been proved. The 15.62 format is similar, but does not limit the defendant to the precise language used in the elements instruction. That is, the defendant can specify any fact that the plaintiff must prove in order to recover and obtain an instruction stating that the defendant is entitled to a verdict unless that fact is proved. The defendant may wish to use this format where the defense theory is that the plaintiff has failed to prove notice or reasonable foreseeability of harm.

The formats used in 15.61 and 15.62 are designed to cover defense theories where the plaintiff has failed to prove an element of his or her claim. The third category of defense theory instructions, as set forth in Model Instruction 15.63, is designed to cover affirmative defenses where the railroad has the burden of proof.

The court should limit the number of defense theory instructions to avoid unduly emphasizing the defense theories in a way that would be unfair to the plaintiff. The Committee believes that as a general rule, the defendant should be entitled to at least one defense theory instruction for each claim that the plaintiff is separately submitting to the jury. There may be cases where more than one defense-theory instruction should be given for a particular claim. For example, in an occupational lung disease case, there may be a statute of limitations defense hinging on fact issues to be decided by the jury and there also may be issues about notice and reasonable foreseeability of harm. In such a case, the court might decide to give a 15.63 instruction on the affirmative defense of statute of limitations and a 15.62 instruction covering the failure to prove notice or reasonable foreseeability of harm. If the defendant wants 15.61 and 15.62 instructions to be given in a case, they should be combined in a single defense-theory instruction following the 15.62 format. Rather than creating an arbitrary limit on the number of defense-theory instructions that may be given, the Committee believes it is preferable to give the court flexibility and discretion in dealing with each case on its own facts. The operative principles are fairness and evenhanded treatment.

## **15.61 ELEMENTS OF DEFENSE: FAILURE OF PROOF ON ANY ELEMENT OF THE PLAINTIFF’S CASE LISTED IN THE ELEMENTS**

Your verdict must be for defendant [insert name] and against plaintiff [insert name] [on the plaintiff’s (identify claim presented in this instruction as “*first*,” “*second*,” etc.)<sup>1</sup> claim] unless it has been proved<sup>2</sup> that [(specify any element upon which the plaintiff bears the burden of proof as listed in the appropriate elements instruction for the particular claim)].

### **Notes on Use**

1. Include this phrase and identify the claim represented in this instruction as “*first*,” “*second*,” etc., only if more than one claim is to be submitted. *See* Introduction to Section 15 (discussion of relationship among FELA claims for general negligence, violation of the Safety Appliance Act, violation of the Locomotive Inspection Act, and violation of regulations enacted for the safety of railroad employees).

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds that it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

### **Committee Comments**

*See* Model Instruction 15.60 for a discussion of the general principles underlying the use of defense-theory instructions.

Model Instruction 15.61 provides a general format that can be used when the defendant’s theory is that the plaintiff has failed to prove an element of his or her claim *as listed in the elements instruction*. When this format is used, the language in the elements instruction should be repeated verbatim in the defense theory instruction. For example, if the defense theory is the failure to prove causation, the instruction might read: “Your verdict must be for the defendant on the plaintiff’s claim unless it has been proved that the defendant’s negligence resulted in whole or in part in injury to the plaintiff.”

The defendant may wish to specify in its defense-theory instruction more than one element of the plaintiff’s case that the defendant contends has not been proved. If the defendant specifies more than one element from the elements instruction, the defense theory instruction should use the same connecting term (“and” versus “or”) as used in the elements instruction. In other words, in specifying conjunctive submissions, the defense-theory instruction uses “and” between elements; in specifying disjunctive submissions, it uses “or.”

The defendant has the option to specify one or more elements of the elements instruction in its defense-theory instruction. The only limitation on the defendant’s right to specify as much or as little of the elements instruction as desired is with respect to disjunctive submissions. If the defendant elects to specify any element that is submitted by the elements instruction in the

disjunctive, he or she must specify *all* such disjunctive elements. For example, if the plaintiff's elements instruction submits that the defendant either committed negligent act "A" *or* negligent act "B," it would be improper to give a defense theory instruction stating that the verdict must be for the defendant unless the jury believes that negligent act "A" has been proved. Instead, the defense-theory instruction must specify all of the negligent acts submitted in the elements instruction connected by the word "or."

## 15.62 ELEMENTS OF DEFENSE: FAILURE TO PROVE ANY FACT ESSENTIAL TO THE PLAINTIFF’S RIGHT TO RECOVER

Your verdict must be for defendant [insert name] and against plaintiff [insert name] [on the plaintiff’s (identify claim as “*first*” “*second*,” etc.) claim]<sup>1</sup> unless it has been proved<sup>2</sup> that [(specify any fact that the plaintiff must prove in order to recover)].<sup>3</sup>

### Notes on Use

1. Include this phrase and identify the claim represented in this instruction as “*first*,” “*second*,” etc., only if more than one claim is to be submitted. *See* Introduction to Section 15 (discussion of relationship among FELA claims for general negligence, violation of the Safety Appliance Act, violation of the Locomotive Inspection Act, and violation of regulations enacted for the safety of railroad employees).

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds that it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. What facts are essential to the plaintiff’s right to recover is an issue of substantive law. *See* the examples in the Committee Comments above for instructions on the defense theories of failure to prove notice and failure to prove reasonable foreseeability of harm.

### Committee Comments

*See* Model Instruction 15.60 for a discussion of the general principles underlying the use of defense-theory instructions. If the defendant wants 15.61 and 15.62 instructions to be given in a case, they should be combined in a single defense-theory instruction following the 15.62 format.

This defense-theory instruction format is similar to the 15.60 format, but differs in that the defendant is not restricted to a repetition of the exact language used in the elements instruction. The 15.61 format is intended by the Committee to address the kind of instruction issues discussed in *Chi. & N. W. Ry. Co. v. Green*, 164 F.2d 55, 61 (8th Cir. 1947) and *Chi., Rock Island & Pac. R.R. Co. v. Lint*, 217 F.2d 279, 284–86 (8th Cir. 1954). *See* Introduction and Committee Comments to 15.61 series of defense theory instructions.

The Committee anticipates that the 15.61 format can be used, for example, to instruct on the plaintiff’s burden to prove “notice” and “reasonable foreseeability of harm.” For a discussion of these concepts, *see* Committee Comments, Model Instruction 15.20.

The close and interdependent relationship of notice and reasonable foreseeability of harm to the ultimate question of whether the railroad exercised due care raises the issue whether the jury should be instructed to make separate findings of notice and reasonable foreseeability of harm in the elements instruction. In *Atlantic Coast Line Railroad Co. v. Dixon*, 189 F.2d 525, 527–28 (5th Cir. 1951), and *Patterson v. Norfolk & Western Railway Co.*, 489 F.2d 303, 305 (6th Cir. 1973), instructions calling for such separate findings were found improper in that they

misrepresented the ultimate question of reasonable or ordinary care. In *Lint*, 217 F.2d at 284–86, however, it was held error to refuse the defendant’s notice and reasonable foreseeability of harm instructions that “more specifically” than the court’s instructions presented the defendant’s theory of defense. Similarly, in *Green*, 164 F.2d at 61, it was error to refuse to give an instruction requested by the defendant on the defense theory that the plaintiff had failed to prove notice. Other cases of interest are: *Denniston v. Burlington North, Inc.*, 726 F.2d 391, 393–94 (8th Cir. 1984) (no plain error in instructing that the plaintiff was required to prove notice); and *Baynum v. Chesapeake & Ohio Railway Co.*, 456 F.2d 658, 660 (6th Cir. 1972) (verdict for the plaintiff upon sufficient evidence of notice rendered refusal of notice instruction harmless error).

By way of illustration, assume that the plaintiff’s submission of negligence is that the defendant failed to provide reasonably safe conditions for work in that there was oil on the walkway. Assume further that the defendant’s theory of defense is that the defendant did not know and could not have known in the exercise of ordinary care that there was oil on the walkway. The defense-theory instruction for this defense might read as follows: “Your verdict must be for the defendant unless it has been proved that the defendant knew or by the exercise of ordinary care should have known that there was oil on the walkway.” In other words, a notice defense-theory instruction should specify the defect, condition or other circumstance so it will be clear what fact or facts must be proved in order to establish notice.

Where the defendant claims it is not negligent because it did not have a reasonable opportunity to remove or repair a defect, such as a spill, the jury may be instructed as follows: “Your verdict must be for the defendant unless it has been proved that the defendant had a reasonable opportunity to [clean up the spill] before the plaintiff was injured.”

As an example of a defense-theory instruction on reasonable foreseeability of harm, assume a case where the plaintiff is claiming occupational lung disease caused by exposure to diesel fumes. The negligence submission from the elements instruction might read: “The defendant failed to provide reasonably safe conditions for work in that the plaintiff was repeatedly exposed to diesel fumes.” The defense theory instruction on foreseeability of harm might read as follows: “Your verdict must be for the defendant unless it has been proved that the defendant knew or by the exercise of ordinary care should have known that repeated exposure to diesel fumes was reasonably likely to cause harm to the plaintiff.”

While notice and foreseeability of harm are common defense theories that can be accommodated by the 15.62 format, this format is not limited to those particular theories. This format can be used to specify any fact on which the plaintiff bears the burden of proof and which is essential to the plaintiff’s right to recover. Of course, it is up to the court to determine what those “essential facts” might be under the case law and under the circumstances of the particular case before the court.

The 15.62 format should not be used to specify a fact on which the defendant bears the burden of proof. If the defendant bears the burden of proof to establish the defense theory, the 15.63 format should be followed.

### **15.63 ELEMENTS OF DEFENSE: AFFIRMATIVE DEFENSES**

Your verdict must be for defendant [insert name] and against plaintiff [insert name] [on the plaintiff's (identify claim to which this instruction pertains as "*first*," "*second*," etc.) claim]<sup>1</sup> if all of the following elements have been proved<sup>2</sup>:

[List in numbered paragraphs each element of any affirmative defense upon which the defendant bears the burden of proof and that, if proved, entitles the defendant to a verdict.]

#### **Notes on Use**

1. Include this bracketed language and identify the claim to which this instruction pertains as "*first*," "*second*," etc., only if more than one claim is submitted and one or more of such claims is not subject to the affirmative defense.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds that it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

#### **Committee Comments**

*See* Model Instruction 15.60 for a discussion of the general principles underlying the use of defense-theory instructions.

The 15.63 format should only be used for affirmative defenses where the defendant bears the burden of proof. For example, the affirmative defenses of release and statute of limitations sometimes turn on fact issues to be resolved by the jury. The Committee has not undertaken to prepare model instructions for affirmative defenses. If a particular case requires an affirmative defense instruction, the elements of the affirmative defense should be submitted in separate paragraphs connected by "and." Evidentiary detail should be avoided, but the ultimate factual issues to be resolved by the jury should be specified.

The 15.63 format should not be used to submit the defense of contributory negligence, which, if proved, only reduces the plaintiff's recovery. That defense should be submitted under Model Instruction 15.64.

Assumption of risk is no defense, because it has been abolished in FELA cases. 45 U.S.C. § 54 (1994).

## 15.64 ELEMENTS OF DEFENSE: CONTRIBUTORY NEGLIGENCE

If you find in favor of plaintiff [insert name] and against defendant [insert name] under Instruction \_\_\_\_\_ (insert number or title of the plaintiff's elements instruction) you must consider whether [plaintiff] [(name of decedent)]<sup>1</sup> was also negligent. Under this Instruction, you must assess a percentage of the total negligence<sup>2</sup> to [plaintiff] [(name of decedent)] [on the plaintiff's (identify claim to which this instruction pertains as "first," "second," etc.) claim against defendant [(name of the defendant)]]<sup>3</sup> if all of the following elements have been proved<sup>4</sup>:

*First*, [(the plaintiff) or (name of decedent)] (characterize the alleged negligent conduct, such as, "failed to keep a careful lookout for oncoming trains");<sup>5</sup> and

*Second*, [(the plaintiff) or (name of decedent)] was thereby negligent; and<sup>6</sup>

*Third*, such negligence of [(the plaintiff) or (name of decedent)] resulted in whole or in part in [(his) (her)] injury.<sup>7</sup>

[If any of the above elements have not been proved, then you must not assess a percentage of negligence to [plaintiff] [(name of decedent)].]<sup>8</sup>

### Notes on Use

1. If the employee's injuries resulted in death, identify the decedent by name instead of referring to the plaintiff.

2. The terms "negligent" and "negligence" must be defined. *See* Model Instruction 15.20.

3. Include this bracketed language and identify the claim to which this instruction pertains as "first," "second," etc., only if more than one claim is submitted.

If there are two or more defendants, identify the defendant against whom the claim referred to in this instruction is asserted.

4. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds that it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

5. If multiple acts or omissions are alleged to constitute contributory negligence, they may be submitted in the same way alternative submissions are made under Model Instruction 15.40. *See* Model Instruction 15.40 n.6.

6. If more than one act or omission is alleged as contributory negligence, then Paragraph Second should be modified to read as follows:

*Second*, [plaintiff] [(name of decedent)] in any one or more of the ways described in Paragraph *First* was negligent, and . . . .

7. The same standard of causation applies to the plaintiff's negligence claim and the railroad's claim of contributory negligence. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 159 (2007).

8. This paragraph is optional. If requested, the court may add this paragraph.

### **Committee Comments**

Contributory negligence does not bar recovery under FELA, "but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . ." 45 U.S.C. § 53 (1994).

In a FELA case brought for injury or death caused by the railroad's violation of a "statute enacted for the safety of employees," contributory negligence will neither bar the plaintiff's recovery nor reduce his or her damages. *Id.* The Safety Appliance Act (formerly 45 U.S.C. §§ 1–16, recodified at 49 U.S.C. §§ 20301–20304, 21302, 21304 (1994)), and the Locomotive Inspection Act (formerly the Boiler Inspection Act, 45 U.S.C. §§ 22–23, recodified at 49 U.S.C. §§ 20102, 20701 (1994)), are statutes enacted for the safety of employees. In addition to these statutes, a "regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of title 49, United States Code [49 U.S.C. §§ 20101 *et seq.*], or by a State agency that is participating in investigative and surveillance activities under section 20105 of title 49, is deemed to be a statute under sections 3 and 4 of this Act [45 U.S.C. §§ 53, 54]." 45 U.S.C. § 54a (1994). Therefore, this instruction should not be submitted in a claim brought for violation of the Locomotive Inspection Act (Model Instruction 15.41), for violation of the Safety Appliance Act (Model Instruction 15.42), or for violation of a regulation enacted for the safety of railroad employees (Model Instruction 15.43). *See* Introduction to Section 15 (discussion of relationship among FELA, the Locomotive Inspection Act, the Safety Appliance Act, and regulations enacted for the safety of railroad employees).

## 15.70 DAMAGES: INJURY TO EMPLOYEE

If you find in favor of the plaintiff, then you must award the plaintiff such sum as you find will fairly and justly compensate the plaintiff for any damages you find the plaintiff sustained [and is reasonably certain to sustain in the future]<sup>1</sup> as a direct result of the occurrence mentioned in the evidence.<sup>2</sup> [You should consider the following elements of damages:<sup>3</sup>

1. The physical pain and (mental) (emotional) suffering the plaintiff has experienced (and is reasonably certain to experience in the future); the nature and extent of the injury, whether the injury is temporary or permanent (and whether any resulting disability is partial or total), (including any aggravation of a pre-existing condition);
2. The reasonable expense of medical care and supplies reasonably needed by and actually provided to the plaintiff to date (and the present value of reasonably necessary medical care and supplies reasonably certain to be received in the future);
3. The earnings the plaintiff has lost to date (and the present value of earnings the plaintiff is reasonably certain to lose in the future);<sup>4</sup>
4. The reasonable value of household services that the plaintiff has been unable to perform for [(himself) (herself)] to date (and the present value of household services the plaintiff is reasonably certain to be unable to perform for [(himself) (herself)] in the future).]<sup>5, 6</sup>

[Remember, throughout your deliberations you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.]<sup>7</sup> [You may not include in your award any sum for court costs or attorneys' fees.]<sup>8</sup>

[If you assess a percentage of negligence to the plaintiff by reason of Instruction \_\_\_\_\_ (state the title or number of the contributory negligence instruction),<sup>9</sup> do not diminish the total amount of damages by the percentage of negligence you assess to the plaintiff. The court will do this.]<sup>10</sup>

### Notes on Use

1. Include this language if the evidence supports a submission of any item of future damage.

2. The language “as a direct result of the occurrence mentioned in the evidence” should be deleted and replaced whenever there is evidence tending to prove that the employee suffered the subject injuries in an occurrence other than the one upon which the railroad’s liability is premised. In such cases, the language “as a result of the occurrence mentioned in the evidence” should be replaced with a concise description of the occurrence upon which the railroad’s liability is premised. An example of such a case is one where the plaintiff alleges that his or her injuries were suffered in a fall at the work place, and the railroad claims the injuries were suffered in a car accident that was not job related. The following language would be appropriate to describe the occurrence upon which liability is premised: “as a direct result of the fall on (the date of the fall).”

3. This list of damages is optional and is intended to include those items of damage for which recovery is commonly sought in the ordinary FELA case. *Hall v. BNSF Ry. Co.*, 958 F.3d 672, 674 (8th Cir. 2020). It is not intended to exclude any item of damages that is supported by the evidence and the law. *If the court elects to list items of damage in the damages instruction, there must, of course, be evidence to support each item listed.*

4. For the relationship between lost future earnings and lost earning capacity, *see Gorniack v. Nat’l R.R. Passenger Corp.*, 889 F.2d 481, 483–84 (3d Cir. 1989); *DeChico v. Metro-North Commuter R.R.*, 758 F.2d 856, 861 (2d Cir. 1985); *Wiles v. N.Y., Chi. & St. Louis R.R. Co.*, 283 F.2d 328, 331–32 (3d Cir. 1960); *Downie v. U.S. Lines Co.*, 359 F.2d 344, 347 (3d Cir. 1966) (if permanent injuries result in impairment of earning capacity, the plaintiff is entitled to reimbursement for such impairment, including, but not limited to, probable loss of future earnings). If the court determines that the case is one in which the jury should be instructed on the distinction between loss of future earnings and loss of earning capacity, this model instruction may be modified accordingly. Otherwise, such issue can be left to argument. Situations in which this distinction arises may be rare.

5. The reasonable value of household services that the injured employee is unable to perform for himself or herself is a compensable item of pecuniary damages. *See Cruz v. Hendy Int’l Co.*, 638 F.2d 719, 723 (5th Cir. 1981) (decided under the Jones Act, 46 U.S.C. § 688 (1982), which specifically incorporates FELA, and where it was stated that the plaintiff may recover “the cost of employing someone else to perform those domestic services that he would otherwise have been able to render but is now incapable of doing.”); *cf. Hysell v. Iowa Pub. Serv. Co.*, 559 F.2d 468, 475 (8th Cir. 1977).

6. If the evidence supports a charge that the plaintiff has failed to mitigate his or her damages, the following paragraph should be included after the last listed item of damage, or after the general damage instruction paragraph if the court chooses not to list items of damage:

If you find that the defendant has proved that the plaintiff has failed to take reasonable steps to minimize [(his) (her)] damages, then your award must not include any sum for any amount of damage which you find plaintiff might reasonably have avoided by taking such steps.

In *Kauzlarich v. Atchison, Topeka & Santa Fe Railway Co.*, 910 S.W.2d 254 (Mo. banc 1995), it was held to be reversible error to refuse to give the railroad's proposed mitigation instruction that "closely follow[ed]" the above instruction. *Id.* at 256. The court held that as a matter of federal substantive law, the railroad was entitled to a mitigation instruction when there was evidence to support it. *Id.* at 258. The burden of pleading and proving failure to mitigate is on the defendant. *Sayre v. Musicland Grp., Inc.*, 850 F.2d 350, 355–56 (8th Cir. 1988); *Modern Leasing v. Falcon Mfg. of Cal.*, 888 F.2d 59, 62 (8th Cir. 1989).

7. These instructions may also be added.

8. These instructions may also be added.

9. See Model Instruction 15.63. Note that contributory negligence may not be submitted for claims alleging violation of the Locomotive Inspection Act, Safety Appliance Act, or regulation enacted for the safety of railroad employees.

10. If Model Instruction 15.80, Form of Verdict, is used, then this paragraph must be given because contributory negligence is submitted. If the alternative Form of Verdict set out in Committee Comments to 15.80 is used, this paragraph should not be used.

### **Committee Comments**

This Instruction should be used to submit damages issues in cases where the employee's injuries were not fatal. Model Instruction 15.71 should be used in cases in which the employee's injuries were fatal.

The final paragraph of this instruction tells the jury that the court will diminish the total amount of damages in proportion to the amount of contributory negligence found. This instruction is consistent with the Form of Verdict 15.80, which requires the jury to assess the plaintiff's total damages and the plaintiff's percentage of contributory negligence. If contributory negligence is not submitted, the final paragraph of Model Instruction 15.70 should be eliminated. It should also be eliminated for claims submitted for violation of the Locomotive Inspection Act, the Safety Appliance Act, or a regulation enacted for the safety of railroad employees.

## 15.71 DAMAGES: DEATH OF EMPLOYEE

If you find in favor of the plaintiff, then you must award the plaintiff such sum as you find will fairly and justly compensate [here identify the beneficiaries]<sup>1</sup> for [(his) (her) (their)] damages that can be measured in money that you find [(he) (she) (they)] sustained as a direct result of the death of (name of decedent).<sup>2</sup> [You should consider the following elements of damages:<sup>3</sup>

1. The reasonable value of any money, goods and services that (name of decedent) would have provided (name of beneficiaries) had (name of decedent) not died on (date of death). [These damages include the monetary value of (name of child beneficiaries)'s loss of any care, attention, instruction, training, advice and guidance from (name of decedent).]<sup>4</sup>
2. Any conscious pain and suffering you find from the evidence that (name of decedent) experienced as a result of [(his) (her)] injuries.<sup>5</sup>
3. The reasonable expense of medical care and supplies reasonably needed by and actually provided to (name of decedent).]<sup>5</sup>

Your award must not include any sum for grief or bereavement or the loss of society or companionship.<sup>6</sup>

Any award you make for the value of any money and services that you find from the evidence that (name of decedent) would have provided (name of each beneficiary) in the future should be reduced to present value. Any award you make for the value of any money and services you find from the evidence that (name of decedent) would have provided (name of beneficiary) between the date of [(his) (her)] death on (date of death) and the present should not be reduced to present value.<sup>7</sup>

[Remember, throughout your deliberations you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of

punishment or through sympathy.]<sup>8</sup> [You may not include in your award any sum for court costs or attorneys' fees.]<sup>9</sup>

[If you assess a percentage of negligence to (name of decedent) by reason of Instruction \_\_\_\_\_ (state the number of the contributory negligence instruction),<sup>10</sup> do not diminish the total amount of damages by the percentage of negligence you assess to (name of decedent). The court will do this.]<sup>11</sup>

### Notes on Use

1. A death action under FELA is brought by a personal representative, as the plaintiff, for the benefit of specific beneficiaries. The personal representative brings the action “for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee’s parents; and, if none, then of the next of kin dependent upon such employee, . . . .” 45 U.S.C. § 51 (1939).

2. *See* Kevin F. O’Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 128.30 (5th ed. 2000). Damages in a FELA death action “are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries.” *Mich. Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 70 (1913). “No hard and fast rule by which pecuniary damages may in all cases be measured is possible . . . . The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent, . . . .” *Id.*; *cf. Norfolk & W. Ry. Co. v. Holbrook*, 235 U.S. 625, 629 (1915).

3. This list of damages is optional and is intended to include those items of damage for which recovery is commonly sought in the ordinary FELA case. It is not intended to exclude any item of damages that is supported by the evidence and the law. *If the court elects to list items of damage in the damages instruction, there must, of course, be evidence to support each item listed.*

4. In a FELA death case, recovery is limited to pecuniary losses. The items specified in the bracketed sentence have been deemed pecuniary losses in the case of a child beneficiary. The recovery may be different in the case of a spouse, parent, or adult child. *Vreeland*, 227 U.S. at 70; *Holbrook*, 235 U.S. at 629; *Kozar v. Chesapeake and Ohio Ry. Co.*, 449 F.2d 1238, 1243 (6th Cir. 1971).

5. The items of damage set forth in paragraphs 2 and 3 are recoverable by the personal representative on behalf of the spouse, children, or parents of the decedent, if supported by the evidence. If the claim is brought by the personal representative on behalf of next of kin other than the spouse, children, or parents, then dependency upon decedent must be shown, and the instructions will require modification to submit that issue to the jury. The elements instruction might be modified to submit the dependency issue. 45 U.S.C. § 59 (1910); *Auld v. Terminal R.R.*

*Assoc. of St. Louis*, 463 S.W.2d 297 (Mo. 1970); *Jensen v. Elgin, Joliet & E. Ry. Co.*, 182 N.E.2d 211 (Ill. 1962).

Funeral expenses may not be included in damages awarded in FELA actions under either a 45 U.S.C. § 51 death action or a 45 U.S.C. § 59 survival action. *Phila. & Reading R.R. Co. v. Marland*, 239 F. 1, 11 (3d Cir. 1917); *DuBose v. Kan. City S. Ry. Co.*, 729 F.2d 1026, 1033 (5th Cir. 1984); *Heffner v. Pa. R.R. Co.*, 81 F.2d 28, 31 (2d Cir. 1936); *Frabutt v. N.Y., Chi. & St. Louis R.R. Co.*, 84 F. Supp. 460, 467 (W.D. Pa. 1949).

6. *Vreeland*, 227 U.S. at 70.

7. Future pecuniary benefits in a FELA death case should be awarded at present value. *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 489–90 (1916); *cf. St. Louis Sw. Ry. Co. v. Dickerson*, 470 U.S. 409 (1985).

8. These instructions may also be added.

9. These instructions may also be added.

10. Model Instruction 15.63 submits the issue of contributory negligence.

11. If Model Instruction 15.80, Form of Verdict, is used, then this paragraph must be given when contributory negligence is submitted. If the alternative Form of Verdict set out in Committee Comments to 15.80 is used, this paragraph should not be used.

### **Committee Comments**

This instruction should be used to submit damages in cases where the employee's injuries were fatal. Model Instruction 15.70 should be used in cases where the employee's injuries were not fatal.

The final paragraph of this instruction tells the jury that the court will diminish the total amount of damages in proportion to the amount of contributory negligence found. This instruction is consistent with Form of Verdict 15.80, which requires the jury to assess the plaintiff's total damages and decedent's percentage of contributory negligence. If contributory negligence is not submitted, the final paragraph of Model Instruction 15.71 should be eliminated. It should also be eliminated for claims submitted for violation of the Locomotive Inspection Act, the Safety Appliance Act, or a regulation enacted for the safety of railroad employees.

## 15.72 DAMAGES: PRESENT VALUE OF FUTURE LOSS

If you find that the plaintiff will sustain (specify damages subject to present value reduction, such as, “lost future earnings” or “future medical expenses”), then you must reduce those future damages to their present value.

The present value of future damages is the amount of money that will fully compensate the plaintiff for future damages, assuming that amount is invested now and will earn a reasonably risk-free rate of interest for the time that will pass until the future damages occur.

You must not reduce to present value any non-economic damages you find that the plaintiff is reasonably certain to sustain in the future, such as for pain and suffering, or mental anguish.<sup>1</sup>

### Notes on Use

1. *Crane v. Crest Tankers, Inc.*, 47 F.3d 292, 295 n.5 (8th Cir. 1995).

### Committee Comments

In a FELA case, “an utter failure to instruct the jury that present value is the proper measure of a damage award is error.” *St. Louis Sw. Ry. Co. v. Dickerson*, 470 U.S. 409, 412 (1985); *Monessen Sw. Ry. Co. v. Morgan*, 486 330, 339–40 (1988). If requested, such an instruction must be given. But “no single method for determining present value is mandated by federal law.” *Dickerson*, 470 U.S. at 412. *See also* *Beanland v. Chi., Rock Island & Pac. R.R.*, 480 F.2d 109, 114–15 (8th Cir. 1973); Kevin F. O’Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 128.20 (5th ed. 2000).

Only future economic damages are to be reduced to present value. Past economic damages and future noneconomic damages are not to be reduced to present value. *See Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 489 (1916).

In *Flanigan v. Burlington North, Inc.*, 632 F.2d 880, 885 (8th Cir. 1980), the court stated that the jury should not be instructed to reduce damages for future pain and suffering to present value.

This Instruction contemplates that the court will allow evidence and jury argument about the proper method for calculating present value. If additional instruction on the definition of present value or factors to be considered is deemed appropriate, then see, for example, *5th Cir. Civ. Jury Instr.* 15.3C (2006); and *Arkansas Model Jury Instructions, Civil*, AMI 2220 (2020).

## **15.73 DAMAGES: INCOME TAX EFFECTS OF AWARD**

### **INSTRUCTION WITHDRAWN**

#### **Committee Comments**

Before *Burlington Northern Santa Fe Railway v. Loos*, 139 S.Ct. 893 (2019), if requested, a court was required to instruct the jury that the verdict will not be subject to income taxes. *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 498 (1980); *Gander v. FMC Corp.*, 892 F.2d 1373, 1381 (8th Cir. 1990); *Paquette v. Atlanska-Plovidba*, 701 F.2d 746, 748 (8th Cir. 1983). Furthermore, the Supreme Court in *Liepelt*, stated that the jury should base its award on the “after-tax” value of lost earnings in determining lost earnings.

The Supreme Court’s decision in *Loos*, however, raises questions about the proper way to instruct juries on the taxation of jury verdicts. The Committee anticipates that as FELA cases are tried and reviewed in the appellate courts, the answers to these questions will be clarified. The Committee will continue to monitor the developing law with the intention of drafting a model instruction when there is sufficient clarity to do so.

**15.80 GENERAL VERDICT FORM:  
CONTRIBUTORY NEGLIGENCE SUBMITTED**

VERDICT<sup>1</sup>

**Note:** Complete this form by writing in the name required by your verdict.

On the claim<sup>2</sup> of plaintiff [(name of plaintiff)] against defendant [(name of the defendant)], we, the jury find in favor of:

---

Plaintiff [(name of plaintiff)] or Defendant [(name of the defendant)]

**Note:** Complete the next paragraph only if the above finding is in favor of the plaintiff.

We, the jury, assess the total damages of plaintiff [(name of plaintiff)] at

\$ \_\_\_\_\_.

DO NOT REDUCE THIS AMOUNT BY THE PERCENTAGE OF NEGLIGENCE, IF ANY, YOU FIND IN THE NEXT QUESTION.

**Note:** If you do not assess a percentage of negligence to [plaintiff] [(name of decedent)] under Instruction \_\_\_\_\_ (state the number or title of the contributory negligence instruction), then write “0” (zero) in the blank in the following paragraph. If you do assess a percentage of negligence to [plaintiff] [(name of decedent)] by reason of Instruction \_\_\_\_\_ (state the number or title of contributory negligence instruction), then write the percentage of negligence in the blank in the following paragraph. The court will then reduce the total damages you assess above by the percentage of negligence you assess to [plaintiff] [(name of decedent)].

We, the jury, find [plaintiff] [(name of decedent)] to be \_\_\_\_\_ % negligent.

### Notes on Use

1. When more than one claim is submitted, a jury decision is required on each claim.

Although the employee may bring claims for negligence as well as claims for violation of the Safety Appliance Act or Locomotive Inspection Act in the same case, the employee is entitled to only one recovery for his or her damages.

2. If more than one claim is submitted in the same lawsuit, the claims should be separately identified in the verdict form. *See* Model Instruction 4.80.

### Committee Comments

This form of verdict can be used in FELA negligence cases when contributory negligence is submitted. In FELA cases where contributory negligence is not submitted, and in cases under the Locomotive Inspection Act and Safety Appliance Act, use Form of Verdict 15.81.

In cases where the issue of contributory negligence has been submitted to the jury, and the jury has been instructed to make findings on the issues of contributory negligence and damages, there is a question whether the jury or the court should perform the computations that reduce the total damages by the percentage of contributory negligence found. 45 U.S.C. § 53 (1908) states that “the damages shall be diminished *by the jury* . . . .” (Emphasis added.) The Committee is not aware of any case specifically prohibiting a form of verdict that allows the jury to determine the percentage of the plaintiff’s negligence and permits the court to perform the mathematical calculation. State jurisdictions such as Arkansas and Missouri, and some federal courts, instruct the jury to reduce the total damage award by the percentage of contributory negligence before rendering a general verdict for the reduced amount of total damages. *See Wilson v. Burlington N., Inc.*, 670 F.2d 780, 782–83 n.1 (8th Cir. 1982) (jury instructed to perform contributory negligence reduction and to return a general verdict for damages in the reduced amount); *note* Kevin F. O’Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil §§ 106.12, 106.13, 106.14 (5th ed. 2000).

Another option is for the jury to set forth both the percentage of contributory negligence and the total amount of damages without reduction for contributory negligence. With this information, the court will reduce the total damages according to the percentage of contributory negligence in arriving at its judgment. This may be done with a special verdict. FED. R. CIV. P. 49(a); *Wattigney v. S. Pac. Co.*, 411 F.2d 854, 856 (5th Cir. 1969); Kevin F. O’Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil §§ 106.12, 106.13, 106.14 (5th ed. 2000). This may also be done with a general verdict accompanied by special interrogatories. FED. R. CIV. P. 49(b); *Flanigan v. Burlington N. Inc.*, 632 F.2d 880, 884 (8th Cir. 1980).

If the court wants the jury to reduce the damages by a monetary amount because of contributory negligence, the following instruction may be used:



**15.81 GENERAL VERDICT FORM:  
CONTRIBUTORY NEGLIGENCE NOT SUBMITTED**

VERDICT<sup>1</sup>

**Note:** Complete this form by writing in the name required by your verdict.

On the claim<sup>2</sup> of plaintiff [(name of plaintiff)] against defendant [(name of the defendant)], we, the jury find in favor of:

---

Plaintiff [(name of plaintiff)]

Defendant [(name of the defendant)]

**Note:** Complete the next paragraph only if the above finding is in favor of the plaintiff.

We, the jury, assess the total damages of plaintiff [(name of plaintiff)] at

\$ \_\_\_\_\_.

**Notes on Use**

1. When more than one claim is submitted, a jury decision is required on each claim.

Although the employee may bring claims for negligence as well as claims for violation of the Safety Appliance Act or Locomotive Inspection Act in the same case, the employee is entitled to only one recovery for his or her damages.

2. If more than one claim is submitted in the same lawsuit, the claims should be separately identified in the verdict form. *See* Model Instruction 4.80.

**Committee Comments**

This form of verdict should be used in FELA negligence cases when contributory negligence is not submitted. Also, it is to be used in Locomotive Inspection Act and Safety Appliance Act cases.

## 16. EMPLOYMENT—FAIR LABOR STANDARDS ACT

### 16.00 OVERVIEW

The following instructions are for use in Fair Labor Standards Act (“FLSA”) cases where failure to pay minimum wage or overtime compensation is alleged. 29 U.S.C. § 201, et seq. The FLSA is a remedial statute that was enacted to eliminate “the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.” *Id.* § 202(a). Generally, under the FLSA, employers must pay employees the applicable minimum wage for each hour worked, and must pay 1½ times the regular rate for all hours worked in excess of forty in one week. *Id.* §§ 206, 207. The FLSA contains numerous exemptions and exceptions to these general rules.

The following instructions are intended for use in cases involving one (or a few) plaintiffs. Section 216(b) of the FLSA also provides for collective actions, a unique multi-plaintiff litigation process. The collective action process is distinct in several critical respects from the class actions procedures of Rule 23, Federal Rules of Civil Procedure. Perhaps chief among the differences is that collective action plaintiffs join the lawsuit by affirmatively and individually “opting-in” rather than by choosing not to “opt out” as is the case in Rule 23 class actions. The full effect of these procedural differences continues to be explored by the courts, and disputes often arise concerning the extent to which evidence may be presented on a representative basis. District courts should carefully consider the manner in which these instructions may be modified for use in collective actions.

#### General Considerations

Although there are common themes in FLSA cases, claims often turn on specific provisions of the statute, regulations, caselaw and other authority. Consequently, although certain basic instructions as set forth in this section may be useful, district courts must carefully consider the precise nature of the issues to be tried in each case, and adopt, reject, modify, or supplement these instructions as appropriate for the case.

In crafting appropriate instructions, courts must also carefully consider the nature of relevant authority. For example, with respect to certain minimum wage and overtime exemptions, the Secretary of Labor has promulgated regulations pursuant to express delegation of statutory authority. *See, e.g.*, 29 C.F.R. § 541. In addition, the Secretary of Labor and Department of Labor’s Wage and Hour Division have established a substantial body of “interpretive guidance.” Much of this guidance is published in the Code of Federal Regulations. *See, e.g.*, 29 C.F.R. Ch. 531 subpart C, Ch. 775-94. Other guidance appears in the form of interpretive bulletins and private opinion letters. When considering agency interpretations, “a court must first ask whether Congress has directly spoken to the precise question at issue.” *Glover v. Standard Federal Bank*, 283 F.3d 953, 961 (8th Cir. 2002) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). “[T]he plain meaning of a statute or regulation controls, if there is one, regardless of an agency’s interpretation.” *St. Luke’s Methodist Hospital v. Thompson*, 182 F. Supp. 2d 765, 775 (N.D. Iowa 2001) (citing *Hennepin County Med. Ctr. v. Shalala*, 81 F.3d 743, 748 (8th Cir. 1996)).

Where there is room for agency interpretation, interpretive guidance from the Secretary of Labor and Wage and Hour Division may, in certain circumstances, be entitled to varying degrees of “deference” or “respect” by courts, depending on the form of guidance. *See Kisor v. Wilkie*, 139 S.Ct. 2400 (2019); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Chevron*, 467 U.S. at 842; *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

### **Employee and Enterprise Coverage, Employee v. Independent Contractor**

To prove a case for FLSA overtime or minimum wage violations, a plaintiff must prove he or she was employed by a covered defendant and that defendant failed to pay plaintiff minimum wage or overtime as required by law. *Hensley v. MacMillan Bloedel Containers, Inc.*, 786 F.2d 353 (8th Cir. 1986).

As a threshold matter, FLSA plaintiffs must prove that an employment relationship existed with the defendant. *Reich v. ConAgra, Inc.*, 987 F.2d 1357, 1360 (8th Cir. 1993). “Employer” is defined in Section 203(d) as “any person acting directly or indirectly in the interest of an employer in relation to an employee.” *Walsh v. Alpha & Omega USA, Inc.*, 39 F.4th 1078, 1081 (8th Cir. 2022). The term “employ” is defined in section 203(g) expansively as “to suffer or permit to work.” *Id.* at 1081-82. Employee is defined by section 203(e)(1) as “any individual employed by an employer.” This definition has been interpreted as broad and expansive. *See United States v. Rosenwasser*, 323 U.S. 360, 363 (1945); *Walsh*, 39 F.4th at 1081-82.

Determining whether an individual is “an employee under the FLSA involves questions of fact – the precise nature of his duties and relationship with the alleged employer – but the ultimate question of ‘whether or not an individual is an ‘employee’ within the meaning of the FLSA is a legal determination rather than a factual one.’” *Karlson v. Action Process Service & Private Investigations, LLC*, 860 F.3d 1089, 1092-93 (8th Cir. 2017) (quoting *Donovan v. Trans World Airlines, Inc.*, 726 F.2d 415, 417 (8th Cir. 1984)); *see also Walsh*, 39 F.4th at 1082 (same).

In determining whether an employment relationship exists, the Supreme Court has rejected the common law “right-to-control test” and concluded that the “economic reality” test more appropriately satisfies the intended broad application of the statute’s protections. *See, e.g., NLRB v. Heart Publications*, 322 U.S. 111 (1944); *see also Tony & Susan Alamo Found. v. Sec’y of Lab.*, 471 U.S. 290, 301 (1985).

In *Karlson*, the Eighth Circuit noted that many courts considering “economic reality” have held that “degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete.” *Karlson*, 860 F.3d at 1092 (quoting *United States v. Silk*, 331 U.S. 704, 716 (1947)). However, the *Karlson* court further observed that “neither the Supreme Court nor this court has ever held that it is the governing standard” for the “economic reality” test. *Karlson*, 860 F.3d at 1092. In 2022, the *Walsh* court stated the “economic reality” test “examines six factors regarding the economic realities of the working relationship: (1) ‘the degree of control exercised by the alleged employer over the business operations;’ (2) ‘the relative investments of the alleged employer and employee;’ (3) ‘the degree

to which the alleged employee’s opportunity for profit and loss is determined by the employer; (4) ‘the skill and initiative required in performing the job;’ (5) ‘the permanency of the relationship;’ and (6) ‘the degree to which the alleged employee’s tasks are integral to the employer’s business.’” *Walsh*, 39 F.4th at 1082 (quoting *Karlson*, 860 F.3d at 1093).

The FLSA applies to employees, not independent contractors. In *Walsh*, the Eighth Circuit “assume[d] without deciding that the economic realities test is appropriate in determining whether a worker is an employee or independent contractor under the FLSA.” *Walsh*, 39 F.4th at 1082.

In *Karlson*, the parties consented to the district court submitting to the jury the ultimate question of whether the plaintiff was an employee. 860 F.3d. at 1094. *Karlson* holds that, where the district court does so and then adopts the jury’s verdict, the Eighth Circuit must affirm if the evidence viewed most favorably to the jury’s verdict is sufficient to support the verdict. *Id.* at 1094.

In *Walsh*, however, the Eighth Circuit reaffirmed that the ultimate question of whether an individual is an employee or independent contractor is a legal determination. Nonetheless, the *Walsh* court reversed summary judgment in favor of the plaintiff (U.S. Department of Labor) on this issue because there were material disputes regarding the underlying factors. The court specifically cited these instructions in stating: “disputed factual issues that may affect this legal determination can be submitted to the jury as special jury questions.” *Walsh*, 39 F.4th at 1082-83 (citing *Karlson*, 860 F.3d at 1093–94 and Eighth Circuit Model Jury Instruction (Civil) 16.00 and 16.06).

In light of *Karlson* and *Walsh*, it is settled that the ultimate question of employee status is a legal determination, but material factual disputes regarding the nature of duties and relationship with the alleged employer (i.e., the factors in the economic reality test) may require submission to a jury. Instruction 16.06 is intended for such use, reserving to the court the legal determination by considering any material facts that are undisputed along with the special findings from the jury with respect to any disputed material factual issues.

Additionally, to satisfy coverage requirements, a plaintiff must prove either individual employee coverage or enterprise coverage. *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005). Individual coverage is established when the plaintiff, in his or her work for the defendant, is engaged in commerce or the production of goods for commerce. 29 U.S.C. §§ 206(a), 207(a)(1), 212(c). Enterprise coverage requires that the defendant is “an enterprise engaged in commerce or the production of goods for commerce that had annual gross sales of at least \$500,000.” 29 U.S.C. § 203(s)(1).

In some instances, an individual may be deemed to be employed by more than one employer in a “joint employment” relationship. *See* 29 C.F.R. § 791.2 (2020) (describing two joint employer scenarios).

### **Common Types of Cases**

The three most common types of FLSA wage disputes involve (1) misclassification, (2) off-the-clock, and (3) payroll and compensation practices.

### *Misclassification Cases*

FLSA litigation frequently involves statutory exemptions from the minimum wage and/or overtime requirements. In such cases, the employer is alleged to have “misclassified” employees as exempt from the FLSA. These cases often involve exemptions known as “white collar” exemptions, which include individuals employed in a bona fide executive, administrative, professional, or outside sales position. 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541. At one time courts consistently held that exemptions were to be narrowly construed against the employer. *See, e.g., McDonnell v. City of Omaha*, 999 F.2d 293, 295 (8th Cir. 1993) (Employers must demonstrate that their employees fit “plainly and unmistakably within the exemption’s terms and spirit.”). This “narrow construction” was rejected by the Supreme Court in *Encino Motorcars, LLC v. Navarro*, 138 S.Ct. 1134 (2018). There, the Court observed that the FLSA’s numerous exemptions “are as much a part of the FLSA’s purpose as the overtime-pay requirement. . . . Because the FLSA gives no ‘textual indication’ that its exemptions should be construed narrowly, there is no reason to give them anything other than a fair (rather than ‘narrow’) interpretation.” *Id.* at 1142.

Exemptions involve issues of law and fact. “Disputes regarding the nature of an employee’s duties are questions of fact, but the ultimate question whether an employee is exempt under the FLSA is an issue of law.” *Jarrett v. ERC Properties, Inc.*, 211 F.3d 1078, 1081 (8th Cir. 2000) (citing *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (“The question of how the respondents spent their time working . . . is a question of fact. The question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law. . . .”). Accordingly, Instruction No. 16.07 is prepared to enable the court to submit any material, disputed factual issues to the jury, with the court then making the legal determination by considering any facts that are undisputed along with the special findings from the jury with respect to any disputed material facts.

Because the Eighth Circuit has held that the ultimate question of exempt status is a legal determination, the Committee does not recommend submitting the ultimate question of exempt status to the jury. Nonetheless, a court may decide to submit the ultimate issue to the jury on an advisory basis, or the parties may agree to submit the ultimate issue to the jury. *See Karlson v. Action Process Service & Private Investigations, LLC*, 860 F.3d 1089 (8th Cir. 2017) (discussing appellate review in the analogous context of employee/independent contractor). To assist the Court and parties with the applicable legal standards in such circumstances, the elements of several common exemptions may be found at Instruction Nos. 16.60-64.

Misclassification cases also often involve off-the-clock/payroll practice issues due to the employer’s failure to track and record time worked. Therefore, where it is determined that an employer misclassified plaintiff, analysis under the other two major types of cases likely will be necessary.

### *Off-the-Clock Cases*

Ordinarily in off-the-clock cases, employers have failed to keep records of the plaintiff-employee’s time worked or otherwise improperly recorded time-worked. Reasons for the failure to record all hours worked vary and, for example, may be due to misclassification as exempt or

the employer's belief that the activity at issue is not compensable. Such instances may include preparatory and concluding activities such as "donning and doffing," travel time, waiting time, and rest or meal periods.

### *Payroll Practices/Calculations*

Payroll practices are generally at issue when employees' pay was allegedly calculated improperly. Common issues include the allegedly improper calculation of the regular rate for overtime purposes, such as when certain bonuses or commissions are not included in the calculation. Other common issues involve tipped employees and employees paid by the job, piece, or task. Payroll practices that involve unlawful deductions comprise another commonly litigated issue. Deduction concerns typically arise when an employer reduces employees' paychecks in amounts meant for items such as uniforms, shortages or other debts.

### **Significance of Recordkeeping**

Section 211(c) of the FLSA requires employers to "make, keep and preserve records" of employees' "wages, hours, and other conditions and practices of employment." *Id.*; 29 C.F.R. § 516(1). Although there is no private cause of action against an employer for noncompliance with recordkeeping obligations, improper recordkeeping practices may have a significant evidentiary impact in FLSA cases. Where an employer has not kept adequate records of wages and hours, employees generally may not be denied recovery of back wages on the ground that the precise extent of their uncompensated work cannot be proved. *Dole v. Alamo Foundation*, 915 F.2d 349, 351 (8th Cir. 1990). Instead, the employees "are to be awarded compensation on the most accurate basis possible." *Id.* (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946)). The plaintiff must establish "a just and reasonable inference" as to the uncompensated work performed. *Anderson*, 328 U.S. at 687-88; *Holaway v. Stratasys, Inc.*, 771 F.3d 1057, 1059 (8th Cir. 2014). Plaintiffs may satisfy this requirement with evidence of their regular work schedules or work habits, e.g., such as calendars, computer records, parking records, or coworker testimony. Once the plaintiff has produced such evidence of uncompensated labor, "the burden then shifts to the employer to produce evidence to dispute the reasonableness of the inference." *Holaway*, 771 F.3d at 1059. (quoting *Carmody v. Kansas City Bd. of Police Comm'rs*, 713 F.3d 401, 406 (8th Cir. 2013)).

### **Retaliation**

It is unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint . . . under or related to this chapter." *Id.* § 215(a)(3); *Grey v. City of Oak Grove*, 396 F.3d 1031, 1034-35 (8th Cir. 2005); *Brennan v. Maxey's Yamaha*, 513 F.2d 179 (8th Cir. 1975). See Chapter 10 of this Manual for instructions relating to retaliation claims.

### **Statute of Limitations**

Ordinarily, FLSA claims must be brought within two years, but the statute of limitations is extended to three years if it is proven that the employer "willfully" violated the law. *See* 29 U.S.C. § 255(a). A violation is "willful" where "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin v.*

*Richland Shoe Co.*, 486 U.S. 128, 133 (1988). The recovery period generally is calculated backward from the date that the lawsuit is filed or from the date a consent to join form is filed on behalf of an opt-in plaintiff in a collective action pursuant to 29 U.S.C. § 216(b).

### **Damages**

Backpay damages are generally calculated as the difference between what the employee should have been paid had the employer complied with the FLSA and the amount the employee actually was compensated. In addition, liquidated damages in an amount equal to the amount of backpay will be awarded unless the employer proves that it acted in good faith and had reasonable grounds for believing that it was not in violation of the FLSA. 29 U.S.C. § 216(b); *Jarrett v. ERC Properties, Inc.*, 211 F.3d 1078, 1083 (8th Cir. 2000). The burden is on the employer to prove it acted in good faith. *Broadus v. O.K. Industries, Inc.*, 226 F.3d 937, 944 (8th Cir. 2000) (Equal Pay Act). This determination is made by the court. *See Braswell v. City of El Dorado*, 187 F.3d 954, 957 (8th Cir. 1999). “The jury’s decision on willfulness [for statute of limitations purposes] is distinct from the district judge’s decision to award liquidated damages,” *id.*, but “it is hard to mount a serious argument . . . that an employer who has acted in reckless disregard of its obligations has nonetheless acted in good faith.” *Jarrett*, 211 F.3d at 1084.

## **CHAPTER 16 INSTRUCTIONS AND VERDICT FORMS**

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## **16.01 EXPLANATORY: DETERMINING HOURS WORKED<sup>1</sup>**

You must determine the number of hours worked by plaintiff based on all of the evidence. The defendant is legally required to maintain accurate records of its employees' hours worked. If you find that the defendant failed to maintain records of the plaintiff's hours worked or that the records kept by the defendant are inaccurate, you must accept plaintiff's estimate of hours worked, unless you find it to be unreasonable.

### **Notes on Use**

1. Use this instruction only when the number of hours worked is in dispute.

### **Committee Comments**

The FLSA requires employers to “make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator [of the Department of Labor’s Wage and Hour Division] as he shall prescribe by regulation or order . . . .” 29 U.S.C. § 211(c). The Department of Labor’s record-keeping regulations may be found at 29 C.F.R. § 516. The FLSA does not create a private cause of action against an employer for noncompliance with record-keeping obligations. Where an employer has not kept adequate records of wages and hours, however, employees generally may not be denied recovery of back wages on the ground that the precise extent of their uncompensated work cannot be proved. *Dole v. Alamo Foundation*, 915 F.2d 349, 351 (8th Cir. 1990). Instead, the employees “are to be awarded compensation on the most accurate basis possible.” *Id.* (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946)). The plaintiff bears the burden of proving the extent of any uncompensated work, but may satisfy that burden by “just and reasonable inference.” *Anderson*, 328 U.S. at 687-88; *Holaway v. Stratasys, Inc.*, 771 F.3d 1057, 1059 (8th Cir. 2014). Once the plaintiff has produced such evidence of uncompensated work, “[t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee’s evidence.” *Anderson*, 328 U.S. at 687-88. The Committee believes the proposed instruction properly allocates the relative burdens of proof consistent with *Anderson*, without the risk of confusion that may be associated with an instruction that incorporates the exact language of the *Anderson* decision.

## **16.02 EXPLANATORY: MINIMUM WAGE<sup>1</sup>**

An employer must pay at least minimum wage for all hours worked by an employee each workweek. The minimum wage rate applicable in this case is \$7.25 per hour.

You may have heard about other minimum wage rates that may be applicable in certain states. You must not consider any minimum wage rates other than that listed above.

### **Notes on Use**

1. This instruction is intended for use only when the plaintiff claims unpaid minimum wage.

### **16.03 EXPLANATORY: MINIMUM WAGE CREDIT FOR BOARD AND LODGING<sup>1</sup>**

In determining whether an employer has paid the minimum wage, the employer is entitled to a credit for the reasonable cost it incurred in furnishing board, lodging or other facilities to an employee if the employer regularly provided the board, lodging, or other facilities for the benefit of the employee.

#### **Notes on Use**

1. This instruction is intended for use only when the defendant claims credit for board and/or lodging. The instruction should be modified to reflect the specific circumstances of the case, based on applicable caselaw and the Department of Labor guidance published at 29 C.F.R. part 531.

## **16.04 EXPLANATORY: OVERTIME COMPENSATION<sup>1</sup>**

An employer must pay overtime compensation in any workweeks in which an employee has more than 40 “hours worked,” as defined in Instruction No. \_\_\_\_\_. Overtime compensation must be paid at a rate at least one and one-half times the employee’s regular rate of pay for all hours worked in excess of 40.

An employee’s “regular rate of pay” is determined by totaling all the compensation that should have been paid to the employee for the workweek, excluding any overtime premium pay and any pay for vacation, holiday, or illness, and then dividing that total by all of the employee’s hours worked for that workweek. If the employee is employed solely at a single hourly rate, the hourly rate is his “regular rate of pay.”

### **Notes on Use**

1. This instruction is intended for use only when the plaintiff claims unpaid overtime compensation. The language regarding regular rate of pay should be modified to reflect the specific circumstances of the case, based on applicable caselaw and the Department of Labor guidance published at 29 C.F.R. part 778.

## 16.05 EXPLANATORY: SALARY BASIS<sup>1</sup>

An employee is paid on a “salary basis” if the employee is regularly paid, on a weekly or less frequent basis, a predetermined amount constituting all or part of the employee’s compensation, and the amount is not subject to reduction because of variations in the quality or quantity of the work performed.<sup>2</sup> [An employee is paid on a salary basis even if the employee’s salary is subject to reduction for one or more of the following reasons: (insert permissible deduction(s) at issue)].<sup>3</sup>

### Notes on Use

1. This instruction is intended for use only where there are material factual disputes as to whether the plaintiff was paid on a “salary basis” within the meaning of the FLSA as it pertains to the executive, administrative, or professional exemptions from overtime. *See* 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541. The instruction should be modified as necessary to appropriately present the material factual issue(s) to the jury. Otherwise, “the ultimate question whether an employee is exempt under the FLSA is an issue of law.” *Jarrett v. ERC Properties, Inc.*, 211 F.3d 1078, 1081 (8th Cir. 2000). Because the Eighth Circuit has held that the ultimate question of exempt status is a legal determination, the Committee does not recommend submitting the ultimate question of exempt status to the jury. Nonetheless, a court may decide to submit the ultimate issue to the jury on an advisory basis, or the parties may agree to submit the ultimate issue to the jury. *See Karlson v. Action Process Service & Private Investigations, LLC*, 860 F.3d 1089 (8th Cir. 2017) (discussing appellate review in the analogous context of employee/independent contractor). To assist the Court and parties with the applicable legal standards in such circumstances, the elements of several common exemptions may be found at Instruction Nos. 16.60-64.

2. 29 C.F.R. § 541.602(a).

3. Permissible deductions from an employee’s salary include:

- A. Deductions when an employee is absent from work for one or more full days for personal reasons other than sickness or disability. 29 C.F.R. § 541.602(b)(1).
- B. Deductions for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation or loss of salary occasioned by sickness or disability. Deductions for full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted their leave allowance. Similarly, an employer may make a deduction from pay for absences of one or more full days if salary replacement benefits are provided under a state disability insurance law or under a state workers’ compensation law. 29 C.F.R. § 541.602(b)(2).

- C. While the employer may not make deductions for an employee's absence occasioned by jury duty, attendance as a witness, or temporary military leave, the employer may offset any amounts received by the employee as jury fees, witness fees, or military pay for a particular week against the salary for that particular week without loss of the exemption. 29 C.F.R. § 541.602(b)(3).
- D. Deductions for penalties imposed in good faith for infractions of safety rules relating to the prevention of serious danger in the workplace or to other employees. 29 C.F.R. § 541.602(b)(4).
- E. Deductions for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules pursuant to a written policy applicable to all employees. 29 C.F.R. § 541.602(b)(5).
- F. In the initial and final week of employment, the employer may pay a proportionate part of an employee's salary for the time actually worked. 29 C.F.R. § 541.602(b)(6).
- G. When an employee takes an unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked. 29 C.F.R. § 541.602(b)(7).

## 16.06 EXPLANATORY: DETERMINING EMPLOYEE STATUS<sup>1</sup>

[One of your roles in this case is to determine the answers to the following questions.] [On a verdict form you will be asked to] [You must] answer the following question(s)<sup>2</sup> about the working relationship between plaintiff and defendant.

Question No. 1: [Insert material, disputed question of fact. *See* Committee Comment below] [*E.g.*, Who set the means and manner in which plaintiff performed his/her work?].

Question No. 2: [Insert material, disputed question of fact] [*E.g.*, Did plaintiff have an opportunity to make a profit?].

### Notes on Use

1. Use this instruction, and special verdict form 16.92, only when there are one or more disputed material facts with respect to the Court's determination of employee status. *See* 16.00 Overview, "Employee v. Independent Contractor."

2. This instruction is merely an example of two of the many factors that may be considered. *See Karlson v. Action Process Service & Private Investigations, LLC*, 860 F.3d 1089, 1092 (8th Cir. 2017). Court and counsel should review the factors at issue in the case at bar and compare them with current Eighth Circuit law.

### Committee Comments

1. As more fully discussed in 16.00 Overview, "Employee v. Independent Contractor," "the ultimate question of 'whether or not an individual is an 'employee' within the meaning of the FLSA is a legal determination rather than a factual one.'" *Karlson v. Action Process Service & Private Investigations, LLC*, 860 F.3d 1089, 1092-93 (8th Cir. 2017) (quoting *Donovan v. Trans World Airlines, Inc.*, 726 F.2d 415, 417 (8th Cir. 1984) ; *see also Walsh v. Alpha & Omega USA, Inc.*, 39 F.4th 1078, 1082 (8th Cir. 2022) (same). Although the ultimate question is a legal one, the precise nature of an individual's duties and relationship with the alleged employer may involve disputed issues of fact. Where there are no disputed issues of material fact with respect to the nature of a plaintiff's duties and relationship with the alleged employer, the Court can and should make the ultimate legal determination before submitting the case to the jury. This instruction should be used only where the Court determines that one or more specific, disputed facts are material to the determination of employee status. In such a case, the Committee strongly encourages the parties and the Court to carefully examine relevant caselaw, and carefully craft special interrogatories that are limited to determination of those specific, disputed facts that are material to the Court's determination of the ultimate legal issue.

2. This Instruction is intended to be used with other instructions to submit all issues of liability and damages to the jury simultaneously. If the Court determines, based on the jury's factual findings on the issues submitted in the special interrogatories, that the plaintiff was not an employee, the Court should enter judgment in favor of the defendant as a matter of law with respect to any claim on which the existence of an employee relationship was an essential element of the claim.

## 16.07 EXPLANATORY: DETERMINING EXEMPT STATUS<sup>1</sup>

[One of your roles in this case is to determine the answers to the following questions.] [On a verdict form you will be asked to] [You must] answer the following question(s)<sup>2</sup> about the working relationship between plaintiff and defendant.

Question No. 1: [Insert material, disputed question of fact. *See* Committee Comments below] [*E.g.*, Did plaintiff have authority to hire and fire other employees?].

Question No. 2: [Insert material, disputed question of fact. *See* Committee Comments below] [*E.g.*, Were plaintiff’s suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees given particular weight?].

### Notes on Use

1. Use this instruction, and special verdict form 16.93, only when there are one or more disputed material facts with respect to the Court's determination of exempt status. *See* 16.00 Overview, "Misclassification Cases." These cases often involve exemptions known as “white collar” exemptions, which include individuals employed in a bona fide executive, administrative, professional, or outside sales position. 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.

2. This instruction is merely an example of one of the disputed facts that may be at issue. *See Jarrett v. ERC Properties, Inc.*, 211 F.3d 1078, 1081 (8th Cir. 2000). Court and counsel should review the factors at issue in the case at bar and compare them with current Eighth Circuit law.

### Committee Comments

As more fully discussed in 16.00 Overview, “Misclassification Cases,” FLSA exemptions can involve issues of law and fact. “Disputes regarding the nature of an employee's duties are questions of fact, but the ultimate question whether an employee is exempt under the FLSA is an issue of law.” *Jarrett v. ERC Properties, Inc.*, 211 F.3d 1078, 1081 (8th Cir. 2000) (citing *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (“The question of how the respondents spent their time working... is a question of fact. The question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law . . . .”)). Although the ultimate question is a legal one, the precise nature of an individual’s duties may involve disputed issues of fact. Where there are no disputed issues of material fact with respect to the nature of a plaintiff’s duties, the Court can and should make the ultimate legal determination before submitting the case to the jury. This instruction should be used only where the Court determines that one or more specific, disputed facts are material to the determination of exempt status. In such a case, the Committee strongly encourages the parties and the Court to carefully examine relevant caselaw, and carefully craft special interrogatories that are limited to determination of

those specific, disputed facts that are material to the Court's determination of the ultimate legal issue. Because the Eighth Circuit has held that the ultimate question of exempt status is a legal determination, the Committee does not recommend submitting the ultimate question of exempt status to the jury. Nonetheless, a court may decide to submit the ultimate issue to the jury on an advisory basis, or the parties may agree to submit the ultimate issue to the jury. *See Karlson v. Action Process Service & Private Investigations, LLC*, 860 F.3d 1089 (8th Cir. 2017) (discussing appellate review in the analogous context of employee/independent contractor). To assist the Court and parties with the applicable legal standards in such circumstances, the elements of several common exemptions may be found at Instruction Nos. 16.60-64.

This Instruction is intended to be used with other instructions to submit all issues of liability and damages to the jury simultaneously. If the Court determines, based on the jury's factual findings on the issues submitted in the special interrogatories, that the plaintiff was exempt, the Court should enter judgment in favor of the defendant as a matter of law with respect to any claim on which the existence of the exemption defeats the claim.

## 16.20 DEFINITION: “HOURS WORKED”<sup>1</sup>

The phrase “hours worked” includes all time spent by an employee that was primarily for the benefit of the employer or the employer’s business.<sup>2</sup> Such time constitutes “hours worked” if the employer knew or should have known that the work was being performed.<sup>3</sup> Periods during which an employee is completely relieved of duty that are long enough to enable the employee to use the time effectively for his own purposes are not “hours worked.”<sup>4</sup>

### Notes on Use

1. This instruction is intended for use only when there is a dispute as to whether certain activities constitute hours worked, or there is a dispute as to the number of hours worked. The language should be modified to reflect the specific circumstances of the case based on caselaw and the Department of Labor guidance published at 29 C.F.R. part 785.

2. The FLSA does not define “work” but uses the term in its definition of “employ.” *See* 29 U.S.C. § 254. Under the Act, “employ” means “to suffer or permit to work.” 29 U.S.C. § 203(g); *see also* 29 C.F.R. § 785.6. The “suffer or permit” test provides that time spent on a “principal activity” for the benefit of the employer, with the employer’s knowledge, is considered to be hours worked and therefore is compensable. *Id.*; *see Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005).

3. An employer must know or have reason to believe that the employee is working. 29 C.F.R. § 785.11; *see Donovan v. Williams Chem. Co.*, 682 F.2d 185, 188 (8th Cir. 1982). An employer who has such knowledge cannot passively allow an employee to work without proper compensation, even if the work has not been done at the request of the employer.

4. The Supreme Court in *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005), stated that physical or mental exertion is not necessary for an activity to constitute “work.” (citing *Armour & Co. v. Wantock*, 323 U.S. 126 (1944)). Compensable time includes activities that are an “integral and indispensable part of the principal activities.” *IBP*, 546 U.S. at 30 (quoting *Steiner v. Mitchell*, 350 U.S. 247, 278 (1956)). Activities that are “an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities” constitute compensable time. *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 33 (2014). When an employee is required to give up a substantial measure of his or her time and effort, the time is hours worked. *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 693 (1946). Accordingly, the workweek typically includes “all the time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed work place.” *Id.* at 690-91. Periods during which an employee is completely relieved of duty that are long enough to enable the employee to use the time effectively for his or her own purposes, however, are not considered “hours worked.” For example, a meal period of at least 30 minutes during which an employee is completely relieved from duties does not ordinarily constitute hours worked, even if the employee is not permitted to leave the employer’s premises. 29 C.F.R. §785.19; *see also Henson*

*v. Pulaski Cnty. Sheriff Dep't*, 6 F.3d 531, 534 (8th Cir. 1993) (employee is not engaged in conduct “primarily for the benefit of the employer” merely because employee is “subject to call” during an unpaid meal break). Additionally, rest or break periods of 20 minutes or less must be included in “hours worked.” 29 C.F.R. § 785.18.

**16.21 DEFINITION: “WORKWEEK”<sup>1</sup>**

A “workweek” is a regularly recurring period of seven days or 168 hours, as designated by the employer. [In this case, the parties have stipulated – that is, they have agreed – that the workweek was from [day of week] at [time] to [day of week] at [time].]

**Notes on Use**

1. This instruction is intended for use only when the Court determines that “workweek” should be defined to assist the jury. The bracketed language should be inserted if the parties have so stipulated.

## 16.22 DEFINITION: WILLFULNESS

If you find in favor of the plaintiff under Instruction \_\_\_\_\_ [and you find against defendant under Instruction No. \_\_\_\_\_ ],<sup>1</sup> then you must determine whether the defendant's failure to pay [minimum wage and/or overtime] was willful. Defendant's failure to pay [minimum wage and/or overtime] conduct was willful if it has been proved<sup>2</sup> that the defendant either knew that its conduct was prohibited by the [federal]<sup>3</sup> law regarding [minimum wage and/or overtime pay]<sup>4</sup>, or showed reckless disregard for whether its conduct was prohibited by the [federal]<sup>3</sup> law regarding [minimum wage and/or overtime pay].<sup>4</sup>

### Notes on Use

1. Insert the number of the affirmative defense instruction(s), if submitted.
2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.
3. Insert the bracketed language only if there is potential risk of confusion to the jurors due to evidence or argument regarding state law.
4. Select minimum wage and/or overtime as appropriate for the claim.

### Committee Comments

The standard set forth in the instruction is consistent with that mandated by *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) and 29 C.F.R. § 578.3(c)(1). For a further discussion of the evidence necessary to justify a submission on the issue of willfulness, see *Jarrett v. ERC Properties, Inc.*, 122 F.3d 566 (8th Cir. 1997).

## 16.40 ELEMENTS OF CLAIM

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on plaintiff's FLSA claim if all the following elements have been proved<sup>1</sup>:

*First*, plaintiff was employed by defendant on or after \_\_\_\_\_;<sup>2</sup>

*Second*, in plaintiff's work for defendant, plaintiff [was engaged in commerce or in the production of goods for commerce] [was employed by an enterprise engaged in commerce or the production of goods for commerce that had annual gross sales of at least \$500,000];<sup>3</sup> and

*Third*, defendant failed to pay plaintiff [minimum wage for all hours worked by plaintiff in one or more workweeks] [overtime pay for all hours worked by plaintiff in excess of 40 in one or more workweeks].<sup>4</sup>

[The term "commerce" means any trade, commerce, transportation, transmission or communication between any state and any place outside that state.]

[A person or enterprise is considered to have been "engaged in the production of goods" if the person or enterprise produced, manufactured, mined, handled, transported, or in any other manner worked on such goods or worked in any closely related process or occupation directly essential to the production of the goods.]

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. This paragraph should be used only if employee status or dates of employment are disputed. Insert the date or dates of the relevant recovery period.

3. This paragraph, and the appropriate bracketed language, should be inserted only when the applicability of the FLSA is in dispute.

4. Select the appropriate bracketed language.

**16.60 ELEMENTS OF DEFENSE: EXECUTIVE EMPLOYEE EXEMPTION  
[FOR USE IN LIMITED CIRCUMSTANCES - SEE COMMITTEE COMMENT]**

Your verdict must be for defendant [insert name] and against plaintiff [insert name] on plaintiff's FLSA claim]<sup>1</sup> if all of the following elements have been proved:

*First*, plaintiff was compensated on a salary basis as defined in Instruction No. \_\_\_\_<sup>2</sup> at a rate not less than \$684<sup>3,4</sup> per week<sup>5</sup>; and

*Second*, plaintiff's principal, main or most important duty was management<sup>6</sup> of [(the enterprise in which plaintiff was employed) or (a customarily recognized department or subdivision of the enterprise in which plaintiff was employed)]<sup>7</sup>; and

*Third*, plaintiff customarily and regularly directed the work of at least two or more other full-time employees or their equivalent; and

*Fourth*, plaintiff had authority to hire and fire other employees, or plaintiff's suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees were given particular weight.

The phrase "customarily and regularly" means a frequency that is greater than occasional, but may be less than constant. Work performed customarily and regularly includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.

**Notes on Use**

1. Insert the bracketed language if more than one claim is submitted to the jury.
2. Insert the number of the "salary basis" instruction.
3. The \$684 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if plaintiff is compensated biweekly on a salary basis of \$1,368, semimonthly on a salary basis of \$1,482, or monthly on a salary basis of \$2,964. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b).

4. Or \$455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal Government; or \$380 per week, if employed in American Samoa by employers other than the Federal Government.

5. Exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).

6. Generally, management includes activities such as interviewing, selecting, and training of employees; setting and adjusting employee rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures. 29 C.F.R. § 541.102.

7. Select the bracketed language as appropriate for the claimed exemption.

### **Committee Comments**

As more fully discussed in 16.00 Overview, "Misclassification Cases," FLSA exemptions can involve issues of law and fact. "Disputes regarding the nature of an employee's duties are questions of fact, but the ultimate question whether an employee is exempt under the FLSA is an issue of law." *Jarrett v. ERC Properties, Inc.*, 211 F.3d 1078, 1081 (8th Cir. 2000) (citing *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) ("The question of how the respondents spent their time working... is a question of fact. The question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law . . .")). Although the ultimate question is a legal one, the precise nature of an individual's duties may involve disputed issues of fact. Instruction 16.07 is intended for use where the Court determines that one or more specific, disputed facts are material to the determination of exempt status. Because the Eighth Circuit has held that the ultimate question of exempt status is a legal determination, the Committee does not recommend submitting the ultimate question of exempt status to the jury. Nonetheless, a court may decide to submit the ultimate issue to the jury on an advisory basis, or the parties may agree to submit the ultimate issue to the jury. *See Karlson v. Action Process Service & Private Investigations, LLC*, 860 F.3d 1089 (8th Cir. 2017) (discussing appellate review in the analogous context of employee/independent contractor). To assist the Court and parties with the applicable legal standards in such circumstances, this Instruction provides the elements of the executive exemption.

**16.61 ELEMENTS OF DEFENSE: ADMINISTRATIVE EMPLOYEE  
EXEMPTION**

**[FOR USE IN LIMITED CIRCUMSTANCES - SEE COMMITTEE COMMENT]**

Your verdict must be for defendant [insert name] and against plaintiff [insert name] [on plaintiff's FLSA claim]<sup>1</sup> if all of the following elements have been proved:

*First*, plaintiff was compensated on a salary basis<sup>2</sup> as defined in Instruction No. \_\_\_\_<sup>3</sup> rate not less than \$684<sup>4,5</sup> per week<sup>6,7</sup>; and

*Second*, plaintiff's primary duty was the performance of office or non-manual work at a directly related to the management or general business operations<sup>8</sup> of defendant or defendant's customers; and

*Third*, plaintiff's primary duty included the exercise of discretion and independent judgment with respect to matters of significance.<sup>9</sup>

The term "primary duty" means the principal, main, major or most important duty that plaintiff performs.

**Notes on Use**

1. Insert the bracketed language if more than one claim is submitted to the jury.
2. Compensation may also be on a fee basis. If the case involves a fee basis issue, this instruction should be modified accordingly. *See* 29 C.F.R. § 541.605.
3. Insert the number of the "salary basis" instruction.
4. The \$684 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if plaintiff is compensated biweekly on a salary basis of \$1,368, semimonthly on a salary basis of \$1,482, or monthly on a salary basis of \$2,964. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b).
5. Or \$455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal Government; or \$380 per week, if employed in American Samoa by employers other than the Federal Government.

6. Exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).

7. In the case of academic administrative employees, the compensation requirement also may be met by compensation on a salary basis at a rate at least equal to the entrance salary for a teacher in the educational establishment where plaintiff is employed. 29 C.F.R. § 541.600(c). *See* 29 C.F.R. § 541.204(a)(1).

8. “Work directly related to management or general business operations” includes work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. 29 C.F.R. § 541.201(b).

9. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee’s assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances. 29 C.F.R. § 541.202 (b).

### **Committee Comments**

As more fully discussed in 16.00 Overview, “Misclassification Cases,” FLSA exemptions can involve issues of law and fact. “Disputes regarding the nature of an employee's duties are questions of fact, but the ultimate question whether an employee is exempt under the FLSA is an issue of law.” *Jarrett v. ERC Properties, Inc.*, 211 F.3d 1078, 1081 (8th Cir. 2000) (citing *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (“The question of how the respondents spent their time working...is a question of fact. The question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law . . .”). Although the ultimate question is a legal one, the precise nature of an individual’s duties may involve disputed issues of fact. Instruction 16.07 is intended for use where the Court determines that one or more specific, disputed facts are material to the determination of exempt status. Because the Eighth Circuit has held that the ultimate question of exempt status is a legal determination, the Committee does not recommend submitting the ultimate question of exempt status to the jury. Nonetheless, a court may decide to submit the ultimate issue to the jury on an advisory basis, or the parties may agree to submit the ultimate issue to the jury. *See Karlson v. Action Process Service & Private Investigations, LLC*, 860 F.3d 1089 (8th Cir. 2017) (discussing appellate review in the analogous context of employee/independent contractor). To assist the Court and

parties with the applicable legal standards in such circumstances, this Instruction provides the elements of the administrative exemption.

A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations. 29 C.F.R. § 541.2.

The following are types of positions that may qualify for the administrative employee exemption: insurance claims adjusters; employees in the financial services industry; an employee who leads a team of other employees assigned to complete major projects (such as purchasing, selling, or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements); an executive assistant or administrative assistant to a business owner or senior executive of large business; human resources managers who formulate, interpret or implement employment policies; management consultants who study the operations of a business and propose changes in the organization; and purchasing agents with authority to bind the company on significant purchases. 29 C.F.R. § 541.203.

The following are types of positions that typically do not qualify for the administrative employee exemption: personnel clerks who screen applicants to obtain data regarding their minimum qualifications and fitness for employment; ordinary inspection work; examiners or graders (such as employees that grade lumber); comparison shopping performed by an employee of a retail store who reports to the buyer the prices at the competitor's store; public sector inspectors or investigators, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists; and similar employees. 29 C.F.R. § 541.203.

**16.62 ELEMENTS OF DEFENSE: LEARNED PROFESSIONAL EXEMPTION  
[FOR USE IN LIMITED CIRCUMSTANCES - SEE COMMITTEE COMMENT]**

Your verdict must be for defendant [insert name] and against plaintiff [insert name] [on plaintiff’s FLSA claim]<sup>1</sup> if all of the following elements have been proved:

*First*, plaintiff was compensated on a salary basis<sup>2</sup> as defined in Instruction No. \_\_\_<sup>3</sup> at a rate not less than \$684<sup>4,5</sup> per week;<sup>6</sup> and

*Second*, plaintiff’s principal, main, major or most important duty was the performance of work requiring advanced knowledge in a field of science or learning.<sup>7</sup>

The term “advanced knowledge” means work that is predominantly intellectual in character, and that requires the consistent exercise of discretion and judgment. Advanced knowledge is customarily acquired by a prolonged course of specialized intellectual instruction.

**Notes on Use**

1. Insert the bracketed language if more than one claim is submitted to the jury.
2. Compensation may also be on a fee basis. If the case involves a fee basis issue, this instruction should be modified accordingly. *See* 29 C.F.R. § 541.605. The salary basis and minimum salary requirements are inapplicable to certain employees engaged in teaching or the practice of law or medicine. *See* 29 C.F.R. § 541.303 and 304.
3. Insert the number of the “salary basis” instruction.
4. The \$684 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if plaintiff is compensated biweekly on a salary basis of \$1,368, semimonthly on a salary basis of \$1,482, or monthly on a salary basis of \$2,964. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b).
5. Or \$455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal Government; or \$380 per week, if employed in American Samoa by employers other than the Federal Government.
6. Exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).

7. “Field of science or learning” includes traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status. 29 C.F.R. § 541.301(c). This instruction should be modified, as appropriate, for employees engaged in teaching or the practice of law or medicine. *See* 29 C.F.R. § 541.303 and 304.

### **Committee Comments**

As more fully discussed in 16.00 Overview, “Misclassification Cases,” FLSA exemptions can involve issues of law and fact. “Disputes regarding the nature of an employee's duties are questions of fact, but the ultimate question whether an employee is exempt under the FLSA is an issue of law.” *Jarrett v. ERC Properties, Inc.*, 211 F.3d 1078, 1081 (8th Cir. 2000) (citing *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (“The question of how the respondents spent their time working...is a question of fact. The question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law . . . .”)). Although the ultimate question is a legal one, the precise nature of an individual’s duties may involve disputed issues of fact. Instruction 16.07 is intended for use where the Court determines that one or more specific, disputed facts are material to the determination of exempt status. Because the Eighth Circuit has held that the ultimate question of exempt status is a legal determination, the Committee does not recommend submitting the ultimate question of exempt status to the jury. Nonetheless, a court may decide to submit the ultimate issue to the jury on an advisory basis, or the parties may agree to submit the ultimate issue to the jury. *See Karlson v. Action Process Service & Private Investigations, LLC*, 860 F.3d 1089 (8th Cir. 2017) (discussing appellate review in the analogous context of employee/independent contractor). To assist the Court and parties with the applicable legal standards in such circumstances, this Instruction provides the elements of the learned professional exemption.

A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee’s salary and duties meet the requirements of the regulations. 29 C.F.R. § 541.2.

The following are types of positions that may qualify for the learned professional exemption: registered or certified medical technologists, registered nurses, dental hygienists, physicians’ assistants, certified public accountants, executive chefs and sous chefs, certified athletic trainers, and licensed funeral directors and embalmers. 29 C.F.R. § 541.301(e).

The following are types of positions that typically do not qualify for the learned professional exemption: licensed practical nurses and other similar health care employees, accounting clerks, bookkeepers and other employees who normally perform a great deal of routine work, cooks who predominantly perform routine mental, manual, mechanical or physical work, and paralegals and legal assistants. 29 C.F.R. § 541.301(e).

**16.63 ELEMENTS OF DEFENSE: CREATIVE PROFESSIONAL EXEMPTION  
[FOR USE IN LIMITED CIRCUMSTANCES - SEE COMMITTEE COMMENT]**

Your verdict must be for defendant [insert name] and against plaintiff [insert name] [on plaintiff's FLSA claim]<sup>1</sup> if all of the following elements have been proved:

*First*, plaintiff was compensated on a salary basis<sup>2</sup> as defined in Instruction No. \_\_\_<sup>3</sup> at a rate not less than \$684<sup>4,5</sup> per week;<sup>6</sup> and

*Second*, plaintiff's principal, main, major or most important duty was the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.<sup>7</sup>

**Notes on Use**

1. Insert the bracketed language if more than one claim is submitted to the jury.
2. Compensation may also be on a fee basis. If the case involves a fee basis issue, this instruction should be modified accordingly. *See* 29 C.F.R. § 541.605.
3. Insert the number of the "salary basis" instruction.
4. The \$684 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if plaintiff is compensated biweekly on a salary basis of \$1,368, semimonthly on a salary basis of \$1,482, or monthly on a salary basis of \$2,964. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b).
5. Or \$455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal Government; or \$380 per week, if employed in American Samoa by employers other than the Federal Government.
6. Exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).
7. Recognized fields of artistic and creative endeavor include music, writing, acting and the graphic arts. 29 C.F.R. § 541.302(b).

**Committee Comments**

As more fully discussed in 16.00 Overview, "Misclassification Cases," FLSA exemptions can involve issues of law and fact. "Disputes regarding the nature of an employee's duties are questions of fact, but the ultimate question whether an employee is exempt under the FLSA is an

issue of law.” *Jarrett v. ERC Properties, Inc.*, 211 F.3d 1078, 1081 (8th Cir. 2000) (citing *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (“The question of how the respondents spent their time working... is a question of fact. The question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law . . .”). Although the ultimate question is a legal one, the precise nature of an individual’s duties may involve disputed issues of fact. Instruction 16.07 is intended for use where the Court determines that one or more specific, disputed facts are material to the determination of exempt status. Because the Eighth Circuit has held that the ultimate question of exempt status is a legal determination, the Committee does not recommend submitting the ultimate question of exempt status to the jury. Nonetheless, a court may decide to submit the ultimate issue to the jury on an advisory basis, or the parties may agree to submit the ultimate issue to the jury. *See Karlson v. Action Process Service & Private Investigations, LLC*, 860 F.3d 1089 (8th Cir. 2017) (discussing appellate review in the analogous context of employee/independent contractor). To assist the Court and parties with the applicable legal standards in such circumstances, this Instruction provides the elements of the creative professional exemption.

A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee’s salary and duties meet the requirements of the regulations. 29 C.F.R. § 541.2.

The performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor is distinguished from routine mental, manual, mechanical or physical work. The exemption does not apply to work that can be produced by a person with general manual or intellectual ability and training. The requirement of “invention, imagination, originality or talent” distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. The duties of employees vary widely, and may depend on the extent of the invention, imagination, originality or talent exercised by the employee. 29 C.F.R. § 541.302(a) and (b).

The following are types of positions that may qualify for the creative professional exemption: actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short-story writers and screen-play writers who choose their own subjects and hand in a finished piece of work to their employers; and persons holding the more responsible writing positions in advertising agencies. 29 C.F.R. § 541.302(c).

Journalists may satisfy the duties requirement for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent; performing on the air radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator. 29 C.F.R. § 541.302(d).

The creative professional requirement generally is not met by a person who is employed as a copyist, as an animator of motion-picture cartoons, or as a retoucher of photographs. 29 C.F.R. § 541.302(c). Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect, organize and record information that is routine

or already public, or if they do not contribute a unique interpretation or analysis to a news product. *See* 29 C.F.R. § 541.302(d).

**16.64 ELEMENTS OF DEFENSE: COMPUTER EMPLOYEE EXEMPTION**  
**[FOR USE IN LIMITED CIRCUMSTANCES - SEE COMMITTEE COMMENT]**

Your verdict must be for defendant [insert name] and against plaintiff [insert name] [on plaintiff's FLSA claim]<sup>1</sup> if all of the following elements have been proved:

*First*, plaintiff was compensated on [(a salary basis<sup>2</sup> as defined in Instruction No. \_\_\_<sup>3</sup> at a rate not less than \$684<sup>4, 5</sup> per week<sup>6</sup>) or (at a rate not less than \$27.63 per hour)];<sup>7</sup> and

*Second*, plaintiff was employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field; and

*Third*, plaintiff's principal, main, major or most important duty consisted of at least one of the following:

- A. The application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications;
- B. The design, development, documentation, analysis, creation, testing, modification of computer systems or programs, including prototypes, based on and related to use or system design specifications;
- C. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- D. A combination of the aforementioned duties, the performance of which requires the same level of skills.

**Notes on Use**

1. Insert the bracketed language if more than one claim is submitted to the jury.

2. Compensation may also be on a fee basis. If the case involves a fee basis issue, this instruction should be modified accordingly. *See* 29 C.F.R. § 541.605.

3. Insert the number of the “salary basis” instruction.

4. The \$684 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if plaintiff is compensated biweekly on a salary basis of \$1,368, semimonthly on a salary basis of \$1,482, or monthly on a salary basis of \$2,964. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b).

5. Or \$455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal Government; or \$380 per week, if employed in American Samoa by employers other than the Federal Government.

6. Exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).

7. Select the bracketed language that corresponds to plaintiff’s compensation.

### **Committee Comments**

As more fully discussed in 16.00 Overview, “Misclassification Cases,” FLSA exemptions can involve issues of law and fact. “Disputes regarding the nature of an employee's duties are questions of fact, but the ultimate question whether an employee is exempt under the FLSA is an issue of law.” *Jarrett v. ERC Properties, Inc.*, 211 F.3d 1078, 1081 (8th Cir. 2000) (citing *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (“The question of how the respondents spent their time working... is a question of fact. The question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law . . . .”)). Although the ultimate question is a legal one, the precise nature of an individual’s duties may involve disputed issues of fact. Instruction 16.07 is intended for use where the Court determines that one or more specific, disputed facts are material to the determination of exempt status. Because the Eighth Circuit has held that the ultimate question of exempt status is a legal determination, the Committee does not recommend submitting the ultimate question of exempt status to the jury. Nonetheless, a court may decide to submit the ultimate issue to the jury on an advisory basis, or the parties may agree to submit the ultimate issue to the jury. *See Karlson v. Action Process Service & Private Investigations, LLC*, 860 F.3d 1089 (8th Cir. 2017) (discussing appellate review in the analogous context of employee/independent contractor). To assist the Court and parties with the applicable legal standards in such circumstances, this Instruction provides the elements of the computer employee exemption.

## 16.70 DAMAGES

If you find in favor of plaintiff under Instruction No. \_\_\_\_\_ [and you find against defendant under Instruction No. \_\_\_\_\_ ],<sup>1</sup> you must award plaintiff damages in the amount that plaintiff should have been paid in [minimum wages and/or overtime compensation], less what defendant actually paid plaintiff.

[The minimum wage amount that should have been paid is the number of hours worked in each workweek up to 40 hours, times the minimum wage applicable to that workweek, as set forth in Instruction No. \_\_\_\_\_ .]<sup>2</sup>

[The overtime compensation amount that should have been paid is the number of hours worked in excess of 40 hours in each workweek, times the regular rate for that workweek, times one and one-half, as set forth in Instruction No. \_\_\_\_\_ .]<sup>3</sup>

You must calculate [this amount] [these amounts] separately [for each plaintiff] for each workweek.

In determining the amount of damages, you may not include or add to the damages any sum for the purpose of punishing defendant.

### Notes on Use

1. Insert the bracketed language in the limited circumstances in which the Court has submitted an exemption defense to the jury. *See* Committee Comments to Instructions 16.60-64.
2. Insert the bracketed language if the plaintiff claims damages for a minimum wage violation.
3. Insert the bracketed language if the plaintiff claims damages for an overtime pay violation.

## **16.71 DAMAGES (ONLY HOURS WORKED SUBMITTED TO JURY)<sup>1</sup>**

If you find in favor of plaintiff under Instruction No. \_\_\_\_\_, [and you find against defendant under Instruction No. \_\_\_\_\_ ],<sup>2</sup> you must determine the number of hours worked in each workweek.

### **Notes on Use**

1. Use this instruction only where the parties have agreed or the court determines that the jury will be asked to decide the number of hours worked, but will not be asked to calculate damages. Such an instruction may be appropriate where, for example, the appropriate rate of pay is not in dispute and damages may be calculated as a matter of law once the number of hours worked is determined by the jury.

2. Insert the bracketed language in the limited circumstances in which the Court has submitted an exemption defense to the jury. *See* Committee Comments to Instructions 16.60-64.

**16.80 GENERAL VERDICT FORM**

VERDICT

**Note:** Complete the following paragraph by writing in the name required by your verdict.

1. On the [(minimum wage) or (overtime)]<sup>1</sup> claim of plaintiff [\_\_\_\_\_] <sup>2</sup> against defendant [\_\_\_\_\_] <sup>3</sup> we find in favor of:

\_\_\_\_\_  
(Plaintiff \_\_\_\_\_) or (Defendant \_\_\_\_\_)

**Note:** Answer Question 2 only if the above finding is in favor of plaintiff [\_\_\_\_\_] <sup>2</sup>. If the above finding is in favor of defendant [\_\_\_\_\_] <sup>3</sup>, have your foreperson sign and date the form because you have completed your deliberations on this claim.

[2. Has it been proved that the defendant’s failure to pay [minimum wage and/or overtime] was willful as that term is defined in Instruction \_\_\_\_\_? <sup>4</sup>

\_\_\_\_\_Yes \_\_\_\_\_No

**Note:** If you answered yes to Question 2, you should award damages for the period from [\_\_\_\_\_ to \_\_\_\_\_]. <sup>5</sup> If you answered no to Question 2, you should award damages for the period from [\_\_\_\_\_ to \_\_\_\_\_]. <sup>6</sup> <sup>7</sup>

3. We find that the plaintiff should be awarded damages in the amount of:  
\$\_\_\_\_\_ (stating the amount)

\_\_\_\_\_  
Foreperson

Dated: \_\_\_\_\_

### Notes on Use

1. This phrase should be used when the plaintiff submits multiple claims to the jury.
2. Insert the name of the plaintiff.
3. Insert the name of the defendant.
4. The number or title of the instruction defining “willfulness” should be inserted. *See* Model Instruction 16.22.
5. Insert the date on which the plaintiff’s cause of action accrued, or the date three years prior to the date on which the plaintiff filed his or her complaint, whichever is later. Insert the date the instructions are submitted to the jury as the final date.
6. Insert the date on which the plaintiff’s cause of action accrued, or the date two years prior to the date on which the plaintiff filed his or her complaint, whichever is later. Insert the date the instructions are submitted to the jury as the final date.
7. This question is used when the parties dispute the “willfulness” of the defendant’s actions. When the parties do not dispute “willfulness,” Question 2 may be eliminated. Question 3 should become Question 2 with the following recommended language:

For the period from \_\_\_\_\_ to \_\_\_\_\_, we find that the plaintiff should be awarded damages in the amount of:

\$\_\_\_\_\_.(stating the amount)

**16.90 SPECIAL VERDICT FORM: INTERROGATORIES (DAMAGES)**

Your verdict in this case will be determined by your answers to the following questions. Make sure that you read the questions and notes carefully because they explain the order in which the questions should be answered and what questions may be skipped.

Question No. 1: Was plaintiff employed by defendant on or after \_\_\_\_\_?

\_\_\_\_\_Yes                      \_\_\_\_\_No  
(Mark an “X” in the appropriate space)]

Question No. 2: In plaintiff’s work for defendant, was plaintiff [engaged in commerce or in the production of goods for commerce] [employed by an enterprise engaged in commerce or the production of goods for commerce that had annual gross sales of at least \$500,000]?

\_\_\_\_\_Yes                      \_\_\_\_\_No  
(Mark an “X” in the appropriate space)]

Question No. 3: Did defendant fail to pay plaintiff minimum wage [and/or overtime pay] for all hours worked by plaintiff?

\_\_\_\_\_Yes                      \_\_\_\_\_No  
(Mark an “X” in the appropriate space)

**Note:** If you answered “No” to *any* of the above questions, you should have your foreperson sign and date this form and turn it in because you have completed your deliberations on this claim. If you answered “Yes” to all of the above questions, please proceed to Question No. 4.

Question No. 4: Do you find for defendant under Instruction No. \_\_\_\_\_?

[Exemption]

\_\_\_\_\_Yes                      \_\_\_\_\_No  
(Mark an “X” in the appropriate space)

**Note:** If you answered “Yes” to Question No. 4, you should have your foreperson sign and date this form because you have completed your deliberations on this claim. If you answered “No” to Question No. 4, please proceed to Question No. 5. ]

Question No. 5: For each workweek on the attached table, state plaintiff’s hours worked, as that term is defined in Instruction No. \_\_\_\_.

\_\_\_\_\_  
(Number of hours worked)

Question No. 6: For each workweek on the attached table, state the amount that plaintiff should have been paid in minimum wage, as set forth in Instruction No. \_\_\_\_.

\_\_\_\_\_  
(State the amount)

Question No. 7: For each workweek on the attached table, state the amount that plaintiff should have been paid in overtime compensation, as set forth in Instruction No. \_\_\_\_.

\_\_\_\_\_  
(State the amount)

Question No. 8: For each workweek in the attached table, state the amount of wages that you find plaintiff was actually paid by defendant.

\_\_\_\_\_  
(State the amount)

Question No. 9: For each of the periods set forth below, state the amount of plaintiff’s damages as that term is defined in Instruction No. \_\_\_\_:



**16.91 SPECIAL VERDICT FORM: INTERROGATORIES (HOURS WORKED)**

Your verdict in this case will be determined by your answers to the following questions. Make sure that you read the questions and notes carefully because they explain the order in which the questions should be answered and what questions may be skipped.

Question No. 1: Was plaintiff employed by defendant on or after \_\_\_\_\_?

\_\_\_\_\_Yes                      \_\_\_\_\_No  
(Mark an "X" in the appropriate space)

Question No. 2: In plaintiff's work for defendant, was plaintiff [engaged in commerce or in the production of goods for commerce] [employed by an enterprise engaged in commerce or the production of goods for commerce that had annual gross sales of at least \$500,000]?

\_\_\_\_\_Yes                      \_\_\_\_\_No  
(Mark an "X" in the appropriate space)

Question No. 3: Did defendant fail to pay plaintiff minimum wage [and/or overtime pay] for all hours worked by plaintiff?

\_\_\_\_\_Yes                      \_\_\_\_\_No  
(Mark an "X" in the appropriate space)

**Note:** If you answered "No" to *any* of the above questions, you should have your foreperson sign and date this form because you have completed your deliberations on this claim. If you answered "Yes" to *each* of the above questions, please proceed to Question No. 4.

Question No. 4: Do you find for defendant under Instruction No. \_\_\_\_\_?  
[Exemption]

\_\_\_\_\_Yes                      \_\_\_\_\_No  
(Mark an "X" in the appropriate space)



**16.92 SPECIAL VERDICT FORM: EMPLOYEE STATUS**

**Note:** Complete each of the following paragraphs by marking the answer required by your findings. You must answer each of the following questions:

Question No. 1: [Insert material, disputed question of fact] [*E.g.*, Who set the means and manner in which plaintiff performed his/her work?].

[Response A] \_\_\_\_\_ [Response B] \_\_\_\_\_  
(Mark an “X” in the appropriate space)

Question No. 2: [Insert material, disputed question of fact] [*E.g.*, Did plaintiff have an opportunity to make a profit?].

[Response A] \_\_\_\_\_ [Response B] \_\_\_\_\_  
(Mark an “X” in the appropriate space)]

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Foreperson

---

Date

**Notes on Use**

1. Use this special verdict form in conjunction with Instruction No. 16.06 and only where there are one or more disputed material facts with respect to the Court’s determination of employee status. *See* 16.00 Overview, “Employee v. Independent Contractor” and Committee Comment to Instruction 16.06. Where feasible, the Committee suggests that questions be phrased in such a manner that they may be answered with alternative responses, such as Yes/No or Plaintiff/Defendant.

### 16.93 SPECIAL VERDICT FORM: EXEMPT STATUS

**Note:** Complete each of the following paragraphs by marking the answer required by your findings. You must answer each of the following questions:

Question No. 1: [Insert material, disputed question of fact] [*E.g.*, Did plaintiff have authority to hire and fire other employees?].

[Response A] \_\_\_\_\_ [Response B] \_\_\_\_\_

(Mark an “X” in the appropriate space)

Question No. 2: [Insert material, disputed question of fact] [*E.g.*, Were plaintiff’s suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees given particular weight?].

[Response A] \_\_\_\_\_ [Response B] \_\_\_\_\_

(Mark an “X” in the appropriate space)

\_\_\_\_\_  
Foreperson

\_\_\_\_\_  
Date

#### Notes on Use

1. Use this special verdict form in conjunction with Instruction No. 16.07 and only where there are one or more disputed material facts with respect to the Court’s determination of exempt status. *See* 16.00 Overview, “Misclassification Cases” and Committee Comment to Instruction 16.07. Where feasible, the Committee suggests that questions be phrased in such a manner that they may be answered with alternative responses, such as Yes/No or Plaintiff/Defendant.

## 17. ADMIRALTY AND MARITIME

### 17.00 OVERVIEW

The territorial bounds of the district courts of the Eighth Circuit include large portions of the Missouri and Mississippi Rivers, the longest inland river system in the United States. On this river system moves most of the inland waterborne commerce in America. The jurisprudence of the Eighth Circuit has generated opinions on many admiralty and maritime disputes and issues. To facilitate the submission of such issues to juries in federal judicial actions, the jury instructions that follow this introduction are submitted.

Admiralty and maritime jury trials occur in actions brought by employees against employers and by invitees against the owners and operators of business premises. There are issues unique and issues common to each type of claim. The rules of decision for such cases may be found in the rich maritime common law precedents of the federal courts and in Congressional legislation.

#### General Maritime Law

The admiralty and maritime common law of the courts of the United States provides rules of decision for claims brought by non-employee invitees on vessels on navigable waters. *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 814-16 (2001); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959); *The Max Morris v. Curry*, 137 U.S. 1, 14 (1890). Such claimants may bring a claim for negligence, subject to a reduction of damages (not a complete defense) for comparative negligence or fault. *Kermarec*, 358 U.S. at 629-30.

We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case.

*Id.* at 632. However, admiralty law does not provide a non-employee member a claim for unseaworthiness of the subject vessel. *Id.* at 629; *Smith v. Harbor Towing & Fleeting, Inc.*, 910 F.2d 312 (5th Cir. 1990).

The Supreme Court stated:

It is settled that the general maritime law imposes duties to avoid unseaworthiness and negligence that non-fatal injuries caused by the breach of either duty are compensable and that death caused by breach of the duty of seaworthiness is also compensable.

*Garris*, 532 U.S. at 813 (citations omitted). The Supreme Court recognized for the first time in *Garris* a wrongful death claim under general maritime law based upon negligence. *Id.*

More generally, the Supreme Court has held, “when a statute resolves a particular issue, we have held that the general maritime law must comply with that resolution.” *Id.* at 817.

Further, “even as to seamen, we have held that general maritime law may provide wrongful-death actions predicated on duties beyond those that the Jones Act imposes.” *Id.* at 818.

### **Suits by Employees**

Employee claimants are immediately faced with determining whether to bring suit for compensatory damages under general maritime law, the Jones Act, or to seek workers’ compensation under the Longshore and Harbor Workers’ Compensation Act (LHWCA) or the applicable state’s workers’ compensation laws. *Johnson v. Cont’l Grain Co.*, 58 F.3d 1232, 1235 (8th Cir. 1995) (a Jones Act seaman “is excluded from coverage under the LHWCA and vice versa”). A worker covered by the LHWCA may not recover on a theory of unseaworthiness of the vessel. *Id.*; *see also Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 488 (2005) (“Thus the Jones Act and the LHWCA are complementary regimes that work in tandem: The Jones Act provides tort remedies to *sea*-based maritime workers, while the LHWCA provides workers’ compensation to *land*-based maritime employees.”).

### **The Jones Act**

The Jones Act provides:

A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

46 U.S.C. § 30104 (Jan. 28, 2008).

The Jones Act allows only to a seaman a negligence action for either personal injury or wrongful death against the seaman’s employer. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995); *Britton v. U.S.S. Great Lakes Fleet, Inc.*, 302 F.3d 812, 816 (8th Cir. 2002) (quoting *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 441 (2001)); *Shows v. Harber*, 575 F.2d 1253, 1254 (8th Cir. 1978).

The reference in the Jones Act to laws regulating recovery by railway employees incorporates the Federal Employers’ Liability Act, 45 U.S.C. § 51, *et seq.* (FELA), and doctrines of negligence and comparative negligence and abolishes the defense of assumption of the risk.

*Scindia Steam Navigation Co. v. DeLos Santos*, 451 U.S. 156, 166 n.13 (1981); *Ballard v. River Fleets, Inc.*, 149 F.3d 829, 831 n.3 (8th Cir. 1998); *Miller v. Patton-Tully Transp. Co.*, 851 F.2d 202, 205 (8th Cir. 1988).

The broad scope of Jones Act liability has been described thus:

Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the

evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or in part" to its negligence.

*Clark v. Cent. States Dredging Co.*, 430 F.2d 63, 66 (8th Cir. 1970) (quoting *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 506-07 (1957)); see also *Alholm v. Am. Steamship Co.*, 144 F.3d 1172, 1178 (8th Cir. 1998).

The Jones Act is to be liberally construed "to accomplish its beneficent purposes." *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 790 (1949).

The Fifth Circuit in *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 339 (5th Cir. 1997) (en banc), repudiated its earlier cases to the contrary, and held that under the Jones Act, an employer has the duty to act with ordinary prudence to provide its employees a safe work environment, that is, to act as would a reasonable employer in like circumstances. The court also held that a seaman is obligated under the Jones Act to act with ordinary prudence under similar circumstances to protect himself from the negligence of his employer. *Id.* See *5th Cir. Civ. Jury Instr.* 4.7 (West 2009).

The issues of actionable negligence and causation under FELA received attention when the Supreme Court decided *CSX Transportation, Inc. v. McBride*, 131 S.Ct. 2630 (2011). The question presented to the Court was whether the Federal Employers' Liability Act requires proof of proximate causation. *Id.* at 2634. This is important to Jones Act cases because the Jones Act incorporates the standards of FELA in seamen's personal injury suits. 46 U.S.C. § 30104. The FELA statutory standard uses the language:

for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . equipment.

45 U.S.C. § 51.

In *CSX Transportation, Inc.*, the Supreme Court maintained its earlier ruling in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957). Justice Ginsburg, writing for the Court in *CSX*, summarized the Court's holding:

[W]e conclude that [FELA] does not incorporate "proximate cause" standards developed in nonstatutory common-law tort actions. The charge proper in FELA cases, we hold, simply tracks the language Congress employed, informing juries that a defendant railroad caused or contributed to a plaintiff employee's injury if the railroad's negligence played any part in bringing about the injury.

*Id.* at 2634. Also of note in the *CSX* opinion are the statements that it is unnecessary to use the label “proximate cause” when instructing the jury, *id.* at 2641, and that the following language is also appropriate when instructing the jury on causation in a FELA case:

Juries in such cases are properly instructed that a defendant railroad “caused or contributed to” a railroad worker’s injury “if [the railroad’s] negligence played a part--no matter how small--in bringing about the injury.”

*Id.* at 2644.

### **Unseaworthiness**

The Eighth Circuit described the claim of unseaworthiness:

“Unseaworthiness is a claim under general maritime law based on the vessel owner’s duty to ensure that the vessel is reasonably fit to be at sea.” It is a cause of action distinct from Jones Act negligence, which can be found without a corresponding finding of unseaworthiness.

The warranty of seaworthiness . . . requires that the ship, including the hull, decks, and machinery, “be reasonably fit for the purpose for which they are used.” Examples of conditions that can render a vessel unseaworthy include defective gear, appurtenances in disrepair, insufficient manpower, unfit crew, and improper methods of loading or stowing cargo. The burden of proof in demonstrating unseaworthiness rests on the plaintiff, who must show by a preponderance of the evidence that the unseaworthiness was a proximate cause of the injury. Under these circumstances, proximate cause means: “first, that the unseaworthiness . . . played a substantial part in bringing about or actually causing the injury; and two, that the injury was either a direct result of a reasonable probable consequence of the unseaworthiness.”

*Britton v. U.S.S. Great Lakes Fleet, Inc.*, 302 F.3d 812, 818 (8th Cir. 2002) (citations omitted).

### **Seaman**

To recover from his or her employer under either the Jones Act or general maritime law, a plaintiff must be a seaman. *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 341-42 (1991). The Jones Act does not define “seaman.” *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 487 (2005). Whether a worker is a seaman “is usually a fact-intensive inquiry properly left to the jury to resolve.” *Johnson v. Cont’l Grain Co.*, 58 F.3d 1232, 1235 (8th Cir. 1995). In determining who are and who are not Jones Act seamen, Supreme Court opinions and those of federal courts of appeals have distinguished between maritime workers whose employment is land-based and those whose employment is vessel-based. A “seaman” is an employee whose “duties must contribute to the function of the vessel or to the accomplishment of its mission, and the worker must have a connection to a vessel . . . (or an identifiable group of vessels) that is substantial in terms of both its duration and nature.” *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368; *see also Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554 (1997). Stated another way,

A finder of fact can conclude that a workman was a member of a crew of a vessel if:

(1) the injured workman performed at least a substantial part of his work on the vessel or was assigned permanently to the vessel; and

(2) the capacity in which the workman was employed and the duties that he performed contributed to the function of the vessel or to accomplishment of its mission.

*Miller v. Patton-Tully Transp. Co.*, 851 F.2d 202, 204 (8th Cir. 1988) (quoting *Slatton v. Martin K. Eby Constr. Co.*, 506 F.2d 505, 510 (8th Cir. 1974)); *see also Johnson*, 58 F.3d at 1235-36.

A Jones Act “seaman” need not be assigned to a specific vessel; he or she retains “seaman” status if assigned to a group of Jones Act vessels under common ownership or control. *Harbor Tug & Barge Co.*, 520 U.S. at 556. Such a fleet of vessels “must take their direction from one identifiable central authority.” *Johnson*, 58 F.3d at 1236 (quoting *Reeves v. Mobile Dredging & Pumping Co.*, 26 F.3d 1247, 1258 (2d Cir. 1994)).

In determining whether an employee is a “seaman,” a court must look not only to the nature of the activity in which the claimant was injured, but also in the overall nature of the employee’s work, whether he or she performs a substantial amount of work on board a “vessel,” with regularity and continuity. In *Chandris*, the Supreme Court established a guideline from which courts can vary depending upon the circumstances of the case: “A worker who spends less than about 30 percent of his time in the service of a vessel . . . should not qualify as a seaman under the Jones Act.” 515 U.S. at 371.

There is no such guideline, however, for “determining whether an injured worker is substantially connected to a vessel.” *Lara v. Harvey’s Iowa Mgmt. Co.*, 109 F. Supp.2d 1031, 1034 (S.D. Iowa 2000). An injured worker might be a Jones Act seaman without having worked on board the vessel when it was in transit. *Id.* at 1036. Further, an employer’s consideration of an injured worker as a Jones Act “seaman” by the payment of maritime “cure” may be relevant in determining seaman status. *Id.* “[T]he determinative factor is the employee’s connection to a vessel, not the employee’s particular job.” *Johnson*, 58 F.3d at 1236.

### Vessel

An employee-claimant can be a “seaman” under the Jones Act only if he or she is assigned to a vessel. The definition of “vessel” for admiralty and maritime law purposes is contained in 1 U.S.C. § 3:

The word “vessel” includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

1 U.S.C. § 3.

The Supreme Court applied a reasonableness standard to this definition in *Lozman v. City of Riviera Beach, Fla.*, 133 S.Ct. 735, 2013 WL 149633 (Jan. 15, 2013) (ruling that petitioner’s non-self-propelled floating home was not a “vessel”):

[I]n our view a structure does not fall within the scope of this statutory phrase unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.

133 S.Ct. At 741. In stating this, the court did not part company with its earlier construction of the statutory definition that requires that the subject structure be practicably capable of water transportation. *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 496 (2005) (“The question remains in all cases whether the watercraft’s use ‘as a means of transportation on water’ is a practical possibility or merely a theoretical one.”). “Simply put, a watercraft is not ‘capable of being used’ for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement.” *Id.* at 494.

In construing “vessel,” the court in *Stewart* rejected the relevance of the “in motion” requirement, suggested by *Digiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir. 1992) (en banc), in determining whether a watercraft qualifies as a vessel. *Stewart*, 543 U.S. at 495. Cases applying such a requirement must now be viewed with great care. *E.g.*, *Tonnesen v. Yonkers Contracting Co.*, 82 F.3d 30, 36 (2d Cir. 1996); *Pavone v. Miss. Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995); *Digiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119, 1123 (1st Cir. 1992) (en banc); *Ellender v. Kiva Constr. Eng’g, Inc.*, 909 F.2d 803, 806 (5th Cir. 1990); *Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504, 506 (11th Cir. 1990).

### **Longshore and Harbor Workers’ Compensation Act (LHWCA)**

The Supreme Court has described the facets of the LHWCA generally:

[T]he Longshore and Harbor Workers’ Compensation Act (LHWCA) . . . , 33 U.S.C. § 901 et seq., provides nonseaman maritime workers . . . with no-fault workers’ compensation claims (against their employer, § 904(b)) and negligence claims (against the vessel, § 905(b)) for injury and death. As to those two defendants, the LHWCA expressly pre-empts all other claims, §§ 905(a), (b) . . . , but it expressly preserves all claims against third parties [(those who neither employed the claimant nor owned the vessel involved in the incident)], §§ 933(a), (i).

*Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 818 (2001).

### **§ 905(b) of LHWCA**

Injured maritime workers who are not Jones Act seamen may be able to recover under the LHWCA. Section 905(b) allows a longshore worker to seek compensation for injuries caused by the negligence, but not the unseaworthiness, of a vessel:<sup>1</sup>

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party in accordance with the provisions of § 933 of this title, and the employer shall not be liable

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<sup>1</sup> The definition of “vessel” under the LHWCA should be considered the same as that under the Jones Act. *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 491 (2005) (“at the time Congress enacted the Jones Act and the LHWCA in the 1920’s, it was settled that § 3 defined the term ‘vessel’ for purposes of those statutes.”).

to the vessel for such damages directly or indirectly . . . . The liability of the vessel under the subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. § 905(b).

Section 905(b) does not define the bounds of actionable negligence. *Reed v. ULS Corp.*, 178 F.3d 988, 990-91 (8th Cir. 1999). The Eighth Circuit has recognized that the owner of a vessel owes longshoremen three duties:

The first, which courts have come to call the “turnover duty,” related to the condition of the vessel upon the commencement of stevedoring operations . . . . The second duty, applicable once stevedoring operations have begun, provides that a vessel owner must exercise reasonable care to prevent injuries to longshoremen in areas that remain under the “active control of the vessel.” . . . The third duty, called the “duty to intervene,” concerns the vessel’s obligations with regard to cargo operations in areas under the principal control of the independent stevedore.

*Id.* at 991 (citing *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92, 98 (1994) and *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 167 (1981)).

However, under the statute such a claim is denied to a longshore worker who was engaged in repair work. *Johnson*, 58 F.3d at 1237. Section 905(b) also provides in part:

If such person was employed to provide shipbuilding, repairing, or breaking services and such person’s employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person’s employer (in any capacity including as the vessel’s owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer.

33 U.S.C. § 905(b).

### **§ 933 of LHWCA**

Under § 933 of the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 933, a worker or the representative of his or her estate may seek damages for personal injuries against a non-employer, non-vessel-owner, third party. Also, under § 933 an employer has the right to recoup amounts paid under the LHWCA to the employee or the representative of the employee’s estate in such a judicial action. *See* 33 U.S.C. § 933.

### **Wrongful Death**

A general maritime cause of action for wrongful death due to unseaworthiness was recognized in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). *See Spiller v. Thomas M. Lowe, Jr.*, 466 F.2d 903, 905 (8th Cir. 1972). The United States Supreme Court has

recognized a claim under the general maritime law for the wrongful death of a non-seaman due to negligence. See *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811 (2001).

### **Punitive Damages**

Punitive damages are not recoverable by seamen<sup>2</sup> in personal injury claims under the Jones Act or under general maritime law. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 31 (1990) (a seaman's recovery under the Jones Act or general maritime law is limited to pecuniary losses); *Alholm v. Am. Steamship Co.*, 144 F.3d 1172, 1180-81 (8th Cir. 2002); *Horsley v. Mobile Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994) (applying *Miles* to hold that punitive damages are not recoverable under general maritime law); *Miller v. Am. Present Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir. 1993) (applying *Miles* to hold that punitive damages are not recoverable under the Jones Act).

### **Maintenance and Cure**

General maritime law requires a shipowner to pay an injured seaman maintenance and cure irrespective of any finding of any liability under the Jones Act or general maritime law; this duty arises merely under the employment contract. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527 (1938); *Britton v. U.S.S. Great Lakes Fleet, Inc.*, 302 F.3d 812, 815 (8th Cir. 2002); *Wactor v. Spartan Transp. Corp.*, 27 F.3d 347, 351-52 (8th Cir. 1994); *Stanislawski v. Upper River Servs., Inc.*, 6 F.3d 537, 540 (8th Cir. 1993).

A seaman's entitlement to maintenance and cure is independent of entitlement to damages for negligence under the Jones Act. *Britton*, 302 F.3d at 816. The recovery of compensatory damages, however, cannot duplicate moneys already recovered as maintenance and cure. *Stanislawski*, 6 F.3d at 540. Maintenance is an amount sufficient to provide the sick or injured seaman with food and lodging comparable to that he or she would have received on his or her vessel. *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943, 946 (9th Cir. 1986). Cure is reasonable medical treatment and services needed during the seaman's recovery. *Calmar S.S. Corp. v. Taylor*, 303 U.S. at 528.

Maintenance and cure might not be available, if the seaman was required to provide preemployment medical information and failed to do so or concealed material facts regarding the part of the plaintiff's body allegedly injured. *Britton*, 302 F.3d at 816; *Wactor*, 27 F.3d at 352. Before maintenance and cure is denied, "the employer must show that the nondisclosed medical information was material to its decision to hire." *Britton*, 302 F.3d at 816. Maintenance and cure also may be denied if the seaman personally did not incur actual expenses for food and lodging. *Hall v. Noble Drilling (U.S.) Inc.*, 242 F.3d 582, 588 (5th Cir. 2001).

### **Mitigation of Damages**

An injured seaman or other maritime worker must mitigate his or her damages by obtaining reasonable medical treatment. See *Hagerty v. L & L Marine Serv., Inc.*, 788 F.2d 315,

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<sup>2</sup> Some cases have allowed the recovery of punitive damages to non-seamen in maritime cases. *In re Horizon Cruises Litigation*, 2000 WL 685365, \*5-9 (S.D.N.Y. 2000) (acknowledges split among courts); *contra In re Diamond B Marine Services, Inc.*, 2000 WL 222847, \*3 (E.D. La.)

319 (5th Cir. 1986); *Young v. Am. Export Isbrandtsen Lines, Inc.*, 291 F. Supp. 447, 450 (S.D. N.Y. 1968).

### **Comparative Fault and the Settling Defendant(s)**

The Fifth Circuit in *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 339 (5th Cir. 1997) (en banc), repudiated its earlier cases to the contrary, and held that under the Jones Act an employer has the duty to act with ordinary prudence to provide its employees a safe work environment, that is, to act as would a reasonable employer in like circumstances. The court also held that a seaman is obligated under the Jones Act to act with ordinary prudence under similar circumstances to protect himself from the negligence of his employer. *Id.* at 339. *See 5th Cir. Civ. Jury Instr.* 4.7 (West 2009).

In an admiralty action, when a plaintiff settles with one of several joint tortfeasors, a nonsettling tortfeasor is responsible to the injured party for the nonsettling tortfeasor's proportionate share of the fault or responsibility in causing the injury. *McDermott, Inc. v. AmClyde & River Don Castings, Ltd.*, 511 U.S. 202, 208-09 (1994). *See infra* Special Interrogatories, § 17.90.

## **CHAPTER 17 INSTRUCTIONS AND VERDICT FORM**

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## **17.01 EXPLANATORY: NEGLIGENCE CLAIM UNDER THE JONES ACT**

The law provides a remedy to any seaman who suffers personal injury in the course of [(his) (her)] employment due to the negligence of [(his) (her)] employer. The plaintiff has brought a personal injury claim in this action under the Jones Act.

The Jones Act, however, does not make the employer the accident insurer of the seaman. Negligence on the part of the employer is necessary to recover under the Act.

### **Committee Comments**

The Fifth Circuit in *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 339 (5th Cir. 1997) (en banc), repudiated its earlier cases to the contrary, and held that under the Jones Act an employer has the duty to act with ordinary prudence to provide its employees a safe work environment, that is, to act as would a reasonable employer in like circumstances. The court also held that a seaman is obligated under the Jones Act to act with ordinary prudence under similar circumstances to protect himself from the negligence of his employer. *Id.* at 339. *See 5th Cir. Civ. Jury Instr. 4.7* (West 2009).

## 17.02 EXPLANATORY: JONES ACT—CAUSATION

If you find from the evidence in the case that the defendant was negligent, then you must decide whether that negligence played any part in causing any injury or damages suffered by the plaintiff. Negligence may cause damage or injury, even if it operates in combination with the act of another or some natural cause, as long as the negligence played any part in causing the damage or injury.

[This standard is different from the causation required for a claim of unseaworthiness of a vessel. An unseaworthy condition of a vessel caused damage or injury if that unseaworthy condition played a substantial part in bringing about the injury or damage, the injury or damage was either a direct result of or a reasonably probable consequence of the condition, and except for the unseaworthy condition of the vessel the injury or damage would not have occurred. Unseaworthiness may be a cause of damage or injury, even though it operates in combination with the act of another or some natural cause, as long as the unseaworthiness contributes substantially to producing the damage or injury.]<sup>1</sup>

### Notes on Use

1. Use the bracketed paragraph, if a claim for unseaworthiness is submitted to the jury along with a Jones Act claim.

### Committee Comments

*See supra* Chapter 15 OVERVIEW and Model Instruction 15.40 n.9 (causation under FELA); *9th Cir. Civ. Jury Instr.* 7.4 and 7.7 (West 2007); *11th Cir. Civ. Jury Instr.* 6.1 (West 2005). *See also Alholm v. Am. Steamship Co.*, 144 F.3d 1172, 1180-81 (8th Cir. 1998).

The issues of actionable negligence and causation under FELA received attention when the Supreme Court decided *CSX Transportation, Inc. v. McBride*, 131 S.Ct. 2630 (2011). The question presented to the Court was whether the Federal Employers' Liability Act requires proof of proximate causation. *Id.* at 2634. This is important to Jones Act cases because the Jones Act incorporates FELA standards in seamen's personal injury suits. 46 U.S.C. § 30104. The FELA statutory standard uses the language:

for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . equipment.

45 U.S.C. § 51.

In *CSX*, the Supreme Court maintained its earlier ruling in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957). Justice Ginsburg, writing for the Court in *CSX*, summarized the Court's holding:

[W]e conclude that [ FELA] does not incorporate “proximate cause” standards developed in nonstatutory common-law tort actions. The charge proper in FELA cases, we hold, simply tracks the language Congress employed, informing juries that a defendant railroad caused or contributed to a plaintiff employee’s injury if the railroad’s negligence played any part in bringing about the injury.

*Id.* at 2634. Also of note in the *CSX* opinion are the statements that it is unnecessary to use the label “proximate cause” when instructing the jury, *id.* at 2641, and that the following language is also appropriate when instructing the jury on causation in a FELA case:

Juries in such cases are properly instructed that a defendant railroad “caused or contributed to” a railroad worker’s injury “if [the railroad’s] negligence played a part--no matter how small--in bringing about the injury.

*Id.* at 2644.

### **17.03 EXPLANATORY: UNSEAWORTHINESS CLAIM AGAINST EMPLOYER**

Under maritime law, every shipowner or operator owes to every seaman employed aboard the vessel the non-delegable duty to keep and maintain the vessel, and all decks and passageways, appliances, gear, tools, and equipment of the vessel, in a seaworthy condition at all times.

To be in a “seaworthy condition” means to be in a condition reasonably suitable and fit to be used for the purpose or the use for which the vessel was provided or intended. An unseaworthy condition may result from the lack of an adequate crew, the lack of adequate manpower to perform a particular task on the vessel, or the improper use of otherwise seaworthy equipment.

Liability for an unseaworthy condition does not in any way depend upon negligence or fault or blame. That is to say, the shipowner-operator is liable for all injuries and damages substantially caused by an unseaworthy condition existing at any time, even though the owner or operator may have exercised due care under the circumstances, and may have had no notice or knowledge of the unseaworthy condition that substantially caused the injury or damage.

However, a shipowner is not required to furnish an accident-free vessel. A vessel is not required to have the best equipment or the finest crew, but only equipment that is reasonably fit for its intended purpose and a crew that is reasonably adequate and competent.

#### **Committee Comments**

*See Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960); *5th Cir. Civ. Jury Instr.* 4.5 (West 2009); *9th Cir. Civ. Jury Instr.* 7.6 (West 2007).

## **17.04 EXPLANATORY: UNSEAWORTHINESS CLAIM—CAUSATION**

An unseaworthy condition of a vessel caused damage or injury, if:

- (a) it played a substantial part in bringing about the injury or damage,
- (b) the injury or damage was either a direct result of or a reasonably probable consequence of the condition, and
- (c) the injury or damage would not have occurred except for the unseaworthy condition of the vessel.

Unseaworthiness may be a cause of damage or injury, even though it operates in combination with the act of another or some natural cause, as long as the unseaworthiness contributes substantially to producing the damage or injury.

[This standard is different from the causation required for a claim under the Jones Act. Under a Jones Act claim, if you find that the defendant was negligent, then you must decide whether this negligence played any part in causing the injury or damages suffered by the plaintiff.]<sup>1</sup>

### **Notes on Use**

1. Use the bracketed paragraph, if a claim under the Jones Act is submitted to the jury along with an unseaworthiness claim.

### **Committee Comments**

*See supra* Chapter 15 OVERVIEW and Model Instruction 15.40 n.9 (causation under FELA); *9th Cir. Civ. Jury Instr.* 7.4 and 7.7 (West 2007); *11th Cir. Civ. Jury Instr.* 6.1 (West 2005). *See also Britton v. U.S.S. Great Lakes Fleet, Inc.*, 302 F.3d 812, 818 (8th Cir. 2002); *Alholm v. Am. Steamship Co.*, 144 F.3d 1172, 1180-81 (8th Cir. 1998).

The issues of actionable negligence and causation under FELA received attention when the Supreme Court decided *CSX Transportation, Inc. v. McBride*, 131 S.Ct. 2630 (2011). The question presented to the Court was whether the Federal Employers' Liability Act requires proof of proximate causation. *Id.* at 2634. This is important to Jones Act cases because the Jones Act incorporates the standards of FELA in seamen's personal injury suits. 46 U.S.C. § 30104. The FELA statutory standard uses the language:

for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . equipment.

45 U.S.C. § 51.

In *CSX*, the Supreme Court maintained its earlier ruling in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957). Justice Ginsburg, writing for the Court in *CSX*, summarized the Court's holding:

[W]e conclude that [ FELA] does not incorporate “proximate cause” standards developed in nonstatutory common-law tort actions. The charge proper in FELA cases, we hold, simply tracks the language Congress employed, informing juries that a defendant railroad caused or contributed to a plaintiff employee’s injury if the railroad’s negligence played any part in bringing about the injury.

*Id.* at 2634. Also of note in the *CSX* opinion are the statements that it is unnecessary to use the label “proximate cause” when instructing the jury, *id.* at 2641, and that the following language is also appropriate when instructing the jury on causation in a case:

Juries in such cases are properly instructed that a defendant railroad “caused or contributed to” a railroad worker’s injury “if [the railroad’s] negligence played a part--no matter how small--in bringing about the injury.

*Id.* at 2644.

**17.05 EXPLANATORY: LONGSHORE AND HARBOR WORKERS'  
COMPENSATION ACT § 905(b)—TURN-OVER CLAIM—NEGLIGENCE  
STANDARD**

[Name of defendant]<sup>1</sup> does not owe the plaintiff the duty to provide a seaworthy vessel; [name of the defendant] is liable only if [(he) (she) (it)] was negligent and that negligence was the proximate cause of the [name of plaintiff's] injury.

Negligence is the failure to exercise reasonable care under the circumstances. A vessel operator such as defendant [name of the defendant] must exercise reasonable care before the plaintiff's employer began the defendant's operations on the vessel. This means that defendant [name of the defendant] must use reasonable care to have the vessel and its equipment in such condition that an expert and experienced [here, insert the type of maritime employment in which the plaintiff's employer was engaged on the vessel] would be able, by the exercise of reasonable care, to carry on its [his] [her] work on the vessel with reasonable safety to persons and property.

[Name of the defendant] must warn the plaintiff's employer of a hazard on the vessel, or a hazard with respect to the vessel's equipment, if:

- (1) [name of the defendant] knew about the hazard, or should have discovered it in the exercise of reasonable care, and
- (2) the hazard was one that was likely to be encountered by the plaintiff's employer in the course of its operations in connection with the defendant's vessel, and
- (3) the hazard was one that the plaintiff's employer did not know about, and that would not be obvious to or anticipated by a reasonably competent [here, insert the type of maritime employment in which the plaintiff's employer was engaged on the vessel] in the performance of its [his] [her] work.

[Even if the hazard was one about which the plaintiff's employer (stevedore) knew, or which would be obvious or anticipated by a reasonably competent [here, insert

the type of maritime employment in which the plaintiff's employer was engaged on the vessel], defendant [name of the defendant] must exercise reasonable care to avoid the harm to the plaintiff if the hazard was one that the defendant knew or should have known the plaintiff's employer (stevedore) would not or could not correct and the plaintiff could not or would not avoid.]<sup>2</sup>

#### **Notes on Use**

1. If there are two or more defendants in the lawsuit, include this phrase and identify the defendant against whom the claim covered by this elements instruction is made.

2. The Committee believes that the factual circumstances would be infrequent that would warrant this instruction.

#### **Committee Comments**

This instruction pertains to a claim that the defendant breached its "turn-over" duty. *See Reed v. ULS Corp.*, 178 F.3d 988, 990-91 (8th Cir. 1999). It should only be used where the vessel owner is not the plaintiff's employer (stevedore). Where the vessel owner is also the plaintiff's employer (stevedore), an instruction should be given consistent with *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603, 609, 613 (1st Cir. 1996) (en banc).

The standard of care that a vessel operator owes to the plaintiff after the plaintiff's employer began the operations on the vessel is not the subject of this instruction. Such is different from the standard of care owed before the operations began.

*See Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 170-72 (1981); *Reed v. ULS Corp.*, 178 F.3d 988, 991 (8th Cir. 1999).

## **17.06 EXPLANATORY: MAINTENANCE AND CURE—SUPPLEMENTAL**

A seaman is entitled to recover maintenance and cure, if [(he) (she)] becomes injured or ill, without willful misbehavior on [(his) (her)] part, while in the service of [(his) (her)] employer's vessel. A seaman is entitled to maintenance and cure even though [(he) (she)] was not injured as a result of any negligence on the part of [(his) (her)] employer or as a result of the unseaworthiness of the employer's vessel. Moreover, the seaman's injury or illness need not be work-related. It need only occur while the seaman was in the service of [(his) (her)] employer's vessel. Furthermore, an award for maintenance and cure must not be reduced because of any negligence on the part of the plaintiff.

A seaman is entitled to receive maintenance and cure from the date [(he) (she)] leaves the vessel until [(he) (she)] reaches "maximum medical cure." The term "maximum medical cure" means the point at which no further improvement in the seaman's medical condition is reasonably expected. Thus, if it appears that a seaman's condition is incurable, or that treatment will only relieve pain or provide comfort but will not improve the seaman's physical condition, [(he) (she)] has reached maximum medical cure.

If you find that the plaintiff is entitled to an award of damages under [either] the Jones Act [or on an unseaworthiness claim] and if you award [(him) (her)] lost wages or medical expenses, then you may not also award the plaintiff maintenance and cure for the same period of time, because the plaintiff may not recover twice for the same lost wages or medical expenses.

### **Committee Comments**

A seaman's claim for maintenance and cure is separate and distinct from a claim under the Jones Act or for the unseaworthiness of a vessel. *Aguilar v. Standard Oil Co. of N.J.*, 318 U.S. 724, 736-37 (1943); *Britton v. U.S.S. Great Lakes Fleet, Inc.*, 302 F.3d 812, 816-18 (8th Cir. 2002).

**17.20 DEFINITION: JONES ACT—“COURSE OF EMPLOYMENT”**

Under the Jones Act a seaman is injured in the course of [(his) (her)] employment when, at the time of injury, [(he) (she)] was doing the work of [(his) (her)] employer, that is, [(he) (she)] was working in the service of the vessel as a member of her crew.

**Committee Comments**

*See 11th Cir. Civ. Jury Instr. 6.1 (West 2005).*

### **17.21 DEFINITION: JONES ACT—“NEGLIGENCE”**

The terms “negligent” and “negligence,” as used in these instructions, mean the failure to use that degree of care that a reasonably careful person would use under the same or similar circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under the same or similar circumstances, or in failing to do something that a reasonably careful person would do under the same or similar circumstances.

#### **Committee Comments**

*See supra* Model Instruction 15.20; *9th Cir. Civ. Jury Instr.* 7.3 (West 2007).

The Fifth Circuit in *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 339 (5th Cir. 1997) (en banc), repudiated its earlier cases to the contrary, and held that under the Jones Act an employer has the duty to act with ordinary prudence to provide its employees a safe work environment, that is, to act as would a reasonable employer in like circumstances. The court also held that a seaman is obligated under the Jones Act to act with ordinary prudence under similar circumstances to protect himself from the negligence of his employer. *Id.* at 339. *See 5th Cir. Civ. Jury Instr.* 4.4 (West 2009).

## 17.22 DEFINITION: “SEAMAN”

A “seaman” is a [(sea) or (river) or (lake)]<sup>1</sup>-based maritime employee whose work regularly exposes [(him) (her)] to the special hazards and disadvantages to which they who go down to the [(sea) or (rivers) or (lakes)]<sup>2</sup> in ships are subjected. The term “seaman” does not include a land-based worker who has only a temporary connection to a vessel, and therefore whose employment does not regularly expose [(him) (her)] to the perils of the [(sea) or (river) or (lake)].<sup>3</sup> Rather, a “seaman” is a member of a crew of a vessel.

You must find that the plaintiff was a “seaman,” if it has been proved<sup>4</sup> that at the time of the incident for which the plaintiff is claiming [(he) (she)] was injured:

*First*, the plaintiff had an employment-related connection to a vessel [or to an identifiable group of such vessels]<sup>5</sup> that was substantial in terms of both its duration (in that it occupied at least 30 percent of the plaintiff’s work time) and nature; and

*Second*, the plaintiff’s work duties contributed to [(the function of the vessel) or (the function of an identifiable group of vessels)<sup>6</sup> or (the accomplishment of (its) or (their))] <sup>7</sup> mission)].

### Notes on Use

1. Although the case law refers to “sea” to include all types of navigable water, to avoid jury confusion the term best describing the navigable water at issue in the case should be used in this instruction.

2. *See* footnote 1 above.

3. *See* footnote 1 above.

4. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

5. Include the “identifiable group” language of the definition only if the evidence supports such an instruction.

6. *See* footnote 5 above.

7. The word “their” should be used, if the jury is instructed on an identifiable group of vessels. *See* footnote 5 above.

### **Committee Comments**

*See supra* Chapter 17 OVERVIEW, Seaman; *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554 (1997); *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368-72 (1995); *Roth v. U.S.S. Great Lakes Fleet, Inc.*, 25 F.3d 707, 708-09 (8th Cir. 1994); *Miller v. Patton-Tully Transp. Co., Inc.*, 851 F.2d 202, 204 (8th Cir. 1988); *Slatton v. Martin K. Eby Constr. Co.*, 506 F.2d 505, 510 (8th Cir. 1974); *Offshore Co. v. Robison*, 266 F.2d 769, 775 (5th Cir. 1959). *See also* *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 487 (2005).

### **17.23 DEFINITION: JONES ACT—“VESSEL”**

For claims under the Jones Act, the term “vessel” means any structure that a reasonable person would believe is designed to a practical degree for carrying people or things over water.

#### **Committee Comments**

*See* 1 U.S.C. § 3; Chapter 17 OVERVIEW, Vessel. The definition of “vessel” for claims under the Jones Act and for claims under the Longshore and Harbor Workers’ Compensation Act relates to whether the plaintiff is a seaman and to whether one or the other of these statutes applies. Seaman status depends upon the nature of the work performed by the plaintiff at the time of the alleged incident. In this respect, the scope of the term “vessel” under the Longshore and Harbor Workers’ Compensation Act is the same as that under the Jones Act. *See Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 489 (2005). *Cf.*, *Lozman v. City of Riviera Beach, Fla.*, 133 S.Ct. 735, 741 (2013).

Updated May 7, 2013

## **17.24 DEFINITION: “MARITIME EMPLOYMENT”**

A person is engaged in maritime employment if at the time of [(his) (her)] injury, the person is either

(1) injured while engaged in an essential part of the loading or unloading process of a vessel<sup>1</sup>; or

(2) on actual navigable waters in the course of that person’s employment on those waters; or

(3) working as a harbor worker, including a ship repairman, shipbuilder, or shipbreaker.

### **Notes on Use**

1. When supported by the evidence, the court may be required to instruct the jury that certain workers who meet the general definition of “employee” under the Longshore and Harbor Workers’ Compensation Act have been explicitly excluded from coverage by 33 U.S.C. § 902(3)(A)-(H). Section 902(3) and 33 U.S.C. § 902(4) provide:

(3) The term “employee” means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include—

(A) individuals employed exclusively to perform office, clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. §§ 902(3), 902(4).

#### **Committee Comments**

This instruction must be given if the issue of maritime employment is submitted to the jury in Paragraph *First* of the LHWCA Turn-over Claim Instruction, Model Instruction 17.42.

*See 5th Cir. Civ. Jury Instr. 4.13 (West 2009).*

**17.25 DEFINITION: LONGSHORE AND HARBOR WORKERS’  
COMPENSATION ACT “COVERED PLACE OF INJURY”**

A person is injured at a place within the coverage of the Longshore and Harbor Workers’ Compensation Act if the injury occurred:

- (a) on navigable waters, or
- (b) in an area adjoining navigable waters, or
- (c) in an area that is close to but not necessarily touching an area adjoining navigable waters and that is customarily used by an employer in the loading, unloading, building, or repairing of a vessel.

**Committee Comments**

This instruction must be given if the issue of the place of injury is submitted to the jury in Paragraph *First* of the LHWCA Turn-over Claim Instruction, Model Instruction 17.42.

*See* 33 U.S.C. § 903(a); *5th Cir. Civ. Jury Instr.* 4.13 (West 2009). An additional instruction may be needed, if there is an issue over whether the plaintiff is excluded from coverage under 33 U.S.C. § 902(3). *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 280-81 (1977).

### **17.26 DEFINITION: “NAVIGABLE WATERS”**

The term “navigable waters” as used in these instructions means a body of water that in its ordinary condition [is] [at the time of plaintiff’s injury was] capable of serving as a highway for commerce over which trade and travel are, or may be, conducted in the customary modes of trade and travel on water.

#### **Committee Comments**

*See The Daniel Ball*, 77 U.S. 557, 563 (1870); *Three Buoys Houseboat Vacations, U.S.A. Ltd. v. Morts*, 921 F.2d 775, 778-79 (8th Cir. 1990); *Livingston v. United States*, 627 F.2d 165, 168-69 (8th Cir. 1980).

This instruction must be given if the issue of whether the place of injury was on navigable waters is submitted to the jury in Paragraph *First* of the LHWCA Turn-over Claim Instruction, Model Instruction 17.42.

### **17.27 DEFINITION: “MAINTENANCE” AND “CURE”**

As used in these instructions, the term “maintenance” means the cost of food and lodging that the plaintiff has actually incurred that is reasonable for a person in [(his) (her)] community or is reasonably necessary for survival, whichever is less, and the reasonable cost of any necessary transportation to and from a medical facility.

As used in these instructions, the term “cure” means the cost of reasonable and necessary medical attention, including the services of physicians and nurses as well the cost of hospitalization, medicines and medical equipment.

#### **Committee Comments**

*See supra* Chapter 15 OVERVIEW, Maintenance and Cure; *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527 (1938); *Hall v. Noble Drilling (U.S.) Inc.*, 242 F.3d 582, 588 (5th Cir. 2001); *Wactor v. Spartan Transp. Corp.*, 27 F.3d 347, 351-52 (8th Cir. 1994) (definitions of “maintenance” and “cure”; failure of seaman to disclose medical information before employment may be a defense to maintenance and cure); *Stanislawski v. Upper River Servs., Inc.*, 6 F.3d 537, 540 (8th Cir. 1993); *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943, 946 (9th Cir. 1986).

## 17.40 ELEMENTS OF CLAIM: NEGLIGENCE CLAIM UNDER THE JONES ACT

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's Jones Act claim if all the following elements have been proved <sup>1</sup>:

*First*, the plaintiff was employed by the defendant as a seaman on a vessel <sup>2</sup>; and

*Second*, during the course of the plaintiff's employment as a seaman, the defendant [here describe the submitted act or omission]; and

*Third*, the defendant in any one or more of the respects submitted in paragraph Second was negligent; and

*Fourth*, such negligence played any part in causing injury to the plaintiff.

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. *See supra* Model Instructions 17.22 and 17.23 (defining "seaman" and "vessel").

### Committee Comments

*See Shows v. Harber*, 575 F.2d 1253, 1254 (8th Cir. 1978); *Petty v. Dakota Barge Serv.*, 730 F. Supp. 983, 985 (D. Minn. 1989).

The Fifth Circuit in *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 339 (5th Cir. 1997) (en banc), repudiated its earlier cases to the contrary, and held that under the Jones Act an employer has the duty to act with ordinary prudence to provide its employees a safe work environment, that is, to act as would a reasonable employer in like circumstances. The court also held that a seaman is obligated under the Jones Act to act with ordinary prudence under similar circumstances to protect himself from the negligence of his employer. *Id.* at 339. *See 5th Cir. Civ. Jury Instr.* 4.7 (West 2009).

The issues of actionable negligence and causation under FELA received attention when the Supreme Court decided *CSX Transportation, Inc. v. McBride*, 131 S.Ct. 2630 (2011). The question presented to the Court was whether the Federal Employers' Liability Act requires proof of proximate causation. *Id.* at 2634. This is important to Jones Act cases because the Jones Act incorporates FELA standards in seamen's personal injury suits. 46 U.S.C. § 30104. The FELA statutory standard uses the language:

for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . equipment.

45 U.S.C. § 51.

In *CSX*, the Supreme Court maintained its earlier ruling in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957). Justice Ginsburg, writing for the Court in *CSX*, summarized the Court's holding:

[W]e conclude that [ FELA] does not incorporate “proximate cause” standards developed in nonstatutory common-law tort actions. The charge proper in FELA cases, we hold, simply tracks the language Congress employed, informing juries that a defendant railroad caused or contributed to a plaintiff employee’s injury if the railroad’s negligence played any part in bringing about the injury.

*Id.* at 2634. Also of note in the *CSX* opinion are the statements that it is unnecessary to use the label “proximate cause” when instructing the jury, *id.* at 2641, and that the following language is also appropriate when instructing the jury on causation in a FELA case:

Juries in such cases are properly instructed that a defendant railroad “caused or contributed to” a railroad worker’s injury “if [the railroad’s] negligence played a part--no matter how small--in bringing about the injury.

*Id.* at 2644.

**17.41 ELEMENTS OF CLAIM: UNSEAWORTHINESS CLAIM  
AGAINST EMPLOYER**

Your verdict must for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim of unseaworthiness, if all the following elements have been proved <sup>1</sup>:

*First*, the plaintiff was employed by the defendant as a seaman on a vessel <sup>2</sup> at the time [(he) (she)] suffered injury; and

*Second*, the vessel on which the plaintiff was injured was [(owned) (operated)] by [(his) (her)] employer; and

*Third*, the defendant's vessel was [\_\_\_\_\_]; <sup>3</sup> and

*Fourth*, the defendant's vessel was thereby rendered unseaworthy; and

*Fifth*, the unseaworthy condition of the vessel was a substantial factor in causing the injury or damage to the plaintiff.

**Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. *See supra* Model Jury Instructions 17.22 and 17.23 (defining "seaman" and "vessel").

3. Here state the submitted condition of the vessel.

**Committee Comments**

*See supra* Chapter 17 OVERVIEW; *5th Cir. Civ. Jury Instr.* 4.5 (West 2009); *9th Cir. Civ. Jury Instr.* 7.5 (West 2007); *11th Cir. Civ. Jury Instr.* 6.1 (West 2005).

**17.42 ELEMENTS OF CLAIM: LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT § 905(b)—TURN-OVER CLAIM—ELEMENTS OF CLAIM**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on the plaintiff's claim [generally describe claim] if all of the following elements have been proved <sup>1</sup> :

*First*, the plaintiff was engaged in maritime employment and was injured at [(a place within the coverage of the Longshore and Harbor Worker's Compensation Act) <sup>2</sup>] <sup>3</sup>; and

*Second*, <sup>4</sup> defendant (name of the defendant) had the defendant's vessel and equipment in such condition that an expert and experienced maritime worker would not be able, by the exercise of reasonable care, to carry on [(his) (her)] work on the vessel with reasonable safety [in that (describe the conditions and inadequacies at issue)]; and

*Third*, defendant [(name of the defendant)] in any one or more of the ways described in Paragraph (Second) <sup>5</sup> was negligent <sup>6</sup>; and <sup>7</sup>

*Fourth*, such negligence was the cause of [(injury to the plaintiff) or (the death of (name of decedent))].

If any of the above elements has not been proved, then your verdict must be for defendant [(name of the defendant)]. <sup>87</sup>

**Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Identify the location of the injury supported by the evidence.

3. This paragraph must be used in those cases where the plaintiff's status as a worker covered by § 905(b) of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 905(b), is at issue. The plaintiff's status as a worker covered by § 905(b) has two components--maritime employment and place of injury. *See supra* Chapter 17 OVERVIEW, § 905(b) of LHWCA. The jury must be instructed with respect to each component of the plaintiff's status

that is at issue. If the maritime employment segment is included in this instruction, an explanatory instruction on maritime employment must also be given. *See supra* Model Instruction 17.24. Similarly, if the place of injury segment is included in this instruction, an explanatory instruction on place of injury must also be given. *See supra* Model Instruction 17.25.

4. If the instruction with respect to the plaintiff's status as a worker covered by § 905(b) is omitted, the paragraph numbers should accordingly be modified and this should read "*First.*"

5. Use the appropriate paragraph number corresponding to the paragraph number describing the claimed deficiencies to the defendants' vessel or equipment.

6. The terms "negligent" and "negligence" must be defined. *See supra* Model Instruction 17.21.

7. If only one phrase describing the defendant's breach of duty is submitted in Paragraph Second, then Paragraph Third should read as follows:

Third, defendant [(name of the defendant)] was thereby negligent, and

8. This paragraph should not be used if the jury is given a specific instruction on the defendant's theory of the case.

**17.43 ELEMENTS OF CLAIM: GENERAL MARITIME LAW—  
NONEMPLOYEE-INVITEE’S NEGLIGENCE CLAIM—ELEMENTS**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on plaintiff’s claim [generally describe claim] if all the following elements have been proved <sup>1</sup>:

*First*, the plaintiff was lawfully aboard the vessel; and

*Second*, while the plaintiff was lawfully aboard the vessel, the defendant [here describe the act or omission]; and

*Third*, the defendant [in any one or more of the respects submitted in paragraph Second was negligent] <sup>2</sup> [was thereby negligent]; and

*Fourth*, this negligence of defendant caused plaintiff injury.

**Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Define “negligence” under the ordinary reasonable care standard. *See supra* Model Instructions 15.20, 15.21, and 15.22 without the bracketed language. *See also Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959).

**Committee Comments**

*See Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959).

**17.44 ELEMENTS OF CLAIM: GENERAL MARITIME LAW—  
NONEMPLOYEE-INVITEE’S CLAIM—CONTRIBUTORY NEGLIGENCE  
(COMPARATIVE FAULT)**

If you find in favor of plaintiff [insert name] and against defendant [insert name] under Instruction No. \_\_\_\_ (here insert the number of the plaintiff’s elements instruction or verdict director), you must consider whether [(name of plaintiff) or (name of decedent)] was also negligent. Under this Instruction, on the [name of plaintiff’s] [here identify the claim to which this instruction applies] claim, whether or not the defendant was partly at fault, you must assess to the [(name of plaintiff) or (name of decedent)] a percentage of the total negligence, if all the following elements have been proved<sup>1</sup>:

*First*, [(name of plaintiff) or (name of decedent)] (describe the negligent conduct);  
and

*Second*, [(name of plaintiff) or (name of decedent)] was thereby negligent<sup>1</sup>; and

*Third*, that negligence of [(the plaintiff) or (name of decedent)] played a part in [(his) (her)] own injury or damage.

The total of the negligence of [(name of plaintiff) or (name of decedent)] and of the negligence of the defendant for causing [( plaintiff’s) or (decedent’s) injury must equal 100 percent.

**Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Define “negligence” under the ordinary reasonable care standard. *See supra* Model Instructions 15.20, 15.21, and 15.22 without the bracketed language. *See also Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959).

**Committee Comments**

*See Ballard v. River Fleets, Inc.*, 149 F.3d 829, 831 (8th Cir. 1998).

## **17.60 ELEMENTS OF DEFENSE: JONES ACT—CONTRIBUTORY NEGLIGENCE (COMPARATIVE FAULT)**

A seaman has a duty to use the care that a reasonably careful seaman would use under the same or similar circumstances.

If you find in favor of plaintiff [insert name] and against defendant [insert name] under Instruction No. \_\_\_\_ (here insert the number of the plaintiff's elements instruction or verdict director), you must consider whether [(name of plaintiff) or (name of plaintiff's decedent)] was also negligent. Under this instruction, on the plaintiff's (here identify the claim to which this instruction applies) claim, you must assess to [name of plaintiff] a percentage of the total negligence, if all the following elements have been proved<sup>1</sup>:

*First*, [(name of plaintiff) or (name of plaintiff's decedent)] (describe the negligent conduct); and

*Second*, [(name of plaintiff) or (name of decedent)] was thereby negligent; and

*Third*, this negligence of [(name of plaintiff) or (name of plaintiff's decedent)] played a part in causing [(his) (her)] own injury or damage.

The total percentages of the negligence of [(name of plaintiff) or (name of plaintiff's decedent)] and of the defendant for causing [(the plaintiff's) or (decedent's)] injury must equal 100 percent.

### **Notes on Use**

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

### **Committee Comments**

*See supra* Model Instruction 15.63 (regarding FELA claims); *9th Cir. Civ. Jury Instr. 7.9* (West 2007). *See also Ballard v. River Fleets, Inc.*, 149 F.3d 829, 831-32 (8th Cir. 1998); *Alholm v. Am. Steamship Co.*, 144 F.3d 1172, 1179 (8th Cir. 1998).

The Fifth Circuit in *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 339 (5th Cir. 1997) (en banc), repudiated its earlier cases to the contrary, and held that under the Jones Act an

employer has the duty to act with ordinary prudence to provide its employees a safe work environment, that is, to act as would a reasonable employer in like circumstances. The court also held that a seaman is obligated under the Jones Act to act with ordinary prudence under similar circumstances to protect himself from the negligence of his employer. *Id.* at 339. *See 5th Cir. Civ. Jury Instr.* 4.6 (West 2009).

The issues of actionable negligence and causation under FELA received attention when the Supreme Court decided *CSX Transportation, Inc. v. McBride*, 131 S.Ct. 2630 (2011). The question presented to the Court was whether the Federal Employers' Liability Act requires proof of proximate causation. *Id.* at 2634. This is important to Jones Act cases because the Jones Act incorporates the standards of FELA in seamen's personal injury suits. 46 U.S.C. § 30104. The FELA statutory standard uses the language:

for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . equipment.

45 U.S.C. § 51.

In *CSX*, the Supreme Court maintained its earlier ruling in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957). Justice Ginsburg, writing for the Court in *CSX*, summarized the Court's holding:

[W]e conclude that [ FELA] does not incorporate "proximate cause" standards developed in nonstatutory common-law tort actions. The charge proper in FELA cases, we hold, simply tracks the language Congress employed, informing juries that a defendant railroad caused or contributed to a plaintiff employee's injury if the railroad's negligence played any part in bringing about the injury.

*Id.* at 2634. Also of note in the *CSX* opinion are the statements that it is unnecessary to use the label "proximate cause" when instructing the jury, *id.* at 2641, and that the following language is also appropriate when instructing on causation in a FELA case:

Juries in such cases are properly instructed that a defendant railroad "caused or contributed to" a railroad worker's injury "if [the railroad's] negligence played a part--no matter how small--in bringing about the injury.

*Id.* at 2644.

### **17.70 DAMAGES: COMPENSATORY (GENERAL)**

If you find the issues in favor of the [name of plaintiff], you must award an amount that will fairly and justly compensate [(him) or (her)] for any damages you believe [(he) (she)] sustained [and is reasonably certain to sustain in the future] as a direct result of the occurrence mentioned in the evidence.

You should consider the following elements of damages:

(a) physical pain and suffering;

(b) mental anguish;

(c) income loss in the past;

(d) impairment of earning capacity or ability in the future; and

(e) the reasonable value, not exceeding the actual cost to the plaintiff, of medical care that you find will be reasonably certain to be required in the future as a proximate result of the injury in question.

Damages cannot be based on speculation.

### **17.71 DAMAGES: DEATH OF EMPLOYEE**

If you find in favor of the [name of plaintiff], then you must determine the entire amount that will fairly and justly compensate [him or her] for any damages you believe [(he) (she)] sustained [and is reasonably certain to sustain in the future] as a result of the incident mentioned in the evidence. If liability is determined, you will then assess the percentages of fault (from zero to 100 percent) for which each party is responsible that caused the [name of plaintiff's] damages determined. Do not reduce or increase any amount of damages you find by any percentage of fault that you find.

You should consider the following elements of damages: physical pain and suffering; mental anguish; income loss in the past; impairment of earning capacity or ability in the future; and the reasonable value, not exceeding the actual cost to the plaintiff, of medical care that you find will be reasonably certain to be required in the future as a proximate result of the injury in question.

Damages cannot be based on speculation.

## 17.72 DAMAGES: PUNITIVE

If you find in favor of (name of plaintiff) and against (name of defendant) under Instruction(s) \_\_\_\_\_, and if you further find that (name of defendant) acted willfully and wantonly with reckless or callous disregard for the rights of others, or acted with gross negligence or actual malice or criminal indifference, then you may, but are not required to, award the plaintiff an additional amount of money as punitive damages for the purpose of punishing the defendant for engaging in misconduct and [detering] [discouraging] the defendant and others from engaging in similar misconduct in the future. You should presume that a plaintiff has been made whole for [its, his, her] injuries by the damages awarded under Instruction \_\_\_\_\_.<sup>1</sup>

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. How reprehensible the defendant's conduct was.<sup>2</sup> In this regard, you may consider [whether the harm suffered by the plaintiff was physical or economic or both; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether the defendant's conduct that harmed the plaintiff also posed a risk of harm to others; whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed the plaintiff].<sup>3</sup>

2. How much harm the defendant's wrongful conduct caused the plaintiff [and could cause the plaintiff in the future].<sup>4</sup> [You may not consider harm to others in deciding the amount of punitive damages to award.]<sup>5</sup>

3. What amount of punitive damages, in addition to the other damages already awarded, is needed, considering the defendant's financial condition, to punish the defendant for [its, his, her,] wrongful conduct toward the plaintiff and to deter the defendant and others from similar wrongful conduct in the future.

4. [The amount of fines and civil penalties applicable to similar conduct].<sup>6</sup>

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to the plaintiff and should not be greater than the amount of compensatory damages you award.<sup>7</sup>

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.]<sup>8</sup>

### Notes on Use

1. Fill in the number or title of the compensatory damages instruction here.
2. The word “reprehensible” is used in the same sense as it is used in common parlance. The Supreme Court, in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003), stated: “It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” In *Philip Morris USA v. Williams*, 549 U.S. 346, 355, 127 S. Ct. 1057, 1064-65 (2007), the Supreme Court held that, while harm to persons other than the plaintiff may be considered in determining reprehensibility, a jury may not punish for the harm caused to persons other than the plaintiff. The Court stated that procedures were necessary to assure “that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.” *Id.* at 355.
3. Any item not supported by the evidence, of course, should be excluded.
4. This sentence may be used if there is evidence of future harm to the plaintiff.
5. A paragraph instructing the jury that any punitive damages award should not include an amount for harm suffered by persons who are not parties to the case may be necessary if evidence concerning harm suffered by nonparties has been introduced. *See Philip Morris USA v. Williams*, 549 U.S. at 355; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-24 (2003); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004).
6. Insert this phrase only if evidence has been introduced, or the court has taken judicial notice, of fines and penalties for similar conduct. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996), noting “civil penalties authorized in comparable cases” as a guidepost to be considered. *See also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003).
7. The Supreme Court, in *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 514 (2008), held that, in an admiralty case, punitive damages cannot exceed compensatory damages.
8. The bracketed language is available for use if punitive damages claims are submitted against more than one defendant.

## Committee Comments

See 5th Cir. Civ. Jury Instr. 4.10 (2009); *Gamma Plastics, Inc. v. American Plastics Lines, Ltd*, 32 F.3d 1244, 1254 (8th Cir. 1994). This instruction may be used in any case of property damage that would otherwise qualify under 28 U.S.C. § 1333, but is before the court on diversity jurisdiction, either as an original action or as a result of being removed, and a jury demand has been made.

This instruction is included because of the Supreme Court opinion in a massive pollution case approving punitive damages under the general maritime law, but only in an amount not to exceed compensatory damages. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008). The *Exxon* case does not, however, necessarily resolve the issue of whether general maritime law permits recovery of punitive damages by non-seamen who suffer personal injury or death.

There is presently a split of authority on the issue. *In re Horizon Cruises Litigation*, 2000 WL 685365, \*5-9 (S.D.N.Y. 2000) (acknowledges split among courts); *contra In re Diamond B Marine Services, Inc.*, 2000 WL 222847, \*3 (E.D. La. 2000); *O'Hara v. Celebrity Cruises*, 979 F. Supp. 254, 256 (S.D.N.Y. 1997). The *Gamma Plastics* case involved damage to cargo only and its discussion of punitive damages is dicta. Nevertheless, the discussion of the issue in *Gamma* is an indication that the Eighth Circuit would permit recovery of punitive damages in non-seaman wrongful-death cases because the opinion it cites, *Churchill v. F/U FJORD*, 892 F.2d 763 (9th Cir. 1988), is such a case. *Gamma*, 32 F.3d at 1254.

Punitive damages are available under general maritime law for a willful failure to pay an injured seaman maintenance and cure. See *Atl. Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 414-15 (2009).

This instruction is not to be used in seaman cases under the Jones Act or in unseaworthiness suits under general maritime law. See *The Dutra Group v. Batterton*, 139 S.Ct. 2275, 2278 (2019) (holding “that punitive damages remain unavailable in unseaworthiness actions”). Cf. *Atl. Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 418-20 (2009); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 28, 32 (1990).

### **17.73 DAMAGES: PRESENT VALUE OF FUTURE DAMAGES**

If you find that the plaintiff will sustain [specify damages subject to present value reduction, such as, “lost future earnings” or “future medical expenses”], then you must reduce those future damages to their present value.

The present value of future damages is the amount of money that will fully compensate the plaintiff for future damages, assuming that amount is invested now and will earn a reasonably risk-free rate of interest for the time that will pass until the future damages occur.

You must not reduce to present value any non-economic damages you find that plaintiff is reasonably certain to sustain in the future, such as for pain and suffering, or mental anguish.<sup>1</sup>

#### **Notes on Use**

1. *Crane v. Crest Tankers, Inc.* 47 F.3d 292, 295 n.5 (8th Cir. 1995).

#### **Committee Comments**

The methods of proving the amount of future damages and of reducing that amount to present value can vary with the facts of each case and with the expert opinions and calculations received into evidence in each case. *E.g.*, CHARLES F. BEALL, *FLORIDA CIVIL PRACTICE DAMAGES* Ch. 3 (The Florida Bar 2005); William F. Landsea and David Roberts, *Inflation and the Present Value of Future Economic Damages*, 37 U. MIAMI L. REV. 93 (1982).

The Eighth Circuit has commented:

There are numerous ways of presenting a case involving future damages. Typically the district court will . . . take judicial notice of the plaintiff’s life expectancy. If the case involves an issue of future lost wages, generally an expert witness is employed who, once qualified, opines on various issues including work life expectancy, future damages, and methods of discounting the same to present value.

*Crane v. Crest Tankers, Inc.*, 47 F.3d 292, 295 (8th Cir. 1995). *See also id.* at 295 n.4 (“It has long been held that life expectancy tables are admissible in damage actions for the ‘consideration of the probabilities of damage over a period of years’”) (quoting *Cont’l Cas. Co. v. Jackson*, 400 F.2d 285, 293 (8th Cir. 1968)); *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 545-46 (1983).

The Committee believes it is sufficient for the trial judge to instruct the jury about its basic duties of determining the amount of future damages and of reducing to present value, without selecting and instructing the jury on a specific methodology.

## **17.74 DAMAGES: DUTY TO MINIMIZE DAMAGES**

It is the duty of any person who has been injured to use reasonable diligence and reasonable means, under the circumstances, to prevent the aggravation of [(his) (her)] injury; to act in a way that brings about a recovery from the injury; and to take advantage of any reasonable opportunity [(he) (she)] may have to reduce or minimize loss or damage. [(He) (She)] is required to obtain reasonable medical care and follow [(his) (her)] doctor's reasonable advice and to seek out or take advantage of a business or employment opportunity that was reasonably available to [(him) (her)] under all the circumstances shown by the evidence. You should reduce the amount of the plaintiff's damages by the amount [(he) (she)] could have avoided by obtaining and following reasonable medical care and advice or the amount that the plaintiff could have reasonably realized if [(he) (she)] had taken advantage of such business or employment opportunity, but did not do so.

### **Committee Comments**

*See American Mill. Co. v. Trustee of Distribution Trust*, 623 F.3d 570, 575 (8th Cir. 2010) (“A party in admiralty can have a legal duty to mitigate damages”); *Rapisardi v. United Fruit Co.*, 441 F.2d 1308, 1312 (2d Cir. 1971); *Saleeby v. Kingsway Tankers, Inc.*, 531 F. Supp. 879, 891 (S.D.N.Y. 1981).

## **17.75 DAMAGES: COMPENSATORY DAMAGES NOT TAXABLE**

In the event that you award the (name of plaintiff) money damages, you are instructed that the award is not subject to any federal or state income taxes. Therefore, you may not consider taxes in considering any award of damages.

### **Committee Comments**

*See Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 498 (1980) (instruction is mandatory); *Fanetti v. Hellenic Lines, Ltd.*, 678 F.2d 424, 431 (2nd Cir. 1982); *cf. Flanigan v. Burlington N., Inc.*, 632 F.2d 880, 889 (8th Cir. 1980) (without evidence of an excessive verdict, the failure to give instruction was not prejudicial).

**17.90 SPECIAL VERDICT FORM: INTERROGATORIES**

**I.  
NEGLIGENCE CLAIM**

1. Was (name of the plaintiff or decedent) a seaman at the time of the incident shown in the evidence?

Answer: \_\_\_\_\_ (Yes or No)

[If the answer to Interrogatory No. 1 is “Yes,” proceed to Interrogatory No. 2. If the answer to No. 1 is “No,” do not answer any more interrogatories on this form. The Foreperson must sign this form and return it into court.]

2. Was (name of the plaintiff or decedent) injured in the course of [(his) (her)] employment as a seaman?

Answer: \_\_\_\_\_ (Yes or No)

[If the answer to Interrogatory No. 2 is “Yes,” proceed to Interrogatory No. 3. If the answer to No. 2 is “No,” do not answer any more interrogatories on this form. The Foreperson must sign this form and return it into court.]

3. Did the defendant [here describe the act or omission submitted by the plaintiff]?

Answer: \_\_\_\_\_ (Yes or No)

[If the answer to Interrogatory No. 3 is “Yes,” proceed to Interrogatory No. 4. If the answer to No. 3 is “No,” do not answer No. 4, but proceed to No. 7.]

4. Was the act or omission of the defendant [here describe the act or omission submitted by the plaintiff] [found with respect to the answer to No. 3] negligent?

Answer: \_\_\_\_\_ (Yes or No)

[If the answer to Interrogatory No. 4 is “Yes” proceed to Interrogatory No. 5. If the answer to No. 4 is “No,” do not answer No. 5, but proceed to No. 7.]

5. Did (name of defendant’s) negligence [here describe the act or omission submitted by the plaintiff] [found with respect to the answer to No. 3] cause injury to (name of plaintiff)?

Answer: \_\_\_\_\_ (Yes or No)

[If the answer to Interrogatory No. 5 is “Yes,” proceed to Interrogatory No. 6. If the answer to No. 5 is “No,” do not answer No. 6, but proceed to No. 7.]

6. State the total amount of damages that the plaintiff has suffered [and is reasonably certain to suffer in the future] as a result of the incident established in the evidence.

Answer: \_\_\_\_\_ Dollars  
(\$\_\_\_\_\_).

**II.**  
**UNSEAWORTHINESS CLAIM**

7. At the time and place established in the evidence, was the vessel (here name the subject vessel) in an unseaworthy condition in that it (here state condition of vessel submitted by the plaintiff)?

Answer: \_\_\_\_\_ (Yes or No)

[If the answer to Interrogatory No. 7 is “Yes” proceed to Interrogatory No. 8. If the answer to No. 7 is “No,” proceed to No. 10.]

8. Was the unseaworthy condition of the [here name the subject vessel], with respect to No. 7, a substantial factor in causing any injury or damage sustained by the plaintiff?

Answer: \_\_\_\_\_ (Yes or No)

[If the answer to Interrogatory No. 8 is “Yes,” proceed to Interrogatory No. 9. If the answer to No. 8 is “No,” do not answer No. 9, but proceed to No. 10.]

9. State the total amount of damages that (name of plaintiff) has suffered [and is reasonably certain to suffer in the future] as a result of the incident established in the evidence.

Answer: \_\_\_\_\_ Dollars  
(\$\_\_\_\_\_).

**III.**  
**COMPARATIVE NEGLIGENCE DEFENSE**  
(Plaintiff)

10(a) Do you find that (name of plaintiff) [describe act or omission]?

Answer: \_\_\_\_\_ (Yes or No)

[Note: If the answer to Interrogatory No. 10 (a) is “Yes,” answer No. 10(b). If the answer to No. 10(a) is “No,” do not answer No. 10(b), but proceed to answer No. 11(a).]

10(b) Do you find that the act or omission of (name of plaintiff) [describe act or omission] was negligent?

Answer: \_\_\_\_\_ (Yes or No)

[Note: If the answer to Interrogatory No. 10(b) is “Yes,” answer No. 10(c). If the answer to No. 10(b) is “No,” do not answer No. 10(c), but proceed to answer No. 11(a).]

10(c) Do you find that the negligence of (name of plaintiff), found in the answer to No. 10(a) caused, in whole or in part, his own damage or injury?

Answer: \_\_\_\_\_ (Yes or No)

**COMPARATIVE NEGLIGENCE DEFENSE**  
**(Settling Defendant)**

11(a) Do you find that (name of settling defendant) [describe act or omission]?

Answer: \_\_\_\_\_ (Yes or No)

[Note: If the answer to Interrogatory No. 11(a) is “Yes,” answer No. 11(b). If the answer to No. 11(a) is “No,” do not answer No. 11(b), but proceed to answer No. 12.]

11(b) Do you find that [name of settling defendant] was negligent in [describe act or omission]?

Answer: \_\_\_\_\_ (Yes or No)

[Note: If the answer to Interrogatory No. 11(b) is “Yes,” answer No. 11(c). If the answer to No. 11(b) is “No,” do not answer No. 11(c), but proceed to answer No. 12.]

11(c). Do you find that the negligence of (name settling defendant), found in the answer to No. 11(b) caused, in whole or in part, damage or injury to (name of plaintiff)?

Answer: \_\_\_\_\_ (Yes or No)

12. State the percentage(s) of the relative fault, if any, for the plaintiff’s damages to the following:

(a) (name of the defendant) \_\_\_\_\_%

(b) (name of the plaintiff) \_\_\_\_\_%

(c) (name of the settling defendant) \_\_\_\_\_%.

[TOTAL MUST EQUAL 100%] \_\_\_\_\_  
100 %

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(FOREPERSON)

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(DATE)

## 18. EMPLOYMENT—FEDERAL RAILWAY SAFETY ACT

### 18.00 OVERVIEW (GENERAL)

The Federal Railway Safety Act, 49 U.S.C. § 20109 *et seq.*, (the “FRSA”) was enacted in 1970 “to promote safety in every area of railroad operations and reduce railroad-related accidents.” 49 U.S.C. § 20101. In 1980, the FRSA was expanded to include protections against retaliation for railroad employees engaged in protected conduct or activities, such as reporting violations of safety laws or refusing to work in hazardous conditions. *Ray v. Union Pac. R.R. Co.*, 971 F.Supp.2d 869, 877 (S.D. Iowa 2013) (referring to Fed. R.R. Safety Authorization Act of 1980, Pub. L. No. 96-423, § 10, 94 Stat. 1811 (1980)). In 2007, Congress again amended the FRSA to include additional categories of protected activities. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1521, 1221 Stat. 266, 4444 (2007). The FRSA currently states that a railroad employer: “may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee’s lawful, good faith act done, or perceived by the employer to have been done or about to be done” to, among other things, report or attempt to report a work-place injury or illness. 49 U.S.C. § 20109(a)(4). The FRSA also states that a railroad may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. 49 U.S.C. § 20109(c)(1).

The 2007 amendments also incorporated the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“AIR-21”), which establishes the standards of liability and burdens of proof for administrative and civil actions. *See* 49 U.S.C. § 20109(d)(2)(A). AIR-21 employs a two-part, burden-shifting test. Plaintiff must first establish a *prima facie* case by showing that (i) he engaged in a protected activity; (ii) the railroad employer knew or suspected—actually or constructively—that plaintiff engaged in a protected activity; (iii) plaintiff suffered an adverse action; and (iv) circumstances raise the inference that the protected activity was a contributing factor in the adverse action. *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. 2014). The full scope of what constitutes adverse action has not been decided by case law. Whether it is similar or identical to tangible employment action (see Chapter 8) or materially adverse action (see Chapter 10) is an open question. For instance, the Committee is aware of no appellate case that specifically addresses whether intimidation alone is actionable under the Act. In *Ray v. Union Pacific Railroad Co.*, 971 F. Supp. 2d 869, 894-894, n. 28 (S.D. Iowa 2013), summary judgment for the defense was denied on a claim based upon intimidation.

“[T]he contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity.” *Kuduk*, 768 F.3d at 791; *Blackorby v. BNSF Ry. Co.*, 849 F.3d 716, 721 (8th Cir. 2017); *Dakota, Minn. & E. R.R. Corp. v. U.S. Dept. of Labor Admin. Rev. Bd.*, 948 F.3d 940, 945 (8th Cir. 2020); *Neylon v. BNSF Ry. Co.*, 968 F.3d 724, 728 (8th Cir. 2020). After plaintiff establishes his or her affirmative case, the burden shifts to the railroad to prove by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. 49 U.S.C. § 42121(b)(2)(B)(ii).

The FRSA’s employee-protection provisions are administered by the Occupational Safety and Health Administration (“OSHA”), and violations are investigated pursuant to the procedures

of 49 U.S.C. § 42121(b). 49 U.S.C. § 20109(d)(2). Action is commenced by filing a complaint with OSHA within 180 days of the violation. 49 U.S.C. § 20109(d)(2)(ii). At the conclusion of OSHA’s investigation the Secretary of Labor, acting through the Regional Administrator of the OSHA region where the case was investigated, will issue findings and a preliminary order. Within 30 days of receipt of the findings, objections and a request for hearing before an Administrative Law Judge may be filed. Hearings before the Administrative Law Judge are governed by 49 C.F.R. Subtitle A, Part 18. Final decisions may be appealed to the United States Court of Appeals. 49 U.S.C. § 20109(d)(4). If there has been no final decision within 210 days of the filing of the complaint, the employee may bring an original action in Federal District Court for *de novo* review in a jury trial. 49 U.S.C. § 20109(d)(3)

**CHAPTER 18 INSTRUCTIONS AND VERDICT FORM**

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## 18.20 DEFINITIONS: “GREATER WEIGHT OF THE EVIDENCE” AND “CLEAR AND CONVINCING EVIDENCE”

Plaintiff [insert name]’s claim<sup>1</sup> must be proven by the “greater weight of the evidence.”<sup>2</sup>

A fact has been proved by the greater weight of the evidence if you find that it is more likely true than not true.

Defendant [insert name]’s defense<sup>3</sup> must be proven by “clear and convincing evidence.”<sup>4</sup> Clear and convincing evidence means that the thing to be proved is highly probable or reasonably certain.<sup>5</sup> Clear and convincing evidence requires a higher degree of persuasion than the greater weight of the evidence.

You probably have heard the phrase “proof beyond a reasonable doubt.” That is a stricter standard than both the “greater weight of the evidence” standard and the “clear and convincing evidence standard.” The “proof beyond a reasonable doubt” standard applies in criminal cases, but not in this civil case; so put it out of your mind.

### Notes on Use

1. Use the plural if plaintiff submits more than one elements instruction.
2. The burden of proof standard that applies to plaintiff’s case is the “greater weight of the evidence” standard. *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 160 (3d Cir. 2013).
3. Use the plural if defendant submits more than one affirmative defense instruction.
4. The burden of proof standard that applies to defendant’s affirmative defenses is the “clear and convincing evidence” standard. 49 U.S.C. § 42121(b)(2)(B)(ii).
5. The phrase “clear and convincing evidence” is not defined in the FRSA. There are a variety of definitions available. In *Colorado v. New Mexico*, the Court stated that clear and convincing evidence required the fact finder to come to an “abiding conviction that the truth of ... the factual contentions are ‘highly probable.’” 467 U.S. 310, 316 (1984) (quoting C. MCCORMICK, *LAW OF EVIDENCE* § 320, p. 679 (1954)). In *Cruzan v. Director, Missouri Department of Health*, the Court stated that clear and convincing evidence means “evidence which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise

facts in issue.” 497 U.S. 261, 285 n. 11 (1990) (quoting *In re Westchester Cnty. Med. Ctr. on behalf of O’Connor*, 531 N.E.2d 607, 613, 534 N.Y.S.2d 886 (N.Y. 1988)); *see also* *Cornell v. Nix*, 119 F.3d 1329, 1334-35 (8th Cir. 1997) (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)). The phrase “reasonably certain” is rarely used as a stand-alone definition of “clear and convincing” but has been used in conjunction with the phrase “highly probable.” *See Ray v. Union Pac. R.R. Co.*, 971 F.Supp.2d 869, 889 (S.D. Iowa 2013).

**18.40 ELEMENTS OF CLAIM: DISCRIMINATION DUE, IN WHOLE OR IN PART, TO ENGAGEMENT IN PROTECTED ACTIVITY**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on plaintiff's claim [here generally describe claim] if all of the following elements have been proved by the greater weight of the evidence:

*First*, plaintiff [insert name] [briefly describe the protected activity<sup>1</sup> plaintiff engaged in (e.g., “notified defendant [insert name] of plaintiff’s work-related personal injury”)];

*Second*, defendant knew<sup>2</sup> plaintiff [insert name] [restate the protected activity from Paragraph First (e.g., “notified defendant of plaintiff’s work-related personal injury”)];

*Third*, defendant [insert name] [briefly describe the adverse action<sup>3</sup> at issue (e.g., “fired plaintiff” [insert name])];

*Fourth*, defendant [insert name] intentionally retaliated against plaintiff<sup>4</sup> by [restate the adverse action from Paragraph Third (e.g., “firing plaintiff”)], due, in whole or in part, to plaintiff [insert name] [restate the protected activity from Paragraph First (e.g., “having notified defendant of plaintiff’s work-related injury”)].

If any of the above elements has not been proved [or if defendant (insert name) is entitled to a verdict under Instruction No. \_\_\_\_\_ (insert number of affirmative defense instruction)], then your verdict must be for defendant [insert name]. [You may find that defendant [insert name]’s [restate the adverse action from Paragraph Third (e.g., “firing plaintiff” [insert name])] was due, in whole or in part, to plaintiff [insert name]’s [briefly describe the protected activity plaintiff engaged in (e.g., “notifying defendant [insert name] of plaintiff [insert name]’s work-related personal injury”)] if it has been proved that defendant [insert name]’s stated reason for [restate the adverse action from Paragraph Third (e.g., “firing plaintiff” [insert name])] is not the real reason, but is a pretext to hide retaliation.]<sup>5</sup>

## Notes on Use

1. From 49 U.S.C. § 20109 (a)(1–7) or (b)(1)(A–C).

If the protected activity is reporting a hazardous safety or security condition (*see* 49 U.S.C. § 20109(b)(1)(A)), then the report must merely be in “good faith,” meaning “honestly and frankly, without any intent to defraud.” *Monohon v. BNSF Ry. Co.*, 17 F.4th 773, 780 (8th Cir. 2021) (quoting ACTING IN GOOD FAITH, BLACK’S LAW DICTIONARY (11th ed. 2019)). The Eighth Circuit has said that “[t]he statute’s plain language . . . does not require that the report be objectively reasonable, and we decline to read a reasonableness requirement into the ‘reporting, in good faith’ provision.” *Id.*

If, on the other hand, the protected activity is refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee’s duties (*see* 49 U.S.C. § 20109(b)(1)(B)), then the refusal must not only be in good faith, but must also arise from circumstances in which “a reasonable individual in the circumstances” would conclude that (1) the condition presents an imminent danger of death or serious injury, and (2) there is not enough time to eliminate the danger without refusing to work. *Monohon*, 17 F.4th at 781 (quoting 49 U.S.C. § 20109(b)(2)(A)–(B)). The Eighth Circuit has said that the different standards reflect the different costs of these two forms of protected activity—refusal to work versus a mere report. *Id.* at 782 (“Congress weighed the higher cost of an employee’s refusal to work—which results in staffing issues and disruption of the work day . . .”).

As used in the FRSA’s anti-retaliation provision, “the ordinary meaning of ‘condition’ is ‘a state of being.’” *Monohon*, 17 F.4th at 782 (quoting *Condition*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2014)). The statute does not require proof that the danger presented by the condition had been realized at the time of the report. *Id.* at 783. It does not require, in other words, “that an accident or injury have occurred.” *Id.*

2. The second element of a prima facie case under the Act is that defendant “knew or suspected, actually or constructively, that (plaintiff) engaged in the protected activity.” *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. 2014). If the case is submitted upon a claim that defendant suspected that plaintiff engaged in the protected activity, or if the case is submitted on a claim of constructive knowledge, Paragraph Second should be modified accordingly.

3. *See* Overview.

4. The contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity. *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014); *Blackorby v. BNSF Ry. Co.*, 849 F.3d 716, 721 (8th Cir. 2017); *Neylon v. BNSF Ry. Co.*, 968 F.3d 724, 728 (8th Cir. 2020). The FRSA’s employee-protections provision is based on “discriminatory animus”; as such, a showing of intentional retaliation is required. *Blackorby*, 849 F.3d at 722 (quoting *Kuduk*, 768 F.3d at 791).

5. This sentence may be added, if appropriate. *See* Model Instruction 5.20.

**18.41 ELEMENTS OF CLAIM: MEDICAL ATTENTION (DENIAL, DELAY OR INTERFERENCE)**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] if all of the following elements of plaintiff's claim [generally describe claim] have been proved by the greater weight of the evidence:

*First*, plaintiff [insert name] was injured during the course of his/her employment; and

*Second*, defendant [insert name] [(denied) (delayed) (interfered with)] [(medical treatment) (first aid treatment)] of plaintiff [insert name].

If any of the above elements has not been proved, then your verdict must be for defendant [insert name].

**Committee Comments**

This instruction is designed to submit a claim brought under 49 U.S.C. § 20109(c)(1). Under this section, there is no reference to motivation on the part of the railroad carrier. Section 20109 (c)(1) provides:

(2) Discipline.--A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are not pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

Because this instruction does not direct the jury to make a finding with regard to motivation, there is no reason to instruct the jury with regard to any finding it may make that the railroad's stated reason for the adverse action was a pretext to hide retaliation, and the affirmative defense instruction, Model Instruction 18.50, does not apply.

**18.42 ELEMENTS OF CLAIM: MEDICAL ATTENTION  
(DISCIPLINE FOR REQUESTING OR FOLLOWING MEDICAL TREATMENT)**

Your verdict must be for plaintiff [insert name] and against defendant [insert name] if all of the following elements of plaintiff's claim [generally describe claim] have been proved by the greater weight of the evidence:

*First*, plaintiff [insert name] [(requested medical treatment) (requested first aid treatment) (followed the [(orders) (treatment plan))]]<sup>1</sup> of his/her treating physician when he/she [briefly describe what plaintiff did to follow the orders or treatment plan of his/her treating physician (e.g., “marked off from work to attend physical therapy”)];

*Second*, defendant [insert name] [(disciplined) (threatened to discipline)] plaintiff due in whole or in part to plaintiff [insert name] [restate the protected activity from Paragraph First (e.g., “having marked off work to attend physical therapy ordered by his/her treating physician”)].

If any of the above elements has not been proved [or if defendant (insert name) is entitled to a verdict under Instruction No. \_\_ (insert number of affirmative defense instruction)], then your verdict must be for defendant [insert name], and you need not proceed further in considering this claim. [You may find that defendant [insert name]'s [restate the prohibited action from Paragraph Third (e.g., “disciplining plaintiff” [insert name])] was due, in whole or in part, to plaintiff [insert name]'s [restate the protected activity from Paragraph First (e.g., “having marked off work to attend physical therapy ordered by his/her treating physician”)] if it has been proved that defendant [insert name]'s stated reason for [restate the prohibited action from Paragraph Third (e.g., “disciplining plaintiff” [insert name])] is not the real reason, but is a pretext to hide retaliation.]<sup>2</sup>

**Notes on Use**

1. Choose the appropriate language. This instruction is designed to submit a claim brought under 49 U.S.C. § 20109(c)(2) which provides, “A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting

medical or first aid treatment, or for following the orders or a treatment plan of a treating physician....”

2. This sentence may be added, if appropriate. *See* Model Instruction 5.20.

**18.50 AFFIRMATIVE DEFENSE INSTRUCTION APPLICABLE  
TO VERDICT DIRECTORS 18.40 AND 18.42**

Your verdict must be for defendant [insert name] if it has been proved by clear and convincing evidence that defendant would have taken the same action of [insert action] (e.g., charging plaintiff [insert name] with a rules violation and firing plaintiff [insert name]) even if plaintiff [insert name] had not [insert protected activity] (e.g., notified defendant [insert name] of plaintiff [insert name]’s work-related personal injury).

**Committee Comments**

The clear and convincing evidence standard is set forth clearly in the statute and case law. 49 U.S.C. §§ 20109(d)(2)(A)(i) and 42121(b)(2)(B)(iii)(iv); *Blackorby v. BNSF Ry. Co.*, 936 F.3d 733, 734 (8th Cir. 2019); *Kuduk v. BNSF Railway Co.*, 768 F.3d 786, 792 (8th Cir. 2014).

## 18.70 DAMAGES: ACTUAL

If you find in favor of plaintiff [insert name] under Instruction No. \_\_\_\_\_ (insert number of the elements instruction<sup>1</sup>), [and if you do not find in favor of defendant [insert name] in response to Instruction No. \_\_\_\_\_ (insert number of affirmative defense instruction),]<sup>2</sup> then you must award plaintiff [insert name] such sum as you find will fairly and justly compensate him/her for any of the following damages you find he/she sustained [and is reasonably certain to sustain in the future]<sup>3</sup> as a result of defendant [insert name]'s [restate the adverse action as set out in the elements of claim instruction (e.g., “firing of plaintiff [insert name],” “delaying first aid treatment of plaintiff [insert name]” or “disciplining plaintiff [insert name]”)]:

[List the types of damages claimed and supported in the evidence.]<sup>4</sup>

[Any award you make for (insert the type of damages that must be reduced to present value) must be reduced to present value.]

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.]

[Your award should not include any damages you find plaintiff (insert name) could have avoided through the exercise of due diligence under the circumstances as submitted in Instruction No. \_\_\_\_\_ (insert number of mitigation of damages instruction).]<sup>5</sup>

### Notes on Use

1. Use the plural, and list each applicable elements instruction, if plaintiff submits more than one elements instruction.
2. Use this language only if an affirmative defense instruction is given.
3. Include this language if the evidence supports a submission of any item of future damage.

4. If more than one type of damage is claimed by plaintiff and supported in the evidence, use the bracketed language such that this sentence will read: “Plaintiff [insert name]’s claim for damages includes the following distinct types of damages, and you must consider them separately:” If only one type of damages is claimed by plaintiff and supported in the evidence, the bracketed language should not be included, and this sentence will read: “Plaintiff [insert name]’s claim for damages includes the following damages:” List here the types of damages claimed and supported in the evidence in the particular case.

49 U.S.C. 20109(e)(1) provides, “In general. – An employee prevailing ... shall be entitled to all relief necessary to make the employee whole.” Section 20109(e)(2) provides:

(2) Damages.—Relief in an action under subsection (d) (including an action described in subsection (d)(3)) shall include—

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) any backpay, with interest; and

(C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

In the employment-law setting, reinstatement and front pay are typically considered equitable remedies and are decided by the court. *See Monohon v. BNSF Ry. Co.*, 17 F.4th 773, 784 (8th Cir. 2021). Under the FRSA, a prevailing employee is “entitled to all relief necessary to make the employee whole,” and that relief “shall include” reinstatement. *Id.* (quoting 49 U.S.C. § 20109(e)(1)–(2)(A)). Based on this language, the Eighth Circuit has concluded that “the FRSA unambiguously requires reinstatement.” *Id.* at 785. The Court has also held, however, that “this requirement is not absolute,” and may depend, for example, on whether reinstatement is factually available, such as whether the former employee is incapacitated or in prison, or whether the employer has closed its United States operations. *Id.* In those types of circumstances, “the statute gives the district court discretion to award whatever relief is ‘necessary to make the employee whole.’” *Id.* (quoting 49 U.S.C. § 20109(e)(1)). Reinstatement might also be off the table where the former employee requests front pay or does not challenge an award of front pay. *Id.*

The case law does not appear to have addressed whether nominal damages may be awarded under this statute.

5. It may be reversible error to refuse to give a mitigation of damages instruction when sufficient evidence has been presented to support it. Consider *Kauzlarich v. Atchison, Topeka & Santa Fe Ry. Co.*, 910 S.W.2d 254 (Mo. banc 1995). The burden of pleading and proving failure to mitigate damages is on defendant. *Sayre v. Musicland Grp., Inc.*, 850 F.2d 350, 355–56 (8th Cir. 1988); *Modern Leasing v. Falcon Mfg. of Cal.*, 888 F.2d 59, 62 (8th Cir. 1989).

## 18.72 DAMAGES: PUNITIVE

In addition to the damages mentioned in other instructions, the law permits the jury under certain circumstances to award punitive damages.

If you find in favor of plaintiff [insert name] under Instruction No. \_\_\_\_<sup>1</sup> [and do not find in favor of defendant [insert name] under Instruction No. \_\_\_\_]<sup>2</sup>, then you must decide whether defendant [insert name] acted with malice or reckless indifference to plaintiff's [insert name] right not to be [briefly describe the adverse action (e.g., discriminated, retaliated, intimidated)] against on the basis of [restate the protected activity (e.g., "having notified defendant [insert name] of plaintiff's [insert name] work related injury")]. Defendant [insert name] acted with malice or reckless indifference if:

it has been proved that [insert the name(s) of the defendant] or manager [insert applicable name] who engaged in the adverse action to plaintiff [insert name] knew that the [state adverse action taken (e.g., termination, suspension)] was in violation of the law prohibiting [discrimination, retaliation, intimidation], or acted with reckless disregard of that law.<sup>3</sup>

[However, you may not award punitive damages if it has been proved that defendant [insert name] made a good-faith effort to comply with the law prohibiting [discrimination, retaliation, intimidation].<sup>4</sup>

If you find that defendant [insert name] acted with malice or reckless indifference to plaintiff's [insert name] rights [and did not make a good-faith effort to comply with the law], then, in addition to any other damages to which you find plaintiff [insert name] entitled, you may, but are not required to, award plaintiff [insert name] an additional amount as punitive damages for the purposes of punishing defendant [insert name] for engaging in such misconduct and deterring defendant [insert name] and others from engaging in such misconduct in the future. You should presume that a plaintiff [insert

name] has been made whole for [his, her, its] injuries by the damages awarded under Instruction \_\_\_\_\_.

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. How reprehensible defendant's [insert name] conduct was. In this regard, you may consider [whether the harm suffered by plaintiff [insert name] was physical or economic or both; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether defendant's [insert name] conduct that harmed plaintiff [insert name] also posed a risk of harm to others; whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed plaintiff [insert name].

2. How much harm defendant's [insert name] wrongful conduct caused plaintiff [insert name] [and could cause plaintiff [insert name] in the future]. [You may not consider harm to others in deciding the amount of punitive damages to award.]

3. What amount of punitive damages, in addition to the other damages already awarded, is needed, considering defendant's [insert name] financial condition, to punish defendant [insert name] for [his, her, its] wrongful conduct toward plaintiff [insert name] and to deter defendant [insert name] and others from similar wrongful conduct in the future.

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to plaintiff [insert name] [and cannot exceed \$250,000].<sup>5</sup>

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.]

[You may not award punitive damages against defendant[s] for conduct in other states.]

### Notes on Use

1. Fill in the number or title of the elements instruction here. Use the plural, and list each applicable elements instruction, if plaintiff submits more than one elements instruction.

2. Do not include if no affirmative defense instruction is submitted.

3. See *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535, 536 (1999) (holding that “‘malice’ or ‘reckless indifference’ pertain to the employer’s knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination” and that “an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages”); *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 903 (8th Cir. 2006) (citing *Kolstad* and observing that an award of punitive damages may be inappropriate when the underlying theory of discrimination is novel or poorly recognized or “when the employer (1) is unaware federal law prohibits the relevant conduct, (2) believes the discriminatory conduct is lawful, or (3) reasonably believes there is a bona fide occupational qualification defense for the discriminatory conduct”).

4. Use this phrase only if the good faith of the defendant is to be presented to the jury. This two-part test was articulated by the United States Supreme Court in *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999). For a discussion of the case, see the Committee Comments to Instruction No. 5.72. It is not clear from the case who bears the risk of nonpersuasion on the good-faith issue. The Committee predicts that case law will place the burden on the defendant to raise the issue and prove it.

5. Fill in here the number of the actual damages instruction, Model Instruction 18.70.

### Committee Comments

The statute limits punitive damages to \$250,000 (49 U.S.C. § 20109(e)(3)). Case law does not require that the jury be advised of this limit. The committee believes the better approach would be not to tell the jury about the limit. The Court can reduce any award in excess of the statutory cap.

**18.80 GENERAL VERDICT FORM APPLICABLE  
TO VERDICT DIRECTOR 18.41**

Note: Complete the following paragraph by writing in the name required by your verdict.

On the claim of plaintiff [insert name], [as submitted in Instruction \_\_\_\_\_ ], we find in favor of:

---

(Plaintiff [insert name]) or (Defendant [insert name])

Note: Proceed to the next paragraph only if the above finding is in favor of plaintiff [insert name]. If the above finding is in favor of defendant [insert name], have your foreperson sign and date this form because you have completed your deliberations on this claim.

We assess plaintiff's [insert name] damages as follows:

A. Lost wages and benefits from [date of adverse action] through [date of your verdict]:

\$\_\_\_\_\_ (stating the amount [or, if none, write the word "none"]).

B. Plaintiff's [insert name] other damages, excluding past and future lost wages and benefits:<sup>1</sup>

\$\_\_\_\_\_ (stating the amount [or, if you find that plaintiff's [insert name] damages do not have a monetary value, write in the nominal amount of One Dollar (\$1.00)]<sup>2</sup>).

[We assess punitive damages against defendant, as submitted in Instruction \_\_\_\_\_, as follows:

\$ \_\_\_\_\_ (stating the amount or, if none, write the word “none”).]

\_\_\_\_\_  
Foreperson

\_\_\_\_\_  
Date

**Notes on Use**

1. This format assumes that front pay and related benefits are equitable claims to be decided by the Court.

2. It is unclear whether nominal damages are authorized in the case law. If the Court believes they are permissible, the bracketed phrase should be included.

**18.81 GENERAL VERDICT FORM APPLICABLE TO  
VERDICT DIRECTORS 18.40 AND 18.42**

Note: Complete the following paragraph by writing in the name required by your verdict.

On the claim of plaintiff [insert name], [as submitted in Instruction \_\_\_\_ ], we find in favor of:

---

(Plaintiff [insert name]) or (Defendant [insert name])

Note: Answer the next question only if the above finding is in favor of plaintiff [insert name]. If the above finding is in favor of defendant [insert name], have your foreperson sign and date this form because you have completed your deliberations on this claim.

Question No. 1: Has it been proved that defendant [insert name] would have [describe adverse action] plaintiff [insert name] regardless of plaintiff's [insert name] engagement of a protected activity as referred in Instruction \_\_\_\_\_.

\_\_\_\_\_Yes                      \_\_\_\_\_No

(Mark an "X" in the appropriate space.)

Note: Complete the following paragraphs only if your answer to the preceding question is "no." If you answered "yes" to the preceding question, have your foreperson sign and date this form because you have completed your deliberations on this claim.

We assess plaintiff's [insert name] damages as follows:

A.     Lost wages and benefits from [date of adverse action] through [date of your verdict]:

\$ \_\_\_\_\_ (stating the amount [or, if none, write the word “none”]).

B. Plaintiff’s [insert name] other damages, excluding past and future lost wages and benefits:<sup>1</sup>

\$ \_\_\_\_\_ (stating the amount [or, if you find that plaintiff’s [insert name] damages do not have a monetary value, write in the nominal amount of One Dollar (\$1.00)]<sup>2</sup>).

[We assess punitive damages against defendant, as submitted in Instruction \_\_\_\_\_, as follows:

\$ \_\_\_\_\_ (stating the amount or, if none, write the word “none”).]

\_\_\_\_\_  
Foreperson

\_\_\_\_\_  
Date

**Notes on Use**

1. This format assumes that front pay and related benefits are equitable claims to be decided by the Court.

2. It is unclear whether nominal damages are authorized in the case law. If the Court believes they are permissible, the bracketed phrase should be included.

## 19. ODOMETER FRAUD

### 19.00 OVERVIEW

The following instructions and verdict form are designed for use in actions brought under the Federal Odometer Act, 49 U.S.C. §§ 32701-32711. Enacted in 1994 and amended thereafter, the Federal Odometer Act replaced the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§ 1981-1991, which was repealed in 1994.

Like the prior statute, the Federal Odometer Act recites that its purposes are ~~is~~ to prohibit tampering with motor vehicle odometers and to provide safeguards to protect purchasers, lessors, and lessees of motor vehicles with altered or reset odometers. 49 U.S.C. § 32701(b). *See Tusa v. Omaha Auto. Auction Inc.*, 712 F.2d 1248, 1252 (8th Cir. 1983) (quoting 15 U.S.C. § 1981, now repealed).

The Federal Odometer Act, at 49 U.S.C. § 32710(b), grants original subject matter jurisdiction in “an appropriate” federal district court “or in another court of competent jurisdiction” over a civil action brought by “a person” “to enforce a claim under this section.” Subsection (b) also prescribes a 2-year limitations period for suit (“not later than 2 years after the claim accrues”).

The Odometer Act, at 49 U.S.C. § 32703 (eff. 1994), in its respective subsections (1) through (4) prohibits:

- (1) the advertisement, sale, or installation of a device that makes a motor vehicle odometer register a mileage different from the mileage the vehicle was driven;
- (2) disconnecting, resetting, altering, or having disconnected, reset, or altered, an odometer of a motor vehicle intending to change the mileage registered by the odometer;
- (3) with the intent to defraud, the operation of a motor vehicle on a roadway if the person knows that the odometer of the vehicle is disconnected or not operating; and
- (4) a conspiracy to violate this section or sections 32704 or 32705.

The Act provides specific definitions for the following terms: auction company, dealer, distributor, leased motor vehicle, odometer, repair, replace, title, and transfer. See 49 U.S.C. § 32702 (eff. 1994, amended Oct. 11, 1996, and July 6, 2012) <sup>1</sup>. The trial court may be called on to submit to a jury an instruction that defines a relevant term. A model instruction is provided below for such a definitional instruction whether its legal source is the Odometer Act or another source.

Section 32704 (eff. 1994) regulates the service, repair, and replacement of motor vehicle odometers and section 32705 (eff. 1994, amended in 1996, 1998, 2012, 2012, and 2015)

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<sup>1</sup> See Title 49 Code of Federal Regulations § 580.3 for definitions of additional relevant terms.

regulates, under regulations prescribed by the Secretary of Transportation (*see* Title 49 Code of Federal Regulations Part 580), the disclosure of the mileage registered on the odometer, regarding the transfer of motor vehicles. See 49 C.F.R. 580.5 and 580.6 (“Additional requirements for electronic odometer disclosure”).

Section 32710 also prescribes the available relief in a civil cases brought by private persons: “[a] person that violates this chapter or a regulation prescribed or an order issued under this chapter, with intent to defraud, is liable for 3 times the actual damages or \$10,000, whichever is greater.” 49 U.S.C. § 32710(a).

Subsection 32710(b) also provides that an award of costs and a reasonable attorney’s fee “shall” be awarded to “the person” who “bring[s] a civil action to enforce a claim under” the Act and for whom judgment is entered. Thus, under the Odometer Act, costs and attorney’s fees are available only to a prevailing claimant. *See Miller’s Apple Valley Chevrolet Olds—GEO, Inc. v. Goodwin*, 177 F.3d 232 (4th Cir. 1999) (applying to the language of § 32710(b) the rules of grammar in the context and placement of the statutory terms); *Ard v. Howard*, 2016 WL 10518594, at \*2-3 (D. Utah Jan. 4, 2016); *cf. BMW Financial Services NA, LLC v. Mellion*, 2015 WL 12712315, at \*3 (S.D. Fla. June 9, 2015) (vehicle lessor suing lessee for rolling back mileage on returned vehicle). The Committee has found no Eighth Circuit authority on this issue and no federal authority contrary to the *Miller’s* case.

Section 32706 of the Act authorizes the Secretary of Transportation to conduct inspections or investigations to enforce the Act, the regulations adopted under it, or orders issued pursuant to it. Section 32707 authorizes federal judges, including Magistrate Judges, to issue warrants for impoundment or inspection upon a showing of probable cause. Section 32709 provides for administrative civil and criminal penalties for violating the Act or its regulations.

Section 32711 protects the applicability of state law regarding “disconnecting, altering, or tampering with an odometer with the intent to defraud,” unless the state law is inconsistent with the Act.

## **CHAPTER 19 INSTRUCTIONS AND VERDICT FORM**

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## 19.20 DEFINITION: ODOMETER

As used in these instructions, the term “odometer” means an instrument or system of components for measuring and recording the distance a motor vehicle is driven, but does not include an auxiliary instrument or system of components designed to be reset by the operator of the vehicle to record mileage of a trip.

### Committee Comments

*See* 49 U.S.C. § 32702(5); *In re Nissan North Am., Inc. v. Odometer Litigation*, 664 F.Supp.2d 873, 884 n. 8 (M.D. Tenn. Feb. 2, 2009). For a discussion of the breadth of the definition of “odometer” see *In re Nissan North Am., Inc. v. Odometer Litigation*, 2010 WL 3852722 (M.D. Tenn. Sept. 28, 2010). *See also*, 19.40, Note on Use 3, below. For a definition of “device” which term is not defined by the Odometer Act, *see Vasilas v. Subaru of Am., Inc.*, 2009 WL 8447590, at \*5 (S.D. N.Y. Aug. 5, 2009).

The Odometer Act does not define “intent to defraud.” In a state court Federal Odometer Act case, for an example of a faulty jury instruction’s definition of “intent to defraud” that included “careless,” *see Williams v. Finance Plaza, Inc.*, 23 S.W.3d 656 (Mo. Ct. App. 2000).

## 19.40 ELEMENTS OF CLAIM

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on plaintiff's claim [generally describe claim] if all of the following elements have been proved <sup>1</sup> :

*First*, the defendant or its agent [disconnected, reset, or altered the odometer on the vehicle in question by changing the number of miles indicated thereon]; <sup>2</sup> and

*Second*, the action of the defendant or its agent was done with the intent to defraud<sup>3</sup> someone. <sup>4</sup>

To act with intent to defraud means to act with intent to deceive or cheat for the purpose of bringing some financial gain to oneself or another.

If any of the above elements has not been proved, your verdict must be for the defendant.

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. The bracketed language should be used when the plaintiff's civil action is based upon a violation of 49 U.S.C. § 32703(2). If the action is premised on an alleged violation of 49 U.S.C. §§ 32703(3) or 32705, the element should be modified as follows:

a) section 32703(3):

*First*, the defendant or its agent operated the vehicle in question knowing that the odometer of such vehicle was disconnected or nonfunctional;

b) section 32705:

*First*, the defendant or its agent failed to provide an accurate written odometer disclosure statement on the vehicle in question at the time of its transfer;

3. Constructive knowledge, recklessness, or even gross negligence in determining or disclosing actual mileage is enough for the fact finder to reasonably infer intent to defraud. *Tusa v. Omaha Automobile Auction, Inc.*, 712 F.2d 1248, 1253 (8th Cir. 1983); *Ryan v. Edwards*, 592 F.2d 756, 762 (4th Cir. 1979); *Nieto v. Pence*, 578 F.2d 640, 642 (5th Cir. 1978). Mere

negligence is not enough. *See Huson v. General Motors Acceptance Corp.*, 108 F.3d 172, 173 (8th Cir. 1997). *See also Bedsworth v. G & J Automotive, Inc.*, 650 F. Supp. 763, 765-66 (E.D. Mo. 1996) (granting summary judgment to Chrysler Credit Corporation, which provided accurate information to the State of Missouri and could not be liable for subsequent clerical error by the State).

4. Privity is unnecessary between the defrauded party and the party who violated the Odometer Act with an intent to defraud. *Tusa v. Omaha Automobile Auction, Inc.*, 712 F.2d 1248, 1251 n. 2 (8th Cir. 1983). The plaintiff need only prove that the defendant intended to defraud someone.

#### **Committee Comments**

Sections 37023(1) and 37024, 49 United States Code, specify other actionable illegal acts not covered by this instruction. *See Overview*, above.

## 19.70 DAMAGES

If you find in favor of plaintiff, then you must award plaintiff the sum you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained as a direct result of [insert appropriate language such as “the conduct of the defendant as submitted in Instruction \_\_\_\_\_ ”].

Damages include the difference between the fair market value of the vehicle in question with its actual mileage and the amount paid for the vehicle by the plaintiff, and the sum you find will fairly and justly compensate the plaintiff for any other damages sustained, including [insert list of appropriate other special damages supported by substantial evidence].<sup>1</sup>

### Notes on Use

1. Title 49 U.S.C. § 32710(a) also allows an award of expenses such as repair bills for defects that are directly related to the car’s higher mileage and overpayment of insurance premiums and title and licensing fees attributable to the car’s fraudulent inflation in value due to the lower mileage reading, provided these expenses are legitimately attributable to the defendant’s acts. *Oettinger v. Lakeview Motors, Inc.*, 675 F. Supp. 1488, 1495-96 (E.D. Va. 1988); *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381, 1388 (D. Neb. 1977), *aff’d* 578 F.2d 721 (8th Cir. 1978). *See also Farmers Co-op Co. v. Senske & Son Transfer Co.*, 572 F.3d 492, 498 (8th Cir. 2009) (district court did not err in allowing plaintiff to recover both the price difference attributable to the fraud and “the repair costs that the jury found were proximately caused by Senske’s misconduct”).

### Committee Comments

This instruction establishes a damage figure for the purposes of the court applying the minimum damage figure set by 49 U.S.C. § 32710(a). Under this section, the plaintiff may, upon proper proof, recover three times the amount of actual damages sustained, or \$10,000, whichever is greater. *Cf. Williams v. Toyota of Jefferson, Inc.*, 655 F. Supp. 1081, 1085-86 (E.D. La. 1987); *Beachy v. Eagle Motors, Inc.*, 637 F. Supp. 1093, 1094 (N.D. Ind. 1986); *Gonzales v. Van’s Chevrolet, Inc.*, 498 F. Supp. 1102, 1103 (D. Del. 1980); *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381, 1388 (D. Neb. 1977). The Committee recommends that, in jury cases, the jury should be directed to determine the amount of actual damages and that the court should apply the statutory formula. *See Gonzales*.

Section 32710(b) mandates an award of reasonable attorney fees and costs only to a prevailing claimant. *See Miller’s Apple Valley Chevrolet Olds—GEO, Inc. v. Goodwin*, 177 F.3d 232 (4th Cir. 1999) (considering the language of § 32710(b) under the rules of grammar and the context and placement of the statutory terms); *Ard v. Howard*, 2016 WL 10518594, at \*2-3 (D.

Utah Jan. 4, 2016); *cf. BMW Financial Services NA, LLC v. Mellion*, 2015 WL 12712315, at \*3 (S.D. Fla. June 9, 2015) (vehicle lessor suing lessee for rolling back mileage on returned vehicle). The factors to be considered in awarding these fees are the same as in other civil cases. *See Blanchard v. Bergeron*, 489 U.S. 87 (1989); *Blum v. Stenson*, 465 U.S. 886 (1984). *See also Farmers Co-op Co. v. Senske & Son Transfer Co.*, 572 F.3d 492, 500 (8th Cir. 2009) (implementing the lodestar method, with adjustments for relevant circumstances, in determining reasonable attorney's fees in case involving a jury trial for odometer fraud).

**19.80 GENERAL VERDICT FORM**

**VERDICT**

**Note:** Complete the following paragraph by writing in the name required by your verdict.

On the odometer fraud claim of plaintiff [name] against defendant [name] as submitted in Instruction \_\_\_\_\_<sup>1</sup>, we find in favor of:

\_\_\_\_\_  
(Plaintiff [name]) or (Defendant [name])

**Note:** Complete the following paragraph only if the above finding is in favor of the plaintiff. If the above finding is in favor of the defendant, have your foreperson sign and date this form because you have completed your deliberation on this claim.

We find plaintiff's damages as defined in Instruction \_\_\_\_\_<sup>2</sup> to be:

\$ \_\_\_\_\_

\_\_\_\_\_  
Foreperson

Dated: \_\_\_\_\_

**Notes on Use**

- 1. The number or title of the "essential elements" instruction should be inserted here.
- 2. The number or title of the "actual damages" instruction should be inserted here.

## 20. COPYRIGHT

### 20.00 OVERVIEW

Chapter 20 contains model jury instructions relating to copyright cases.

The owner of a copyright has the right to exclude any other person from reproducing, distributing, or preparing derivative works from the copyrighted work for a specific period of time. *See* 17 U.S.C. § 106. The owner of a copyright also has the exclusive right to perform and display the copyrighted work. *See id.*

Someone who reproduces, publicly distributes, publicly performs, publicly displays, or prepares derivative works from a copyrighted work without authority from the copyright owner during the term of the copyright infringes the copyright. *See* 17 U.S.C. § 501.

“Two elements are required to establish copyright infringement, ownership of a valid copyright and copying of original elements of the work.” *Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849, 852 (8th Cir. 2004). “Copying” may be established by either (1) direct evidence or (2) a showing of “substantial similarity” between the plaintiff’s work and the alleged infringer’s work and evidence that the alleged infringer had access to the copyrighted material. *Taylor Corp. v. Four Seasons Greetings, LLC*, 315 F.3d 1039, 1042 (8th Cir. 2003).

To determine substantial similarity, courts conduct a two-step analysis under *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117 (8th Cir. 1987). There must be substantial similarity both of ideas and of expression. *Id.* at 120. Similarity of ideas is evaluated extrinsically, focusing on objective similarities in the details of the works, such as “the type of artwork involved, the materials used, the subject matter, and the setting for the subject[.]” *Nelson v. PRN Prods., Inc.*, 873 F.2d 1141, 1143 (8th Cir. 1989). Similarity of expression, on the other hand, is evaluated intrinsically, “by the response of the ordinary, reasonable person to the forms of expression.” *Hartman*, 833 F.2d at 120.

In addition, a copyright may also be infringed by vicariously infringing or contributorily infringing a work. *See generally Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

Under a vicarious infringement theory, a person is liable for another’s copyright infringement if that person has an obvious and direct financial interest in the infringement of the copyright materials and the right and ability to supervise or control the infringing activity, but declines to exercise that right to stop or limit it. *See, e.g., Grokster*, 545 U.S. at 930 n.9; *Sony Corp.*, 464 U.S. at 439; corporate *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 834 (8th Cir. 1992); *RCA/Ariola Int’l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 781 (8th Cir. 1988).

Under a contributory infringement theory, a person is liable for copyright infringement if the person knows or should have known of another’s infringing activity and induces, encourages, or materially contributes to the activity. *See Grokster*, 545 U.S. at 929-31; *Sony Corp.*, 464 U.S. at 435-39 n.17.

In a multi-party infringement case, if the jury finds that there has been a direct infringement of the plaintiff's copyrighted materials by one defendant, it may also consider whether there has been "vicarious infringement" or "contributory infringement" by another defendant or a third party. *See generally Grokster*, 545 U.S. at 929-31; *Sony Corp.*, 464 U.S. at 435-39.

There are a number of defenses to copyright infringement, including:

- the defendant independently created the challenged work
- the defendant made fair use of the copyrighted work by using the copyrighted work in a reasonable way under the circumstances if it would advance the public interest, including purposes such as criticism, comment, news reporting, teaching, scholarship, or research
- the plaintiff abandoned ownership of the copyrighted work
- the plaintiff misused the copyright by requiring its exclusive use or preventing the development of competing products
- the plaintiff granted the defendant an express license to use or copy the plaintiff's copyrighted work
- the plaintiff granted the defendant an implied license to use the plaintiff's copyrighted work
- the defendant, as an owner of a copy of the plaintiff's copyrighted work, resold that copy after the plaintiff made the first sale

The Copyright Act provides both equitable and legal remedies for infringement. A court may issue an injunction "on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. § 502(a).

The court may also award monetary remedies from one of two categories (as elected by the plaintiff). A court may award the owner's actual damages and "any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages." 17 U.S.C. § 504(b); *see also Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 669, 134 S. Ct. 1962, 1968, 188 L. Ed. 2d 979 (2014); *Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 699 (9th Cir. 2008) ("Under 17 U.S.C. § 504(a) and (c), a copyright owner may elect to recover statutory damages instead of actual damages and any additional profits.").

In the alternative, a plaintiff may elect to receive statutory damages, which can range from \$750 to \$30,000 for each work infringed. 17 U.S.C. § 504(c). If the infringement was innocent, *i.e.*, the infringer "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright," then the award may be reduced to as low as \$200 per work. On the other hand, if the infringement was willful, the award may be increased to as high as \$150,000 per work. *See id.*

Under 17 U.S.C. § 412, statutory damages are unavailable for copyright infringement that commenced prior to registration of an unpublished work or for infringement that commenced before registration of a published work, unless the work was registered within three months of its publication. The interaction of Sections 412 and 504(c) may give rise to issues to be presented to the jury through tailored instructions and/or special interrogatories. **See the Committee Comments at Instruction 20.73 below for discussion of issues specific to statutory damages.**

## CHAPTER 20 INSTRUCTIONS AND VERDICT FORM

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## 20.01 EXPLANATORY: PURPOSE OF COPYRIGHT LAW

This lawsuit includes [claims] [a claim] for copyright infringement under federal law. Copyright is the exclusive right to copy an original work. Copyright law allows the author of an original work to stop others from copying the original expression in the author's work. Only the particular expression of an idea can be copyrighted and protected. Copyright law does not give the author the right to prevent others from copying or using the underlying ideas contained in the work, such as any procedures, processes, systems, methods of operation, concepts, principles, or discoveries.

In this lawsuit, the plaintiff, [name of plaintiff], claims ownership of a copyright in [describe the work] and seeks damages against the defendant, [name of defendant], for copyright infringement. The defendant denies infringing the copyright [and] [contends that the copyright is invalid] [asserts an affirmative defense, *e.g.*, that it made a fair use of the work].<sup>1</sup>

### Notes on Use

1. The second paragraph of the instruction may be modified where appropriate to narrow or expand the charge to fit the case at bar. For example, for a derivative claim for contributory infringement, the court could use:

In this lawsuit, the plaintiff, [name of plaintiff], claims ownership of a copyright in [describe the work] and seeks damages against the defendant, [name of defendant], for copyright infringement. The plaintiff claims that the defendant [induced [direct infringer's name] to infringe the plaintiff's copyright] [contributed to [direct infringer's name]'s infringement of the plaintiff's copyright]. The defendant denies infringing the copyright [and] [contends, *e.g.*, that it did not know and had no reason to know of the infringing conduct] [asserts an affirmative defense].

### Committee Comments

*See generally* 17 U.S.C. §§ 101, et seq.

Regarding an “original” work, “[o]riginal, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.” *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

Copyright law does not protect facts and ideas within a work. *Toro Co. v. R & R Prod. Co.*, 787 F.2d 1208, 1212 (8th Cir. 1986). The Eighth Circuit has explained that “copyright

protection extends only to the expression of a particular idea, not the idea itself. The doctrine is grounded both in a presumed legislative intent to grant an author a monopoly only in his [or her] expressions—not his ideas—and in the First Amendment interest in the free exchange of ideas.” *Id.* at 1212. For questions regarding the idea/expression dichotomy, the jury may need to determine the answer as a matter of fact, not law. Instructing the jury on substantial similarity can cover this aspect of copyright infringement.

## 20.02 EXPLANATORY: COPYRIGHT SUBJECT MATTER

The work[s] [*identify the works at issue*] involved in this trial are known as:

[literary works [in which words, numbers, or other verbal or numerical symbols are expressed];]

[musical works, including any accompanying words;]

[dramatic works, including any accompanying music;]

[pantomimes;]

[choreographic works;]

[pictorial works] [graphic works] [sculptural works][;] [, such as two- and three-dimensional works of fine, graphic or applied art, photographs, prints, and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans;]

[motion pictures] [and other audiovisual works] [in which a series of related images convey an impression of motion when shown in succession];]

[sound recordings][;] [, which are works that result from fixation of a series of musical, spoken, or other sounds;]

[architectural works][;] [, which are building designs as embodied in buildings, architectural plans, drawings, or other modes of expression;]

[computer programs][, that is, sets of statements or instructions to be used directly or indirectly in a computer to bring about a certain result];

You are instructed that a copyright may be obtained in [*identify the work[s] at issue*].

[While [this] [these] work[s] can be protected by copyright law, only that part of the work[s] consisting of original works of authorship [fixed] [produced] in any tangible [medium] [form] of expression from which it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, is protected by the Copyright Act.]

### **Notes on Use**

If the plaintiff is not the author of the work, this instruction can be modified by substituting the word “owner,” “assignee,” or “licensee” in the place of the word “author,” as is appropriate to the facts of the case.

The court may wish to supplement this instruction by providing further instructions addressing these additional terms. For example, the term “literary works” “does not connote any criterion of literary merit or qualitative value: it includes catalogs, directories and similar factual, reference, or instructional works and compilations of data. It also includes computer databases, and computer programs to the extent that they incorporate authorship in the programmer’s expression of original ideas, as distinguished from the ideas themselves.” H.R. Rep. No. 94-1476, at 54 (1976).

### **Committee Comments**

See 17 U.S.C. § 102. For additional definitions of terms used in this instruction, see 17 U.S.C. § 101 (defining numerous terms used here).

Generally, whether a subject matter is copyrightable is a question of law to be determined by the court. See, e.g., *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1009 (2017). This instruction is designed to inform the jury that the court has determined the subject matter to be appropriately copyrightable.

A related concept is the doctrine of merger, which provides that even some *expressions* of ideas are not copyrightable “if the idea behind the expression is such that it can be expressed only in a very limited number of ways. The doctrine is designed to prevent an author from monopolizing an idea merely by copyrighting a few expressions of it.” *Toro*, 787 F.2d at 1212.

A character in cartoons or movies may be copyrightable as well, but only when it is consistently portrayed with distinctive visual traits. See *Warner Bros. Ent. v. X One X Prods.*, 644 F.3d 584, 597 (8th Cir. 2011) (“It is clear that when cartoons or movies are copyrighted, a component of that copyright protection extends to the characters themselves, to the extent that such characters are sufficiently distinctive” and “exhibit consistent, widely identifiable traits[.]”) (citations omitted).

The United States Supreme Court has recognized that design features on “useful articles,” or objects with a utilitarian purpose, such as clothing, may be copyrightable if the design feature “(1) can be perceived as a two- or three-dimensional work of art separate from the useful article

and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.” *Star Athletica*, 137 S. Ct. at 1007.

The United States Supreme Court has ruled that no copyright protection is available for material authored by a judge or a legislative body acting in an official capacity. *See Georgia v. Public Resources*, 140 S. Ct. 1498 (2020).

### **20.03 EXPLANATORY: REGISTRATION OF COPYRIGHT**

A registered mark is presumed to be valid unless the defendant presents evidence challenging that validity. However, the Copyright Office does not investigate the work’s originality or uniqueness, nor does it determine the copyright’s validity. It only determines that the material is the type of work eligible for copyright registration. If the material is copyrightable and certain legal and formal requirements are satisfied, the Register of Copyrights registers the work and issues a certificate of registration to the copyright owner.

#### **Committee Comments**

This instruction may be used if there is a dispute about the import of a copyright’s registration. “[R]egistration . . . has been made’ within the meaning of 17 U.S.C. § 411(a) not when an application for registration is filed, but when the Register has registered a copyright after examining a properly filed application.” *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 892 (2019).

## 20.04 EXPLANATORY: OWNERSHIP—IN GENERAL

An “owner” of a copyright is a person or entity that:

- (a) is a creator of the work [and didn’t transfer to another the exclusive rights being asserted], [or]
- (b) received the copyright from someone else who owned it, [or]
- (c) created a joint work. A joint work is a work that two or more persons prepared with the intention that their contributions be merged into inseparable elements of a single work. To own a copyright in a joint work, a person must contribute original expression that, by itself, would be eligible for copyright protection as that term has been previously defined. [Contributions in the nature of research, comments or edits are not sufficient.] [Contributing direction or ideas is not enough.]]

[The copyright owner may [transfer] [sell] [convey] to another person all or part of the owner’s property interest in the copyright, that is, the right to exclude others from reproducing, distributing, performing, displaying or preparing derivative works from the copyrighted work. To be valid, the [transfer] [sale] [conveyance] must be in writing and signed by the owner or the owner’s authorized agent. The person to whom a right is transferred is called an assignee.]

[The copyright owner may agree to let another person exclusively reproduce, distribute, perform, display, use, or prepare a derivative work from the copyrighted work. To be valid, the [transfer] [sale] [conveyance] must be in writing and signed by the owner or the owner’s authorized agent. The person to whom this right is transferred is called an exclusive licensee. The exclusive licensee has the right to exclude others from [describe the rights granted in the license].]

## Notes on Use

1. This instruction should not be used if the case involves only a work made for hire or a derivative work. In such a case, use the applicable instruction from Instruction Nos. 20.05 or 20.07.

## Committee Comments

Under the Copyright Act, the party claiming infringement must show ownership. *See Warner Bros. Ent. v. X One X Prods.*, 644 F.3d 584, 591 (8th Cir. 2011) (“A plaintiff in a copyright infringement claim has the burden to prove ownership of a valid copyright.”).

*See generally* 17 U.S.C. § 201(a) (“Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.”); *id.* § 201(d) (acquisition of copyright via transfer). The Committee has avoided use of the term “author” to avoid jury confusion in cases in which the work at issue is something other than a textual work, and to avoid the need for further definition of that term. The terms “create” and “creator” are all-encompassing. *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) (“[T]he author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”).

For cases involving joint works, see 17 U.S.C. § 101 (general definition). “A ‘joint work’ is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. § 101. There is no requirement that “the several authors must necessarily work in physical propinquity, or in concert, nor that the respective contributions made by each joint author must be equal either in quantity or quality.” *Nimmer on Copyright* § 6.03, at 7. Each author's contribution, however, must be more than de minimis. *Id.* § 6.07(A)(1), at 21. There may be an exception when the overall work is copyrightable but the contributions of each creator couldn't stand alone because of the nature of the particular creative process that produced it. For example, “if authors *A* and *B* work in collaboration, but *A*'s contribution is limited to plot ideas that standing alone would not be copyrightable, and *B* weaves the ideas into a completed literary expression, it would seem that *A* and *B* are joint authors of the resulting work.” *Id.* § 6.07 at 23 (2003). The instruction will require modification in a case in which ownership of this type of work is at issue.

Regarding the transfer of ownership, when the entire bundle of rights is transferred, the person to whom the rights are transferred is called an assignee. When anything fewer than all rights are transferred, the person is an exclusive licensee. *Applied Innovations, Inc. v. Regents of the Univ. of Minnesota*, 876 F.2d 626, 631 (8th Cir. 1989).

## **20.05 EXPLANATORY: OWNERSHIP—WORK MADE FOR HIRE**

A copyright owner is entitled to exclude others from copying a work made for hire. [Name of plaintiff] owns a copyright in [describe the work at issue] if the work was [prepared by Plaintiff's employee within the scope of his employment. A work is made for hire within the scope of employment if:

*First*, it is the kind of work the employee is employed to create;

*Second*, it occurs substantially within the authorized time and space limits; and

*Third*, it is made, at least in part, for the purpose of serving the employer.]

OR

[specially [ordered; commissioned] as [a contribution to a collective work; a part of a motion picture or other audiovisual work; a translation; a supplementary work; a compilation; an instructional text; a test; answer material for a test; an atlas], and there was a prior agreement, signed by [*names of necessary signators*] that the work would be a work made for hire.] [A supplementary work is a work prepared for publication as an accompaniment to someone else's work to [introduce; conclude; illustrate; explain; revise; comment upon; assist in the use of] that work [for example, a foreword; afterword; pictorial illustration; map; chart; table; editorial note; musical arrangement; answer material for a test; bibliography; appendix; index].] [An instructional text is a literary, pictorial, or graphic work prepared for publication for use in systematic instructional activities.]

### **Notes on Use**

1. This instruction should not be used in cases where a copyright was obtained under the 1909 Copyright Act.

2. If the case involves work made for hire in the context of an employment relationship, use the second paragraph above and omit the third paragraph. Most cases will involve work made for hire in the context of an employment relationship, but the Copyright Act also applies

the work for hire doctrine to nine specific circumstances set out in the third paragraph above. If applicable, omit the second paragraph and use the third paragraph.

### Committee Comments

See 17 U.S.C. §§ 101, 201(b) (“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”); *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737-40 (1989).

Often, whether the work is one made for hire turns on the nature of the employment relationship. See, e.g., *Kirk v. Harter*, 188 F.3d 1005, 1007 (8th Cir. 1999). This is a question of law that may be decided by a jury. *Id.* Congress used the words "employee" and "employment" in 17 U.S.C. § 101 to describe the conventional relationship of employer and employee. See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52. If the issue of the employment status of the work’s creator will be decided by the jury, the Supreme Court has suggested an eleven-factor test focusing on whether the creator of a work was an employee or an independent contractor under common-law agency principles. See *Cnty. for Creative Non-Violence*, 490 U.S. at 751-52. No single factor is determinative. *Id.* at 752. The following instruction has been suggested by the Ninth Circuit Civil Jury Instructions Subcommittee to assist the determination of the employment status of the person creating the work at issue:

#### Factors Regarding Work for Hire

You should consider the following factors in determining whether the creator of the work in this case was an employee of the [name of party identified]:

- (1) The skills required to create the work. The higher the skills required, the more likely the creator was an independent contractor rather than an employee.
- (2) The source of the tools or instruments used to create the work. The more the creator had to use his or her own tools or instruments, the more likely the creator was an independent contractor rather than an employee.
- (3) The location of where the work was done. The less the creator worked at [name of alleged employer’s work site], the more likely the creator was an independent contractor rather than an employee.
- (4) Applicability of employee benefits, like a pension plan or insurance. The more the creator is covered by the benefit plans [name of alleged employer] offers to other employees, the less likely the creator was an independent contractor rather than an employee.
- (5) Tax treatment of the creator by [name of alleged employer]. If [name of alleged employer] reported to tax authorities payments to the creator with no withholding or by use of a Form 1099, the more likely the creator was an independent contractor rather than an employee.

(6) Whether the creator had discretion over when and how long to work. The more the creator can control his or her work times, the more likely the creator was an independent contractor rather than an employee.

(7) Whether [name of alleged employer] has the right to assign additional projects to the creator. The more the creator could refuse to accept additional projects unless additional fees were paid, the more likely the creator was an independent contractor rather than an employee.

(8) Duration of the relationship between the parties. The more the creator worked on a project basis for [name of alleged employer], the more likely the creator was an independent contractor rather than an employee.

(9) The method of payment. The more the creator usually works on a commission or onetime-fee basis, the more likely the creator was an independent contractor rather than an employee.

(10) Whether the creator hired (or could have hired) and paid his or her own assistants. The more the creator hires and pays for his or her own assistants, the more likely the creator was an independent contractor rather than an employee.

(11) Whether [name of alleged employer] is a business. If the party that did the hiring is not a business, it is more likely that the creator was an independent contractor rather than an employee.

## **20.06 EXPLANATORY: OWNERSHIP—COMPILATION OR COLLECTIVE WORK**

An owner of a copyright in a collective work is entitled to exclude others from copying it. A collective work is a work such as a newspaper, magazine, anthology, or encyclopedia in which a number of contributions, constituting separate and independent works in themselves, are selected, coordinated or arranged into an original, collective whole. The person who assembles the contributions of independent works into the collective work is an author and is entitled to copyright.

Plaintiff owns a copyright in [describe compilation/collective work] if Plaintiff selected and arranged the separate [works; materials; data] in an original way. [Plaintiff does not need to own a copyright in the separate [works; materials; data] themselves.] [By assembling the separate [works; materials], a person does not acquire a copyright in any of the separate [works; materials; data].] [A person who owns a copyright in one of the separate [works; materials; data] does not acquire a copyright in the collective work.]

### **Committee Comments**

Copyright protects the “selection and arrangement [of facts], so long as they are made independently by the compiler and entail a minimal degree of creativity.” *Infogroup, Inc. v. Database LLC*, 956 F.3d 1063, 1066 (8th Cir. 2020); *see also Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359 (1991); *Schoolhouse, Inc. v. Anderson*, 275 F.3d 726, 729 (8th Cir. 2002); 17 U.S.C. §§ 101, 201(c) (stating that, in the absence of an express copyright transfer by a contributor to the author of a collective work, it is presumed that copyright owner of collective work acquires “only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series”).

Whether a contribution to a collective work has been reproduced and distributed as part of a “revision” depends on how it is presented and how it is perceived by users in context. *N.Y. Times Co., Inc. v. Tasini*, 533 U.S. 483, 499-500 (2001) (considering use of contributions to periodicals and other collective works in databases). Several sections of the Copyright Act are related to the placement of the copyright notice on a collective work and on the contributions to the collective work. *See* 17 U.S.C. §§ 401–406.

## **20.07 EXPLANATORY: OWNERSHIP—DERIVATIVE WORK**

A copyright owner is entitled to exclude others from creating derivative works based on the owner's copyrighted work. The term derivative work refers to a work based on one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which the pre-existing work is recast, transformed, or adapted. Accordingly, the owner of a copyrighted work is entitled to exclude others from recasting, transforming, or adapting the copyrighted work without the owner's permission.

If the copyright owner exercises the right to create a derivative work based on the copyrighted work, this derivative work may also be copyrighted. Only what was newly created, such as editorial revisions, annotations, elaborations, or other modifications to the pre-existing work is considered to be the derivative work.

If the copyright owner allows others to create a derivative work based on the copyrighted work, the copyright owner of the pre-existing work retains a copyright in that derivative work with respect to all of the elements from the pre-existing work that were used in the derivative work.

The plaintiff owns a copyright in [describe derivative work at issue], with respect to the elements that [were taken from the plaintiff's original work]<sup>1</sup> OR [the plaintiff [recast; transformed; adapted] from an earlier work. Plaintiff owns a copyright only in the original expression that he adds to the earlier work. Plaintiff does not own a copyright in the expression taken from the earlier work.][The earlier work may include work that is protected by copyright and used with the copyright owner's permission. [The earlier work [also] may include work that is in the public domain.]]<sup>2</sup>

### **Notes on Use**

1. Use this phrase if the plaintiff is the owner of the original work.

2. Use this phrase if the plaintiff is the owner of the derivative work.

### **Committee Comments**

*See* 17 U.S.C. §§ 101, 103(b) (“The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.”); *Stewart v. Abend*, 495 U.S. 207, 223 (1990) (aspects of a derivative work added by the derivative author are that author’s property, but the element drawn from the pre-existing work remains “on grant from the owner of the pre-existing work”).

A derivative work may itself be copyrighted if it has the requisite originality. “However, the copyright is limited to the features that the derivative work adds to the original. Moreover, because the owner of the original copyright has the exclusive right to prepare derivative works, the creator of an original derivative work is only entitled to a copyright if she had permission to use the underlying copyrighted work.” *Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849, 852 (8th Cir. 2004) (citations omitted); *see also* 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright*, § 3.04[A] (2005) (discussing subject matter in the public domain).

## 20.08 EXPLANATORY: COPYING

You may find that the defendant copied the plaintiff's work if you find that the defendant had a reasonable opportunity to [view; read; hear] the plaintiff's work before creating [his][her][its] own work and the two works are so similar that a reasonable person would conclude the defendant took protected expression from the plaintiff's work.

[In determining whether the plaintiff has proved copying, you may consider evidence that the defendant's work was created independently of the plaintiff's copyrighted work [or that the defendant had authority from the plaintiff to copy the plaintiff's work.]]

### Committee Comments

This instruction should be used only when the plaintiff seeks to prove copying inferentially. If the plaintiff offers direct evidence of copying, then this instruction is unnecessary. *See Infogroup, Inc. v. DatabaseLLC*, 956 F.3d 1063, 1066 (8th Cir. 2020); *Rottlund Co. v. Pinnacle Corp.*, 452 F.3d 726, 731 (8th Cir. 2006).

To establish copying by circumstantial evidence, the plaintiff must demonstrate (1) access and (2) substantial similarity. *See Rottlund Co. v. Pinnacle Corp.*, 452 F.3d 726, 731 (8th Cir. 2006).

Extensive distribution or public availability permits the presumption of access. *See Warner Bros. Ent. v. X One X Prods.*, 644 F.3d 584, 596 (8th Cir. 2011).

The Eighth Circuit applies a two-part test for "substantial similarity." *Rottlund*, 452 F.3d at 731 (citing *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 120 (8th Cir. 1987)). There must be substantial similarity both of ideas and of expression. *Hartman*, 833 F.2d at 120. The first step, an objective extrinsic test analyzing the similarity of ideas, is conducted by the court. *Rottlund*, 452 F.3d at 731 ("Similarity of ideas is evaluated extrinsically, focusing on objective similarities in the details of the works. Because this extrinsic test depends on such objective criteria as the type of artwork involved, the materials used, the subject matter, and the setting for the subject, expert opinion evidence may be considered.") (citations and internal quotation marks omitted). If the ideas are substantially similar, then the fact-finder decides the second step: a subjective analysis of the similarity of expression based on the response of a reasonable, ordinary person. *See Hartman*, 833 F.2d at 120 ("similarity of expression is evaluated using an intrinsic test depending on the response of the ordinary, reasonable person to the forms of expression.").

## **20.20 DEFINITION: “ORIGINAL”**

The term “original” means that the work required some degree of creativity and was independently created by the author, as opposed to copied from other works. It must contain at least some minimal degree of creativity. The work need not be completely new or novel. [An original work may include or incorporate elements taken from [prior works] [works from the public domain] [works owned by others, with the owner’s permission]. However, only the original elements added by the author are protected by copyright.] [A work may be original even though it closely resembles other works, as long as the similarity is not the result of copying. For example, if two hypothetical poets, each unaware of the other, composed identical poems, both poems may be considered original.]

### **Committee Comments**

The Eighth Circuit has not addressed whether originality is a question of law or fact, and other circuits have split on the issue. This instruction may be used if the question of originality is submitted to the jury. *See generally Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”); *W. Pub. Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1223 (8th Cir. 1986) (“The standard for ‘originality’ is minimal. It is not necessary that the work be novel or unique, but only that the work have its origin with the author—that it be independently created.”).

## 20.40 ELEMENTS OF CLAIM: COPYRIGHT INFRINGEMENT

Your verdict must be for plaintiff [name] on plaintiff's claim [generally describe claim] if all of the following elements have been proved:

*First*, the plaintiff owns a copyright in an original work; and

*Second*, the defendant copied original expression in the plaintiff's copyrighted work.

If any of the above elements has not been proved, [or if defendant (insert name) is entitled to a verdict under Instruction No. \_\_\_\_\_ (insert number of affirmative defense instruction)], then your verdict must be for defendant [insert name].

### Notes on Use

1. Any elements that are undisputed may be eliminated.
2. If the infringement consists of something other than copying (*i.e.*, publicly performing, publicly displaying, distributing copies of, preparing derivative works based upon), the instruction should be modified accordingly.
3. Finally, if causation is contested, it may be appropriate to modify this instruction to explicitly include causation as an element.

### Committee Comments

*See generally* 17 U.S.C. § 501(a)-(b); *See also Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (“To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”); *See Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, 399 n.2 (1974) (“Although the Copyright Act does not contain an explicit definition of infringement, it is settled that unauthorized use of copyrighted material inconsistent with the ‘exclusive rights’ enumerated in § 1, constitutes copyright infringement under federal law”); *Warner Bros. Ent. v. X One X Prods.*, 644 F.3d 584, 595 (8th Cir. 2011).

To establish the defendant's liability on a direct infringement theory, the defendant's intent is not relevant. *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 829 (8th Cir. 1992) (“The defendant is liable even for ‘innocent’ or ‘accidental’ infringements. ‘[E]ven where the defendant believes in good faith that he is not infringing a copyright, he may be found liable.’”) (citations omitted). However, the plaintiff must still show that the defendant was the cause of the infringement. *See American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

The elements in this instruction are explained in Instructions 20.2\_ (Definition: Ownership of Valid Copyright), 20.2\_ (Definition: Originality), and 20.2\_ (Definition: Copying—Access and Substantial Similarity).

## 20.41 ELEMENTS OF CLAIM: SECONDARY LIABILITY—VICARIOUS INFRINGEMENT

Your verdict must be for the plaintiff on [his][her][its] claim against defendant [name] if all of the following elements have been proved:

*First*, [Direct infringer’s name] infringed the plaintiff’s copyright, as defined in Instruction No. \_\_\_;

*Second*, the defendant profited from the infringement by [Direct infringer’s name];  
and

*Third*, the defendant had the right and ability to stop or limit the infringement by [Direct infringer’s name] but failed to reasonably do so.

If any of the above elements has not been proved, [or if defendant (insert name) is entitled to a verdict under Instruction No. \_\_\_\_\_ (insert number of affirmative defense instruction)], then your verdict must be for defendant [insert name].

### Notes on Use

This instruction refers to a direct infringer and assumes that the direct infringer is on trial along with the alleged vicarious infringer. If the alleged direct infringer is not on trial, the instructions regarding direct infringement still must be given but may require modification.

### Committee Comments

Copyright law “allows imposition of liability when the defendant profits directly from the infringement and has a right and ability to supervise the direct infringer, even if the defendant initially lacks knowledge of the infringement.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 n.9 (2005); *RCA/Ariola Int’l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 781 (8th Cir. 1988) (“The prerequisites for vicarious liability for copyright infringements are: 1. The right and ability to supervise the infringing activity; and 2. An obvious and direct financial interest in exploitation of copyrighted materials.”) (citations omitted).

A corporate officer or individual owners of a corporate defendant can be held liable for vicarious infringement. *See id.* A defendant can also be held liable for both vicarious and contributory infringement. *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 437-38 (1984).

## 20.42 ELEMENTS OF CLAIM: DERIVATIVE LIABILITY—CONTRIBUTORY INFRINGEMENT

Your verdict must be for the plaintiff on [his][her][its] claim against defendant [name] if all of the following elements have been proved:

*First*, [Direct infringer's name] infringed Plaintiff's copyright, as defined in Instruction No. \_\_\_;

*Second*, Defendant [[induced; caused; encouraged] [direct infringer's name] to infringe Plaintiff's copyright] [contributed in a significant way to [direct infringer's name]'s infringement of Plaintiff's copyright]; and

*Third*, Defendant [knew of the infringing activity] [strongly suspected or should have known of the infringing activity but took steps to avoid knowing about the infringing activity].

If any of the above elements has not been proved, [or if defendant (insert name) is entitled to a verdict under Instruction No. \_\_\_\_\_ (insert number of affirmative defense instruction)], then your verdict must be for defendant [insert name].

### Notes on Use

This instruction references other instructions regarding direct infringement. This assumes that the direct infringer is on trial along with the alleged contributory infringer. If the alleged direct infringer is not on trial, the instructions regarding direct infringement still must be given but may require modification.

### Committee Comments

The sale of a product or device that has the potential to infringe (such as a home video recorder) does not constitute contributory infringement if the product is capable of a substantial non-infringing use. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984). However, in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), the Supreme Court held that one who distributes a device with the object of promoting its use to infringe a copyright may be liable for the resulting acts of infringement by third parties, even if the device is capable of substantial noninfringing use. *Id.* at 2780. The Court characterized this as the inducement rule. *Id.*

According to a leading treatise on copyright, a defendant who has provided a copyrighted work to a third party who in turn copied that work may be liable as a contributory infringer, unless the defendant had no knowledge of the third party's intended infringement. 3 *Nimmer on Copyright* § 12.04[A]

The case law discusses various factors that may be considered in deciding whether a defendant engaged in contributory infringement, including whether the defendant sold or distributed a product or service that has been used to infringe copyrights, or whether the defendant promoted or gave instructions for use of a product or service to infringe copyrights. *See id.* (“The rule on inducement of infringement as developed in the early cases is no different today. Evidence of ‘active steps . . . taken to encourage direct infringement’ . . . such as advertising an infringing use or instructing how to engage in an infringing use, show an affirmative intent that the product be used to infringe . . .”).

If the case involves the issue as to whether Defendant’s product or service is capable of substantial noninfringing uses, the jury may need additional instructions based on *MGM Studios*, for example:

[If [Defendant’s; direct infringer’s] [product; service] has substantial non-infringing uses, you may not hold Defendant liable unless Defendant promoted [the; direct infringer’s] use of its [product; service] in a way that infringed Plaintiff’s copyrights.]

*See MGM Studios*, 545 U.S. at 937 (“mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution . . . . The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.”)

## 20.60 AFFIRMATIVE DEFENSE: FAIR USE<sup>1</sup>

[One of your roles in this case is to determine the answers to the following questions.] [On a verdict form you will be asked to] [You must] answer the following question(s)<sup>2</sup> about the defendant's alleged use of the work.

Question No. 1: [Insert material, disputed question of fact. *See* Committee Comment below] [*E.g.*, Did the defendant use the work for the purpose of parody?].

Question No. 2: [Insert material, disputed question of fact] [*E.g.*, Did defendant's use of the work harm plaintiff's actual or potential markets for the work?].

Question No. 3: [Insert material, disputed question of fact] [*E.g.*, How much of the copyrighted work was copied?].

### Notes on Use

1. Use this instruction, and special verdict form 20.90, only when there are one or more disputed material facts with respect to the court's determination of the fair use defense.
2. This instruction is merely an example of two of the many factors that may be considered. *See* Committee Comment No. 2 below. Court and counsel should review the factors at issue in the case at bar and compare them with current Eighth Circuit law.

### Committee Comments

1. Fair use is a mixed question of law and fact. *See Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849, 855 (8th Cir. 2004). The Supreme Court has held that the Seventh Amendment right to trial by jury does not include the fair use defense. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1200 (2021). Although the ultimate question is a legal one for the court to decide, the parties may nevertheless dispute subsidiary factual questions. In such a case, the Committee strongly encourages the parties and the Court to carefully examine relevant caselaw, and carefully craft special interrogatories that are limited to determination of those specific, disputed facts that are material to the Court's determination of the ultimate legal issue.
2. Where there are no disputed issues of material fact with respect to the factors bearing on fair use, the Court can and should make the ultimate legal determination before submitting the case to the jury. This instruction should be used only where the Court determines that one or more specific, disputed facts are material to the determination of fair use.

Factors bearing on fair use can include the nature of the copyrighted work; the purpose and character of the defendant's use; the degree of creativity involved in the plaintiff's work; whether the work was published or unpublished; how much of the work the defendant copied;

the significance of the portion copied in relation to the plaintiff's work as a whole; and how the defendant's use affected the value of or potential market for the plaintiff's work. *See id.*; 17 U.S.C. § 107.

The Supreme Court has stated that determination of whether a particular use qualifies as fair use is not subject to a bright-line test but rather requires “a sensitive balancing of interests,” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583-84 (1994) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984)), and must be “tailored to the individual case.” *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 551-52 (1985). The final factor in a fair use analysis, “the effect of the use upon the potential market for or value of the copyrighted work,” 17 U.S.C. § 107(4), “is undoubtedly the single most important element of fair use.” *United Tel. Co. of Missouri v. Johnson Pub. Co.*, 855 F.2d 604, 610 (8th Cir. 1988). “The fair use doctrine has always precluded a use that supersedes the use of the original.” *Id.* The statutory factors are not comprehensive. *See Campbell*, 510 U.S. at 577-78.

3. This Instruction is intended to be used with other instructions to submit all issues of liability and damages to the jury simultaneously.

4. For a thorough discussion of fair use considerations for the court, see *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith et al.*, 598 U.S. \_\_\_\_ (2023).

## **20.61 AFFIRMATIVE DEFENSE: ABANDONMENT**

Your verdict must be for defendant [insert name] on plaintiff [insert name]'s claim of copyright infringement if you find that the plaintiff abandoned the copyright by [making a statement; performing an action] that demonstrated [his][her][its] intention to give up [his][her][its] copyright interest in the work.

Mere inaction [or publication without a copyright notice] does not constitute abandonment of the copyright; however, [this may be a factor] [these may be factors] for you to consider in determining whether Plaintiff has abandoned the copyright.

## 20.70 DAMAGES: ACTUAL DAMAGES

If you find in favor of the plaintiff under Instruction \_\_\_\_\_, then you must award the plaintiff such sum as you find will fairly and justly compensate the plaintiff for the loss in the fair market value of the copyrighted work, measured by the profits lost due to the infringement or by the value of the use of the copyrighted work to the infringer.

### Notes on Use

The plaintiff may elect statutory damages or actual damages plus the defendant's profits. *See* 20.00 (Overview). Use this instruction and Instruction 20.71 if the plaintiff has elected actual damages, and use Instruction 20.72 if the plaintiff has elected statutory damages.

### Committee Comments

A prevailing plaintiff is entitled to recover his actual damages plus the defendant's profits, or "statutory" damages. *See* 17 U.S.C. § 504(a & b) (actual damages and profits); *id.* § 504(c) (statutory damages). Under 17 U.S.C. § 504(c)(1) the plaintiff may "elect, at any time before final judgment is rendered" whether to seek actual or statutory damages. 17 U.S.C. § 504(c)(1). Though plaintiffs typically elect between these two forms of recovery before the jury is instructed, the statute permits a plaintiff to elect statutory damages "at any time before final judgment is rendered." *Id.* § 504(c). To cover all the possible permutations, the instruction provides three alternatives.

The jury may determine all potential types of damages in a copyright case. *See Cass Cty. Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 644 (8th Cir. 1996) ("We are satisfied that neither the determination of liability nor the assessment of damages in the ordinary copyright case is beyond a jury's ability."). However, when the copyright owner fails to register its copyright before commencement of the infringement, it can recover only actual damages and profits and cannot seek statutory damages. *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1349 (8th Cir. 1994).

## 20.71 DAMAGES: DEFENDANT’S PROFITS

If you find in favor of the plaintiff under Instruction No. \_\_\_, then you must award the plaintiff the direct profits that the defendant made because of the infringement. You must also award the indirect profits that the defendant made because of the infringement, to the extent these indirect profits share a nexus with the infringement. [The defendant’s profits are recoverable only to the extent that you have not taken them into account in determining the plaintiff’s actual losses. You may not award any amount under this Instruction that you awarded under Instruction \_\_\_\_.]

The defendant’s profits are revenues that the defendant made directly or indirectly because of the infringement, minus the defendant’s expenses in [producing; distributing; marketing; selling] the [insert description of infringing material, e.g., product, advertisement, book, song, etc.]. You must not award damages for any profit you find was attributable to factors other than use of the copyrighted work.

### Notes on Use

1. In a multi-defendant case, this instruction may need to be tailored according to the defendant to whom it applies.

### Committee Comments

“In establishing the infringer’s profits, the copyright owner is required to present proof only of the infringer’s gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.” 17 U.S.C. § 504(b); *see generally Andreas v. Volkswagen of Am., Inc.*, 336 F.3d 789 (8th Cir. 2003).

“The question of allocating an infringer’s profits between the infringement and other factors, for which the defendant infringer carries the burden, is highly fact-specific” and should be left to the jury. *Andreas*, 336 F.3d at 797–98 (citations omitted).

## **20.72 DAMAGES: STATUTORY DAMAGES**

If you find in favor of the plaintiff under Instruction No. \_\_\_\_<sup>1</sup>, then you must award the plaintiff damages for each copyrighted work that you found was infringed under Instruction \_\_\_\_.

If you find that the defendant innocently infringed the plaintiff's copyright, your award must be no less than \$200 per copyrighted work. Infringement is innocent if you find that the defendant did not know, and had no reason to know, that [his][her][its] acts constituted infringement. You may not find that the defendant was an innocent infringer if a notice of copyright appeared in the correct form and position on the published [copy; copies] of the plaintiff's work to which the defendant had access. A notice is in correct form if it includes [the symbol © (the 353 (2008 rev.) letter C in a circle); the word "Copyright"; the abbreviation "Copr."], [the name of the copyright owner; an abbreviation by which the copyright owner's name can be recognized; a generally known designation of the copyright's owner]; and the year of first publication of the work.] A notice is in the correct position if it appears in a manner and location that gives reasonable notice of the claim of copyright.

If you find that the defendant willfully infringed the plaintiff's copyright, then you may award up to \$150,000 per copyrighted work. Infringement is willful if you find that the defendant knew that his actions constituted infringement of the plaintiff's copyright [or acted with reckless disregard of the plaintiff's copyright].

If you find that the infringement was neither innocent nor willful, your award must be between \$750 and \$30,000 for each copyrighted work.

[In determining the amount to award, you may consider the following factors: the expenses that the defendant saved and the profits earned because of the infringement; the revenues that the plaintiff lost because of the infringement; the difficulty of proving the

plaintiff’s actual damages; the circumstances of the infringement; whether the defendant intentionally infringed the plaintiff’s copyright; and deterrence of future infringement.]

### Notes on Use

1. Insert the number of the “elements of claim” instruction.

### Committee Comments

Under 17 U.S.C. § 504(c), a plaintiff may elect to receive statutory damages in lieu of actual damages and profits. Statutory damages are designed to deter future infringement. *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952). Even though the statute suggests that statutory damages are awarded by the court, the Seventh Amendment requires that the determination be made by the jury. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998).

Statutory damages range from “a sum of not less than \$750 or more than \$30,000” per work infringed. *See* 17 U.S.C. § 504(c) (prescribing range of damages “with respect to any one work”); *Warner Bros. Ent. v. X One X Prods.*, 840 F.3d 971, 978 (8th Cir. 2016) (“The Copyright Act structures awards of statutory damages on the basis of each copyrighted work infringed, not on the basis of each instance of infringement.”).

The statutory damages amount can be decreased to as low as \$200 per work if the jury finds the infringement was “innocent,” *i.e.*, that the infringer “was not aware and had no reason to believe that his or her acts constituted an infringement of copyright.” 17 U.S.C. § 504(c)(2). If the jury finds the infringement was “willful,” the award can be or increased to as high as \$150,000 per work infringed. 17 U.S.C. § 504; *see generally Cass Cty. Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635 (8th Cir. 1996); *see also Little Mole Music v. Spike Inv., Inc.*, 720 F. Supp. 751, 754–55 (W.D. Mo. 1989) (explaining that motive is irrelevant to establishing liability and only relevant to the determination of statutory damages, and, moreover, “mere non-deliberate infringement is not innocent; rather, defendants must have acted in complete ignorance of the fact that [their] conduct might somehow infringe upon the rights of another party.”) (citations and internal quotations omitted).

In some cases, there may be a dispute as to how many “works” are infringed. “The statute does not define the term ‘one work,’ but it does clarify that ‘all parts of a compilation or derivative work constitute one work.’” *FurnitureDealer.Net, Inc v. Amazon.com, Inc.*, No. CV 18-232 (JRT/HB), 2022 WL 891473, at \*13 (D. Minn. Mar. 25, 2022). There is a split of authority on how to determine if a putative compilation is entitled to more than one award of statutory damages (*e.g.*, whether a musical album is “one work,” or each song on the album is “one work”). The *FurnitureDealer.Net* opinion includes a useful discussion of the issue, addressing the approaches adopted by various courts. *See id.* at \*13-14 (“Three different tests have been employed: (1) the registration test, (2) the compilation test, and (3) the independent economic value test.”) (discussing case law). As of this writing, the Eighth Circuit has not addressed the issue. The determination of the number of “works” infringed may present jury issues that can be addressed through tailored instructions and/or special interrogatories (*e.g.*, to

determine whether songs on an album have sufficient independent economic value to be considered individual “works” for statutory damages purposes).

Section 412 of the Copyright Act sets out a prerequisite for an award of statutory damages. In most infringement actions, a plaintiff cannot recover statutory damages for:

- (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or
- (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

Thus, if the work at issue was unpublished, and infringement commenced the work was registered, then statutory damages are not available. If the work at issue was published, the infringement began before the work was registered, and the work was not registered within three months after publication, then statutory damages are not available. *See* 17 U.S.C. § 412; *see also*, e.g., *Kuznia v. Playmakers, Inc.*, No. 3:08-CV-88, 2009 WL 10665581, at \*3 (D.N.D. Nov. 19, 2009) (“Under the Copyright Act, statutory damages and attorneys’ fees are barred if the infringement ‘commenced’ before the copyright was registered.”). “This limitation was intended to ‘encourage copyright holders to proactively apply to register their works soon after publication, rather than wait until it became necessary to sue an infringer.’” *Haake v. VR Groups, LLC*, No. 19-00706-CV-W-BP, 2019 WL 11679467, at \*2 (W.D. Mo. Dec. 16, 2019) (quoting *Asche & Spencer Music, Inc. v. Principato-Young Entm’t, Inc.*, 147 F. Supp. 3d 833, 837 (D. Minn. 2015)).

For purposes of § 412, infringement “commences” when the first act of infringement occurs, even if the infringement continues after the work is registered. *See, e.g., Feldhacker v. Homes*, 173 F. Supp. 3d 828, 834 (S.D. Iowa 2016) (“District courts in the Eighth Circuit have similarly dismissed claims for statutory damages and attorney fees where the alleged infringement commenced before, and continued after, the copyright registration.”) (collecting cases); *see also Edland v. Basin Elec. Power Coop.*, No. 4:21-CV-04008-KES, 2021 WL 3080225, at \*4 (D.S.D. July 21, 2021) (after noting that “The Eighth Circuit Court of Appeals has yet to analyze the application of § 412 of the Copyright Act,” holding that statutory damages were unavailable where infringement commenced before registration); *Dutch Jackson IATG, LLC v. Basketball Mktg. Co.*, 846 F. Supp. 2d 1044, 1052 (E.D. Mo. 2012) (“Under section 412, infringement ‘commences’ when the first act of infringement in a series of on-going discrete infringements occurs.”) (citations omitted); *Blair v. World Tropics Prods., Inc.*, No. CV 05-6083, 2007 WL 9724699, at \*2 (W.D. Ark. May 17, 2007) (“The case law indicates that “infringement ‘commences’ for the purposes of § 412 when the first act in a series of acts constituting infringement occurs.”) (citation omitted).

The requirements of Sections 412 and 504(c) may warrant tailored jury instructions and/or special interrogatories to address case-specific issues. For example, the jury may be asked to determine when a work was registered, when a work was published, and/or when infringement commenced.

**20.80 GENERAL VERDICT FORM**

**Note:** Complete this form by writing in the name required by your verdict.

On plaintiff [name]’s claim against defendant [name], as submitted in Instruction No. \_\_\_\_\_, we find in favor of

\_\_\_\_\_

(Plaintiff [name]) or (Defendant [name])

[On plaintiff [name]’s claim against defendant [name], as submitted in Instruction No. \_\_\_\_\_, we find in favor of

\_\_\_\_\_

(Plaintiff [name]) or (Defendant [name])

**Note:** Complete the following paragraphs only if one or more of the above findings is in favor of the plaintiff.

[We find plaintiff [name]’s actual damages to be:

\$ \_\_\_\_\_ (state the amount or, if none, write the word “none”)

We find defendant [name]’s profits attributable to defendant [name]’s infringement to be:

\$ \_\_\_\_\_ (state the amount or, if none, write the word “none”).]<sup>2</sup>

[We find plaintiff [name]’s statutory damages to be:

\$ \_\_\_\_\_ (state the amount or, if none, write the word “none”).]<sup>3</sup>

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Foreperson

Dated: \_\_\_\_\_

**Notes on Use**

1. Add as many paragraphs as needed to account for the number of defendants, number of claims, and/or number of works in the case.
2. Include this paragraph if submitting the amount of profits to the jury, as described in Model Instruction 20.72 (Damages: Defendant's Profits).
3. Include this paragraph if submitting statutory damages to the jury.

## 20.90 SPECIAL VERDICT FORM

**Note:** Complete each of the following paragraphs by marking the answer required by your findings. You must answer each of the following questions:

Question No. 1: [Insert material, disputed question of fact] [*E.g.*, Did the defendant use the work for the purpose of parody?].

[Response A] \_\_\_\_\_ [Response B] \_\_\_\_\_  
(Mark an “X” in the appropriate space)

Question No. 2: [Insert material, disputed question of fact] [*E.g.*, Did defendant’s use of the work harm plaintiff’s actual or potential markets for the work?].

[Response A] \_\_\_\_\_ [Response B] \_\_\_\_\_  
(Mark an “X” in the appropriate space)]

Question No. 3: [Insert material, disputed question of fact] [*E.g.*, How much of the copyrighted work was copied?].

[Response A] \_\_\_\_\_ [Response B] \_\_\_\_\_  
(Mark an “X” in the appropriate space)]

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Foreperson

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Date

### Notes on Use

1. Use this special verdict form in conjunction with Instruction No. 20.60 and only where there are one or more disputed material facts with respect to the Court’s determination of fair use. Where feasible, the Committee suggests that questions be phrased in such a manner that they may be answered with alternative responses, such as Yes/No or Plaintiff/Defendant.

## 21. TRADEMARK

### 21.00 OVERVIEW

Chapter 21 contains model jury instructions relating primarily to traditional trademark or trade dress infringement cases.

#### **Objectives of Trademark Law**

“The principle underlying trademark protection is that distinctive marks—words, names, symbols, and the like—can help distinguish a particular artisan’s goods from those of others.” *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U.S. 138, 142 (2015). The Lanham Act serves to (i) “secure to the owner of the mark the goodwill of his business,” and (ii) “protect the ability of consumers to distinguish among competing producers.” *Park ’N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985).

#### **The Lanham Act: Registered and Unregistered Marks**

Trademark infringement claims are typically brought under Section 32(a) and/or Section 43(a) of the Lanham Act (15 U.S.C. § 1114(a) and 15 U.S.C. § 1125(a), respectively). Section 32(a) addresses liability for infringement of a registered mark, *i.e.*, a mark that has been registered with the U.S. Patent and Trademark Office. Section 43(a) provides more broadly for liability for infringing unregistered marks, as well as liability for false advertising.

“The Lanham Act confers important legal rights and benefits on trademark owners who register their marks. Registration, for instance, serves as constructive notice of the registrant’s claim of ownership of the mark. It also is prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner's ownership of the mark, and of the owner's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate. And once a mark has been registered for five years, it can become incontestable.” *B&B Hardware*, 575 U.S. at 142-43. (internal citations and quotations omitted).

“Without federal registration, a valid trademark may still be used in commerce.” *Matal v. Tam*, 137 S. Ct. 1744, 1752 (2017) (citation omitted). “And an unregistered trademark can be enforced against would-be infringers in several ways. Most important, even if a trademark is not federally registered, it may still be enforceable under § 43(a) of the Lanham Act, which creates a federal cause of action for trademark infringement.” *Id.*; *see also ZW USA, Inc. v. PWD Sys., LLC*, 889 F.3d 441, 449 (8th Cir. 2018) (“The Lanham Act protects both registered and unregistered trademarks.”).

#### **Trademark Infringement: Ownership of a Valid Mark**

A trademark owner must prove that its mark is valid and serves as a protectable trademark. “To determine whether [a] mark is protectible, we must first categorize it. A term for which trademark protection is claimed will fall in one of four categories: (1) generic, (2) descriptive, (3) suggestive, or (4) arbitrary or fanciful. *Frosty Treats Inc. v. Sony Computer Ent. Am. Inc.*, 426 F.3d 1001, 1004-05 (8th Cir. 2005) (citation omitted). “A generic mark refers to

the common name or nature of an article, and is therefore not entitled to trademark protection.” *Id.* at 1005. “Suggestive, arbitrary, and fanciful marks are inherently distinctive” and entitled to protection. *ZW USA, Inc. v. PWD Sys., LLC*, 889 F.3d 441, 448 (8th Cir. 2018) (citing *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992)).

A descriptive mark is not inherently distinctive, but it is valid and protectable if it has achieved “secondary meaning,” *i.e.*, if it has acquired distinctiveness in the minds of the consuming public. *See Co-Rect Prods., Inc. v. Marvy! Adver. Photography, Inc.*, 780 F.2d 1324, 1329 (8th Cir.1985). In considering whether a mark has acquired distinctiveness, “the chief inquiry is whether in the consumer’s mind the mark has become associated with a particular source.” *Lovely Skin, Inc. v. Ishtar Skin Care Prods., LLC*, 745 F.3d 877, 887 (8th Cir. 2014) (internal quotations and citation omitted). Acquired distinctiveness can be demonstrated by direct evidence such as consumer testimony or consumer surveys, or it can be shown through circumstantial evidence such as “evidence of the size of the seller, the number of actual sales made, large amounts spent in promotion and advertising, the scope of publicity given the mark, and any similar evidence showing wide exposure of the buyer class to the mark in question.” *Heartland Bank v. Heartland Home Fin., Inc.*, 335 F.3d 810, 819 (8th Cir. 2003) (concurrence) (quoting 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, §§ 15:30, 15:61, 15:66 and 15:70 (4th ed.1999)).

### **Trademark Infringement: Likelihood of Confusion**

The “core inquiry” in trademark infringement cases is “whether the relevant average consumers for a product or service are likely to be confused as to the source of a product or service or as to an affiliation between sources based on a defendant’s use.” *Select Comfort Corp. v. Baxter*, 996 F.3d 925, 933 (8th Cir.). The likelihood of confusion analysis considers a list of nonexclusive factors, including:

- (1) the strength of the owner’s mark;
- (2) the similarity of the owner’s mark and the alleged infringer’s mark;
- (3) the degree to which the products compete with each other;
- (4) the alleged infringer’s intent to “pass off” its goods as those of the trademark owner;
- (5) incidents of actual confusion; and
- (6) the type of product, its costs and conditions of purchase.

*Id.* at 933. The likelihood of confusion analysis is fact-intensive, and “different factors will carry more weight in different settings.” *Id.* (citations omitted). “Although no one factor is determinative, each must be analyzed.” *A.I.G. Agency, Inc. v. Am. Int’l Grp., Inc.*, 33 F.4th 1031, 1035 (8th Cir. 2022) (citation omitted). As the Eighth Circuit recently explained:

This flexible, context-specific, and relative-rather-than-mechanical approach makes sense because the general function of the likelihood-of-confusion factors is to guide the finder of fact towards considerations generally thought to be material to the consuming public’s

understanding of product source or affiliation. Common sense is inherent in the factors, and the factors, properly applied, should try to capture a holistic view of the normal experiences for any given industry, product, or service. The consumer experience differs by products (buying a toothbrush vs. buying a car vs. professional buyers obtaining input goods for a factory), and the relative importance of any given factor is influenced greatly by how the other factors might apply.

*Id.*

“Confusion” has a relatively broad scope, extending to affiliation, sponsorship, or connection between the plaintiff and the defendant. *Id.*; see also *Anheuser–Busch, Inc. v. Balducci Publ’ns*, 28 F.3d 769, 774 (8th Cir.1994) (noting that protection extends “‘against use of [plaintiff’s] mark on any product or service which would reasonably be thought by the buying public to come from the same source, or thought to be affiliated with, connected with, or sponsored by, the trademark owner’ ” (quoting McCarthy § 24.03 (3d. 1992))). Courts in the Eighth Circuit (and elsewhere) apply an “expansive interpretation of likelihood of confusion, extending protection against use of [plaintiff’s] mark on any product or service which would reasonably be thought by the buying public to come from the same source, or thought to be affiliated with, connected with, or sponsored by, the trademark owner.” *Balducci*, 28 F.3d at 769.

### **Monetary Remedies under the Lanham Act**

“Although injunctive relief is often the preferred remedy in resolving trademark disputes, it is not the exclusive remedy.” *Masters v. UHS of Delaware, Inc.*, 631 F.3d 464, 471 (8th Cir. 2011). The Lanham Act prescribes three categories of monetary relief<sup>1</sup> for the successful trademark plaintiff: “(1) defendant’s profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.” *Id.* at 472 (quoting 15 U.S.C. § 1117(a)). “[T]he use of the conjunctive ‘and’ in the delineation of remedies invites a distinction between an award of a defendants’ profits and an award of plaintiff’s damages.” *Id.* “An award of monetary relief under the Lanham Act must be compensatory, not a penalty. It does not follow, however, that a finding of damages is a precondition of any monetary award.” *Id.* at 474; see also *Safeway Transit LLC v. Disc. Party Bus, Inc.*, 954 F.3d 1171, 1177 (8th Cir. 2020) (explaining that the Lanham Act “is grounded in equity and bars punitive remedies.”).

To recover actual damages for trademark infringement under § 1117(a)(2), a trademark plaintiff must prove the *fact* of damages and the *amount* of damages, with different burdens applying to each. See *Minn. Pet-Breeders, Inc. v. Schell & Kampeter, Inc.*, 843 F. Supp. 506, 519 (D. Minn. 1993), *aff’d*, 41 F.3d 1242 (8th Cir. 1994) (addressing “the distinction between the fact of damage and proof of the amount of damage” in trademark cases); see also *Skydive Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105, 1112 (9th Cir. 2012) (“The trier of fact must distinguish between proof of the fact of damages and the amount of damages because a mark holder is held to a lower standard in proving the exact amount of actual damages.”). A trademark plaintiff can prove the fact of damages with “proof of actual customer confusion or diverted

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<sup>1</sup> Courts frequently use “damages” imprecisely to refer to all categories of monetary remedies, including disgorgement of profits. See 5 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 30:57 (5th ed.) (discussing the “great deal of semantic confusion in the opinions dealing with the award of monetary recovery for trademark infringement and unfair competition”).

sales.” *Weems Industries Inc. v. Teknor Apex Co.*, 540 F. Supp. 3d 839, 856-57 n.15 (N.D. Iowa 2021); *see also Co-Rect Prods.*, 780 F.2d at 1330 (“A showing of actual confusion entitles the owner of the mark to damages. . . .”); *Conopco, Inc. v. May Dept. Stores Co.*, 784 F. Supp. 648, 680 (E.D. Mo. 1992), *aff’d in relevant part*, 46 F.3d 1556 (Fed. Cir. 1994) (“Evidence of actual confusion is proof of the fact of damage.”). “The plaintiff is held to a lower burden of proof in ascertaining the exact amount of damages once the existence of damages has been shown.” *Minn. Pet-Breeders*, 843 F. Supp. at 519 (citing *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.*, 754 F.2d 738, 745 (7th Cir. 1985)).

Disgorgement of profits under § 1117(a)(1) is “subject only to the principles of equity.” *Safeway*, 954 F.3d at 1178 (quoting *Masters*, 631 F.3d at 473). “Because the Act is grounded in equity and bars punitive remedies, an accounting will be denied in a trademark infringement action where an injunction will satisfy the equities of the case.” *Id.* at 1177 (citation omitted). Disgorgement can be based on 1) unjust enrichment; 2) damages, or 3) deterrence. *Id.*<sup>2</sup> In assessing profits under the statute, “the plaintiff shall be required to prove defendant’s sales only; defendant must prove all elements of cost or deduction claimed.” 15 U.S.C. § 1117; *see also Lawn Managers, Inc. v. Progressive Lawn Managers, Inc.*, 959 F.3d 903, 913 (8th Cir.) (“[I]n a trademark case, the *defendant* bears the burden of proving any claimed deductions from total profits.”).

## CHAPTER 21 INSTRUCTIONS AND VERDICT FORMS

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<sup>2</sup> In April 2020, the Supreme Court held that willful infringement is not a prerequisite for equitable disgorgement of profits under the Lanham Act, resolving a circuit split on the issue. *Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492 (2020).

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## 21.01 EXPLANATORY: PURPOSE OF TRADEMARK LAW

This lawsuit includes claims for [unfair competition] [trademark infringement] [trade dress infringement] under federal law. A trademark is a word, symbol, or combination of words or symbols used by a person to identify their [goods] [services], to distinguish their [goods] [services] from those provided by others, and to indicate the source of the [goods] [services]. [A trade dress is a type of trademark that refers to the total image of a product and/or its packaging, meaning the overall impression created, not the individual features. The trade dress of a product may include features such as size, shape, color or color combinations, texture, graphics, or particular sales techniques.] The purpose of trademark law<sup>1</sup> is to prevent confusion among consumers about the source of goods or services, to indicate ownership, and to permit [trademark] [trade dress] owners to show ownership of their [products] [services] and control their reputation.

[The plaintiff claims that the defendant infringed the plaintiff's trademark (describe the plaintiff's symbol or term) for (describe the plaintiff's product) by (describe nature of allegedly infringing activity). The defendant denies (describe the defendant's theory of defense, *i.e.*, denies that the plaintiff has a valid trademark or that the defendant's use of its trademark causes a likelihood of confusion) [and says that (describe the defendant's other defense(s), if any)].]

OR

[The plaintiff claims that the defendant infringed the plaintiff's trade dress by (describe nature of allegedly infringing activity and the plaintiff's product design, packaging, or label) (If trade dress, insert the specific identification of the trade dress at issue, by reference to the elements that make up the trade dress). The defendant denies (describe the defendant's theory of defense, *i.e.*, denies that the plaintiff has a valid trade dress or that the defendant's use of its trade dress causes a likelihood of confusion) [and says that (describe the defendant's other defense(s), if any)].]

## Notes on Use

1. These instructions are drafted for a traditional trademark or trade dress infringement case. If the case involves a service mark, collective mark, certification mark, or trade name, the instructions may be modified to reflect the more specific terms at issue, such as “service mark” or “trade name” instead of “trademark.” The term “services” may be substituted for the term “product” if the case involves a service mark.

## Committee Comments

Unless otherwise indicated, the instructions and commentary in this Chapter have been adapted from Chapter 13 of the Federal Civil Jury Instructions of the Seventh Circuit.

For a discussion of the purpose of trademark law, *see, e.g., Anheuser-Busch Inc. v. Stroh Brewery Co.*, 750 F.2d 631, 644 (8th Cir. 1984) (Bright, J. dissenting). *See also Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 774 (1992) (purpose of Lanham Act is to “secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers”); *Truck Equip. Serv. Co. v. Fruehauf Corp.*, 536 F.2d 1210, 1215 (8th Cir. 1976) (purpose of Lanham Act § 43(a) is to “protect the public from deceit, to foster fair competition, and to secure to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not”).

For a discussion of the definitions of trademark and trade dress, *see, e.g.,* 15 U.S.C. § 1127; *Munro v. Lucy Activewear, Inc.*, 899 F.3d 585, 592 (8th Cir. 2018); *Woodsmith Pub. Co. v. Meredith Corp.*, 904 F.2d 1244, 1247 (8th Cir. 1990) (“The trade dress of a product is the total image of a product, the overall impression created, not the individual features.”); *Prufrock Ltd., Inc. v. Lasater*, 781 F.2d 129, 132 (8th Cir. 1986).

## **21.02 EXPLANATORY: OWNERSHIP AND PRIORITY (Unregistered and Contestable Marks)**

Trademark rights are acquired through use. A trademark is "used" for purposes of this instruction when [*for goods*: it is placed in any manner on the goods or their containers or the displays associated with them, or on the tags or labels affixed to them, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and the goods are sold or transported in commerce] [*for services*: it is used or displayed in the sale or advertising of services and the services are rendered in commerce]. [This may include use of the mark on a webpage from which customers can order the goods or services.]<sup>1</sup>

The plaintiff owns [describe the plaintiff's symbol, term, or trade dress] as a [trademark] [trade dress] if the plaintiff used the [symbol, term, or trade dress] in a manner that allowed consumers to identify the [symbol, term, or trade dress] with the plaintiff or its product before the defendant began to use [the defendant's symbol, term, or trade dress] on its [describe the defendant's product or services].<sup>2</sup>

[Among the factors you may consider are the plaintiff's dollar value of sales at the time the defendant entered the market; the number of customers of the plaintiff compared to the population of the state; the plaintiff's relative and potential growth of sales; and the length of time since significant sales were achieved in the area.]<sup>3</sup>

### **Notes on Use**

1. This language is optional.
2. This instruction should be used for cases involving claims for infringement of an unregistered trademark or trade dress and claims for infringement of a contestable registered trademark or trade dress where ownership is an issue for trial. *See* Comments to Model Instruction 21.41 (Elements of Claim: Trademark Infringement). If the issue of priority in the particular case depends not on first usage, but rather on, for example, a statutory constructive use date of a registered mark based on the filing date of an application, the concept of natural expansion, or preparation to do business, then this instruction will not apply, and an alternative instruction must be drafted.

3. The Committee has included a list of factors as an optional addition to this instruction; the judge may include the list as part of the instruction, or may decide to leave it to the parties to argue the factors. *See Sweetarts v. Sunline, Inc.*, 380 F.2d 923, 929 (8th Cir. 1967); *Solutech, Inc. v. Solutech Consulting Servs., Inc.*, 153 F. Supp. 2d 1082, 1089 (E.D. Mo. 2000).

### Committee Comments

*See, e.g., Hana Fin., Inc. v. Hana Bank*, 574 U.S. 418, 419 (2015) (“Rights in a trademark are determined by the date of the mark's first use in commerce. The party who first uses a mark in commerce is said to have priority over other users.”); *Atlas Beverage Co. v. Minneapolis Brewing Co.*, 113 F.2d 672, 674 (8th Cir. 1940) (“ownership of a trade-mark is dependent upon priority of appropriation and use”); *JDR Indus., Inc. v. McDowell*, 121 F. Supp. 3d 872, 883 (D. Neb. 2015) (acknowledging that “a party’s ownership of a protectable mark is determined on the basis of priority of use in commerce. Thus, the party claiming ownership must have been the first to actually use the mark in the sale of goods or services.”) (citation omitted).

For a discussion of common-law trademarks and priority, *see First Bank v. First Bank Sys., Inc.*, 84 F.3d 1040, 1044 (8th Cir. 1996) (“To succeed on its claim of a common-law trademark, therefore, FB must prove: (1) that it actually used FIRST BANK in connection with banking services provided in the relevant Iowa counties; and (2) that FIRST BANK identified FB as the provider of those services in the minds of consumers.”);

For a discussion of intent-to-use trademarks and priority, *see Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1338, 1343 & n.3 (E.D. Mo. 1996). For a discussion of the concept of natural expansion, *see Hain BluePrint, Inc. v. Blueprint Coffee, LLC*, No. 4:16-CV-1758-SNLJ, 2018 WL 6246984, at \*5 & n.2 (E.D. Mo. Nov. 29, 2018).

If the plaintiff is claiming ownership or priority based on use by a predecessor, licensee, or related company, and the plaintiff has registered or applied to register the trademark or trade dress, an alternative instruction must be drafted. 15 U.S.C. § 1055 (legitimate use of mark by related company inures to benefit of registrant); 15 U.S.C. § 1127 (definition of “related company”). *See Sweetarts*, 380 F.2d at 927 (“This mark was adopted by plaintiff’s predecessor and used by plaintiff and its predecessor. . .”).

### **21.03 EXPLANATORY: VALIDITY – TRADEMARK/TRADE DRESS**

Only a valid trademark can be infringed. A valid [trademark] [trade dress] is a [symbol; term; product design; packaging; label] that is “distinctive,” which means that the [symbol; term; product design; packaging; label] is capable of distinguishing plaintiff [name]’s product from the products of others.<sup>1</sup>

[A trademark is valid if it is inherently distinctive or if it has acquired distinctiveness.]

[A trade dress is valid if (1) it is inherently distinctive or if it has acquired distinctiveness, and (2) it is nonfunctional.]<sup>2</sup>

#### **Notes on Use**

1. This instruction should be used if the case involves an unregistered trademark or trade dress or if the defendant has presented sufficient evidence to challenge the validity of a contestable registered trademark or trade dress based on descriptiveness or secondary meaning. *See* Comments to Elements of Claim: Trademark Infringement.

2. If the case involves a trade dress that is based on the product’s design, the final sentence should read, “A trade dress is valid if it has acquired distinctiveness and it is nonfunctional.” *See Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205 (2000) (product design trade dress never is inherently distinctive and always requires proof of secondary meaning.); *Two Pesos, Inc. v. Taco Cabana*, 505 U.S. 763, 768-69 (1992); *ZW USA, Inc. v. PWD Sys., LLC*, 889 F.3d 441, 448 (8th Cir. 2018). *See also* 15 U.S.C. § 1125(a)(3) (“In a civil action for trade dress infringement under this Act for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.”).

## 21.04 EXPLANATORY: INHERENT DISTINCTIVENESS – TRADEMARK (Fanciful, Arbitrary, and Suggestive Marks)

An inherently distinctive trademark is one that almost automatically tells a consumer that it refers to a brand or a source for a product. A trademark is inherently distinctive if it is a [“fanciful”; “arbitrary”; [or] “suggestive”] [symbol] [term].<sup>1</sup>

[A “fanciful” [symbol] [term] is a newly created word or parts of common words that are used in a fictitious, unfamiliar, or fanciful way.]

[An “arbitrary” [symbol] [term] is a common [symbol] [term] used in an unfamiliar way.]

[A “suggestive” [symbol] [term] implies some characteristic or quality of the product. If the consumer must use imagination, thought, or perception to understand the meaning of the mark as used with the product, then the mark is suggestive.]

### Notes on Use

1. This instruction should be used when a party claims its unregistered mark is inherently distinctive, or when a party has presented sufficient evidence to challenge the validity of a contestable registered trademark. *See* Comments to Model Instruction 21.40 (Elements of Claim: Trademark Infringement).

### Committee Comments

Inherent Distinctiveness. *See Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205, 210 (2000) (stating that “a mark is inherently distinctive if ‘[its] intrinsic nature serves to identify a particular source.’”); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992) (arbitrary, fanciful, and suggestive marks are considered inherently distinctive “because their intrinsic nature serves to identify a particular source of a product”).

For Eighth Circuit precedent discussing inherently distinctive marks, *see Frosty Treats Inc. v. Sony Computer Ent. Am. Inc.*, 426 F.3d 1001, 1005 (8th Cir. 2005) (“Suggestive marks, which require imagination, thought, and perception to reach a conclusion as to the nature of the goods, and arbitrary or fanciful marks, are entitled to protection regardless of whether they have acquired secondary meaning.”); *Insty\*Bit, Inc. v. Poly-Tech Indus., Inc.*, 95 F.3d 663, 673 (8th Cir. 1996) (“An arbitrary, fanciful, or suggestive mark is deemed inherently distinctive, and therefore entitled to protection, because its intrinsic nature serves to identify a particular source of a product.”) (quotation marks omitted); *Stuart Hall Co. v. Ampad Corp.*, 51 F.3d 780, 786 (8th Cir. 1995) (“If the specific design of the trade dress is only tenuously connected with the nature

of the product, then it is inherently distinctive, and secondary meaning, which requires a showing that consumers attach significance to the trade dress as a source-signifier, need not be proven.”).

**Fanciful or Arbitrary Term.** “When a common mark is applied in an unfamiliar way as a trademark or trade dress, the use is called ‘arbitrary.’” *Insty\*Bit*, 95 F.3d at 673 n.10. “An arbitrary or fanciful trademark is the strongest type of mark and is afforded the highest level of protection.” *Duluth News-Trib., Inc. v. Mesabi Pub. Co.*, 84 F.3d 1093, 1096 (8th Cir. 1996). An example of a fanciful mark is “Kodak” in reference to film. *See U.S. Patent & Trademark Office v. Booking.com B.V.*, 140 S. Ct. 2298, 2302 (2020); *see also Sensient Techs. Corp. v. SensoryEffects Flavor Co.*, 613 F.3d 754, 763 (8th Cir. 2010); *Viacom Inc. v. Ingram Enters., Inc.*, 141 F.3d 886, 891 (8th Cir. 1998); *JDR Indus., Inc. v. McDowell*, 121 F. Supp. 3d 872, 884 (D. Neb. 2015). For a discussion of fanciful terms, *see* J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 11:8 (5th ed.).

An example of an arbitrary mark is “Camel” in reference to cigarettes. *See Booking.com*, 140 S. Ct. at 2302; *see also JDR Indus.*, 121 F. Supp. 3d at 884 (“Apple” to refer to computer).

**Suggestive Term.** Regarding strength, suggestive trademarks “fall somewhere in between” arbitrary or fanciful and generic marks. *Duluth News-Trib.*, 84 F.3d at 1096; *see also First Bank v. First Bank Sys., Inc.*, 84 F.3d 1040, 1045 (8th Cir. 1996) (strength of a suggestive mark falls somewhere between an arbitrary or fanciful mark and a descriptive mark). “A suggestive mark is one that requires some measure of imagination to reach a conclusion regarding the nature of the product.” *Duluth News-Trib.*, 84 F.3d at 1096; *see also Frosty Treats*, 426 F.3d at 1005 (suggestive marks “require imagination, thought, and perception to reach a conclusion as to the nature of the goods”); *Insty\*Bit*, 95 F.3d at 673 n.11. An example of a suggestive mark is “Tide” in reference to laundry detergent. *See Booking.com*, 140 S. Ct. at 2302.

## **21.05 EXPLANATORY: INHERENT DISTINCTIVENESS – TRADE DRESS**

An inherently distinctive trade dress is one that consumers would almost automatically recognize as identifying a particular brand or source of the product.<sup>1</sup>

To determine whether [the plaintiff’s trade dress] is inherently distinctive, you should consider it as a whole. Some of the factors you may consider are:

[Whether the [product label] [product packaging] is a common basic shape or design (which suggests that the trade dress is not inherently distinctive), or instead is an uncommon shape or design (which suggests that the trade dress is inherently distinctive)];

[Whether the [product label] [product packaging] is [unique or unusual] in a particular field (which suggests that the trade dress is inherently distinctive), or instead is common in that field (which suggests that the trade dress is not inherently distinctive)];

[Whether the [product label] [product packaging] is a unique feature for that type of product (which suggests that the trade dress is inherently distinctive), or instead is merely a refinement of a commonly decorative feature for that type of product (which suggests that the trade dress is not inherently distinctive)].

If you find that [the plaintiff’s trade dress] is inherently distinctive, then you should consider whether the plaintiff’s trade dress is “functional.”

If, on the other hand, you find that [the plaintiff’s trade dress] is not inherently distinctive, then you must decide (1) whether the plaintiff’s trade dress is “descriptive” and has “acquired distinctiveness,” and, if so, (2) whether the plaintiff’s trade dress is “functional.”

### Notes on Use

1. This instruction should be used when a party claims its unregistered trade dress is inherently distinctive or when a party has presented sufficient evidence to challenge the validity of a contestable registered trade dress based on distinctiveness, and the claimed trade dress is for a product label or product packaging. If the case involves a trade dress claim based on the design of the product itself, this instruction should not be used; instead, Model Instruction 21.25 (Acquired Distinctiveness: Descriptive Trademark/Trade Dress) should be used. *See Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205, 212 (2000) (product design trade dress can never be inherently distinctive and always requires proof of secondary meaning).

### Committee Comments

Trade dress is considered as a whole. *See Aromatique, Inc. v. Gold Seal, Inc.*, 28 F.3d 863, 874 (8th Cir. 1994).

The factors listed above are taken from *Seabrook Foods, Inc. v. Bar-Well Foods Ltd.*, 568 F.2d 1342, 1344 (C.C.P.A. 1977); *see also Stuart Hall Co., Inc. v. Ampad Corp.*, 51 F.3d 780, 786 (8th Cir. 1995) (recognizing the *Seabrook* test as “[a]nother widely-adopted standard, based on the [*Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976)] classifications, for identifying an inherently distinctive trade dress”); J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 8:13 (5th ed.) (“In the author’s view, the *Seabrook* test is the preferable method of determining what is and what is not inherently distinctive packaging trade dress.”).

## 21.06 EXPLANATORY: ACQUIRED DISTINCTIVENESS<sup>1</sup> – TRADEMARK/TRADE DRESS (Descriptive Marks)

[The plaintiff’s symbol, term, or trade dress] has “acquired distinctiveness” if:

1. An appreciable number of consumers identifies [the plaintiff’s symbol, term, or trade dress] with a particular source, whether or not consumers know who or what that source is. Consumers consist of people who may buy or use, or consider buying or using, the product or similar products; and
2. [The plaintiff’s symbol, term, or trade dress] acquired distinctiveness before the defendant first began to use [the defendant’s symbol, term, or trade dress].

When deciding whether [the plaintiff’s symbol, term, or trade dress] has “acquired distinctiveness,” you may consider the following non-exhaustive list of factors: (1) the amount and manner of advertising, promotion, and other publicity of the plaintiff’s product using [the plaintiff’s symbol, term, or trade dress]; (2) the sales volume and number of customers of the plaintiff’s product using [the plaintiff’s symbol, term, or trade dress]; (3) intentional copying of [the plaintiff’s symbol, term, or trade dress] by a competitor; (4) the exclusivity, length, and manner of the plaintiff’s use of [the plaintiff’s symbol, term, or trade dress]; (5) consumer surveys; (6) anecdotal evidence showing consumer identification of [the plaintiff’s symbol, term, or trade dress] with its source; (7) plaintiff’s established place in the market; and (8) evidence of actual confusion.<sup>2</sup>

### Notes on Use

1. This instruction should be used if the case involves an unregistered trademark or trade dress or if the defendant has presented sufficient evidence to challenge the validity of a contestable registered trademark or trade dress based on descriptiveness or secondary meaning. *See* Comments to Elements of Claim: Trademark Infringement.

2. The factors set forth above are taken from *Frosty Treats Inc. v. Sony Computer Ent’m’t Am. Inc.*, 426 F.3d 1001, 1005-06 (8th Cir. 2005); *Stuart Hall Co. v. Ampad Corp.*, 51 F.3d 780, 789 (8th Cir. 1995); *Co-Rect Prods., Inc. v. Marvy! Advert. Photography, Inc.*, 780 F.2d 1324, 1332-33 (8th Cir. 1985); and *Fair Isaac Corp. v. Experian Info. Sols. Inc.*, 645 F. Supp. 2d 734, 760 (D. Minn. 2009), adhered to, 711 F. Supp. 2d 991 (D. Minn. 2010), *aff’d*, 650 F.3d 1139 (8th Cir. 2011). In an appropriate case, additional factors may be included.

## Committee Comments

*See Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205, 211 (2000) (secondary meaning occurs when, “in the minds of the public, the primary significance of a mark is to identify the source of the product rather than the product itself.”). “In determining whether a mark has acquired distinctiveness, i.e., secondary meaning, ‘the chief inquiry is whether in the consumer’s mind the mark has become associated with a particular source.’” *Lovely Skin, Inc. v. Ishtar Skin Care Prod., LLC*, 745 F.3d 877, 882 (8th Cir. 2014) (citation omitted). “[T]he ultimate inquiry is whether in the consumer’s mind the mark denotes a single thing coming from a single source.” *Co-Rect Prods.*, 780 F.2d at 1330.

For Eighth Circuit precedent discussing the concept of acquired distinctiveness, *see Frosty Treats*, 426 F.3d at 1005-06; *Heartland Bank v. Heartland Home Fin., Inc.*, 335 F.3d 810, 820 (8th Cir. 2003); *Stuart Hall*, 51 F.3d at 789; *Aromatique, Inc. v. Gold Seal, Inc.*, 28 F.3d 863, 871 (8th Cir. 1994).

As discussed in the Comments to Model Instruction 21.40 (Elements of Claim: Trademark Infringement), “the presumption of validity that attaches to a § 2(f) registration includes a presumption that the registered mark has acquired distinctiveness, or secondary meaning, at the time of its registration.” *Lovely Skin*, 745 F.3d at 882 (8th Cir. 2014); *see also Aromatique*, 28 F.3d at 870.

There is no standard definition for what “appreciable” means in the context of evaluating secondary meaning, so this term is not specifically defined. “It is not necessary that each and every member of the buyer class associate the mark with a single source. Nor is it necessary that a majority of that group do so. \* \* \* [W]hile it is clear that there is no necessity that a majority of concerned customers associate the mark with a single source, how much less than a majority which will suffice is not clearly defined in the cases.” J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 15:45 (5th ed.).

The Committee has not found Eighth Circuit precedent addressing the requisite number of consumers needed to prove acquired distinctiveness. Some district courts within the Circuit, however, have referred to an “appreciable” number of consumers. *See, e.g., Safeway Transit LLC v. Disc. Party Bus, Inc.*, No. 15-CV-3701 (JRT/HB), 2017 WL 8947190, at \*9 (D. Minn. July 31, 2017) (“It is true that use of a mark cannot create a likelihood of confusion as to source if the mark has not acquired a secondary meaning in the minds of an appreciable number of ordinary consumers.”), *report and recommendation adopted*, No. CV 15-3701 (JRT/HB), 2017 WL 4325700 (D. Minn. Sept. 28, 2017).

“Generally, figures over 50 percent are regarded as clearly sufficient.” *McCarthy* § 32:190; *see also, e.g., Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670 (S.D.N.Y. 1963) (25 percent was insufficient to prove secondary meaning); *Roselux Chemical Co. v. Parsons Ammonia Co.*, 299 F.2d 855 (C.C.P.A. 1962) (10 percent insufficient proof of secondary meaning); *McNeil-PPC v. Granutec, Inc.*, 919 F. Supp. 198 (E.D.N.C. 1995) (41 percent association with a single brand was sufficient proof of secondary meaning); *Monsieur Henri Wines, Ltd. v. Duran*, 204 U.S.P.Q. 601 (T.T.A.B. 1979) (37 percent probative to corroborate finding of strong trademark in design).

The Committee has used the term “acquired distinctiveness” instead of “secondary meaning” to avoid the need to define secondary meaning. *See Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205, 211 n.\* (2000) (“‘Secondary meaning’ has since come to refer to the acquired, source-identifying meaning of a non-word mark . . . . It is often a misnomer in that context, since non-word marks ordinarily have no ‘primary’ meaning. Clarity might well be served by using the term ‘acquired meaning’ in both the word-mark and the non-word mark contexts . . . .”); *see also Two Pesos*, 505 U.S. at 769 (“An identifying mark is distinctive and capable of being protected if it . . . *has acquired distinctiveness* through secondary meaning.”) (emphasis added); *Lovely Skin, Inc. v. Ishtar Skin Care Prod., LLC*, 745 F.3d 877, 882 (8th Cir. 2014).

## 21.07 EXPLANATORY: GENERIC TRADEMARK/TRADE DRESS

A “generic” [symbol; term; trade dress] is a common or general [symbol for; name of; trade dress for] a product whose primary significance to consumers is to identify a [group] [class] of similar products, regardless of who [makes] [sells] them. Consumers consist of people who may buy or use, or consider buying or using, the product or similar products.

### Notes on Use

1. This instruction is only intended to be used when the trademark at issue is alleged to be generic, and the court has not already determined this question as a matter of law.
2. Any trademark, unregistered or registered, may be challenged as generic. *See* 15 U.S.C. § 1064(3) (“A petition to cancel a registration of a mark . . . may . . . be filed . . . at any time if the registered mark becomes the generic name for the goods or services, or a portion thereof, for which it is registered . . .”). This instruction should be used when an unregistered or registered, but contestable, trademark or trade dress is challenged as generic and the trial judge has determined that the defendant has met its burden of production referenced in the Comments to this instruction.

### Committee Comments

When a mark claimed as a trademark is not federally registered, the mark user “bears the burden of showing the mark is protected by the Lanham Act.” *ZW USA, Inc. v. PWD Sys., LLC*, 889 F.3d 441, 449 (8th Cir. 2018). In contrast, the registration of a mark creates a rebuttable presumption that the mark is valid. *Aromatique, Inc. v. Gold Seal, Inc.*, 28 F.3d 863, 869 (8th Cir. 1994). This means the owner of the registered mark is entitled to a presumption that its marks are valid and the opposing party is entitled to rebut that presumption. *Id.* The statutory presumption may be overcome by establishing the generic nature of the mark. *WSM, Inc. v. Hilton*, 724 F.2d 1320, 1326 (8th Cir. 1984) (presumption overcome). The trial judge, not the jury, will determine whether the opposing party has met its burden of production. *See id.*

This instruction assumes that when an incontestable registered mark is challenged as generic, the defendant has the burden of persuasion, not merely the burden of production. *See ZW USA*, 889 F.3d at 449 (“In a trademark suit, whether a mark is registered is important because it determines which party bears the burden of persuasion. If the mark is not registered, the mark user bears the burden of showing that the mark is protected by the Lanham Act. But if a mark is listed on the PTO’s Principal Register, the party challenging the mark’s validity bears the burden of showing the mark is not protected by the Lanham Act.”) (citations omitted). This is consistent with Congress’ statutory scheme, which distinguishes between contestable and incontestable marks in this regard. *Compare* 15 U.S.C. § 1115(a) (registered but contestable mark is “prima facie evidence of . . . validity”) *with id.* § 1115(b) (incontestable mark is “conclusive evidence of ‘validity,’” subject to certain exceptions).

For a discussion of generic trademarks, see 15 U.S.C. § 1064(3); *Energy Heating, LLC v. Heat On-the-Fly, LLC*, No. 4:13-CV-10, 2013 WL 5954805, at \*3 (D.N.D. Nov. 6, 2013) (“The correct legal test for genericness . . . requires evidence of the genus of goods or services at issue and the understanding by the general public that the mark refers primarily to that genus of goods or services.”). See also J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 12:6 (4th ed. 2001). For example, since “cola” is a generic term for a type of soft drink, it cannot function as a trademark for this type of soft drink. *McCarthy* § 12:18.

For a discussion of generic trade dress, see *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992) (trade dress case in which court recognized that generic marks are not protectable); *McCarthy* § 8:6.50 (“The courts have held that a package or product shape can lack protection as being ‘generic’ if the trade dress is defined as a mere product theme or style of doing business or is such a hackneyed or common design that it cannot identify any particular source.”); *Malaco Leaf, AB v. Promotion in Motion, Inc.*, 287 F. Supp. 2d 355, 364 (S.D.N.Y. 2003) (fish-shaped animal design of Swedish fish constituted generic trade dress).

## **21.08 EXPLANATORY: NON-FUNCTIONALITY REQUIREMENT – TRADE DRESS<sup>1</sup>**

A trade dress is “functional” if it is essential to the operation of the product as a whole. To determine whether the product's trade dress is functional, you should consider whether the collection of design elements, taken as a whole, are functional.<sup>2</sup>

In making this determination, you may consider the following: (1) whether the design yields a utilitarian advantage in how well the product works; (2) whether alternative designs are available; (3) whether the originator of the design has advertised or promoted the design's utilitarian advantages; (4) whether the design results from a comparatively simple or inexpensive method of manufacturing the product; and (5) whether there is a utility patent disclosing the practical advantages of the design.

### **Notes on Use**

1. As stated in Note 3 of Model Instruction 21.41 (Elements of Claim: Trade Dress Infringement), this instruction should be used for cases involving a claim for infringement of an unregistered trade dress.

2. You may include optional language after this sentence inserting the specific identification of the trade dress at issue, by reference to the elements that make up the trade dress.

### **Committee Comments**

*See TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 32, 34 (2001); *Gateway, Inc. v. Companion Prod., Inc.*, 384 F.3d 503, 508 (8th Cir. 2004).

In assessing functionality, courts consider “whether the collection of design elements, taken as a whole, are functional, not whether individual elements of the trade dress could be categorized as such.” *Insty\*Bit, Inc. v. Poly-Tech Indus., Inc.*, 95 F.3d 663, 673 (8th Cir. 1996). A trade dress “is nonfunctional if it is an arbitrary embellishment primarily adopted for purposes of identification and individuality.” *Prufrock Ltd., Inc. v. Lasater*, 781 F.2d 129, 133 (8th Cir. 1986); *see also Children's Factory, Inc. v. Benez's Toys, Inc.*, 160 F.3d 489, 494 (8th Cir. 1998) (same). “But if the trade dress is an important ingredient in the commercial success of the product, it is clearly functional.” *Prufrock*, 781 F.2d at 133.

In the Eighth Circuit, the test for determining whether a party's claimed trade dress is non-functional is as follows:

If the particular feature is an important ingredient in the commercial success of the product, the interests in free competition permits its imitation in the absence of a patent or

copyright. On the other hand, where the feature or, more aptly, design, is a mere arbitrary embellishment, a form of dress for the goods primarily adopted for purposes of identification and individuality and, hence, unrelated to basic consumer demands in connection with the product, imitation may be forbidden where the requisite showing of secondary meaning is made. Under such circumstances, since effective competition may be undertaken without imitation, the law grants protection.

*Truck Equip. Serv. Co. v. Fruehauf Corp.*, 536 F.2d 1210, 1217-18 (8th Cir. 1976); *see also Honeywell Int'l Inc. v. ICM Controls Corp.*, 45 F. Supp. 3d 969, 995-96 (D. Minn. 2014)

For factors relevant to the issue of functionality, *see TrafFix*, 532 U.S. at 29-30 (“A utility patent is strong evidence that the features therein claimed are functional.”); *Morton-Norwich Prods.*, 671 F.2d at 1341 (existence of utility patent; existence of advertising promoting utilitarian advantages of design; whether design resulted from comparatively simple or cheap manufacturing method); *Disc Golf Assoc., Inc. v. Champion Discs, Inc.*, 158 F.3d 1002, 1006 (9th Cir. 1998) (“To determine whether a product feature is functional, we consider several factors: (1) whether the design yields a utilitarian advantage, (2) whether alternative designs are available, (3) whether advertising touts the utilitarian advantages of the design; and (4) whether the particular design results from a comparatively simple or inexpensive method of manufacture.”); *Valu Engineering, Inc. v. Rexnord Corp.*, 278 F.3d 1268, 1276 (Fed. Cir. 2002) (concluding that *TrafFix* did not alter the *Morton-Norwich* test); *Clicks Billiards v. Sixshooters, Inc.*, 251 F.3d 252 (9th Cir. 2002) (following *TrafFix*, but applying *Morton-Norwich* analysis). In appropriate cases, other factors may be included.

Post-*TrafFix* cases recognize that alternative designs continue to be relevant. *See Honeywell Int'l*, 45 F. Supp. 3d at 997; *AM General Corp. v. Daimlerchrysler Corp.*, 311 F.3d 796, 805 (7th Cir. 2002); *Valu Engineering, Inc. v. Rexnord Corp.*, 278 F.3d 1268, 1276 (Fed. Cir. 2002); *Talking Rain Beverage Co. Inc. v. South Beach Beverage Co.*, 349 F.3d 601, 603 (9th Cir. 2003). *See also* J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 7:75 (5th ed.).

In cases involving trade dress that is claimed to be aesthetically functional, the jury may also consider “whether the exclusive use of the feature would put competitors at a significant disadvantage not related to reputation.” Once it is determined that the trade dress is functional because it is essential to the use or purpose of the article or it affects the article’s cost or quality, competitive necessity should not be considered. *TrafFix*, 532 U.S. at 32-33 (“Expanding upon the meaning of [the definition of functionality], we have observed that a functional feature is one ‘the exclusive use of [which] would put competitors at a significant non-reputation-related disadvantage.’ . . . It is proper to inquire into a ‘significant non-reputation-related disadvantage’ in cases of aesthetic functionality . . . . Where the design is functional under the Inwood formulation [*Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 850 n.10 (1982)] there is no need to proceed further to consider if there is a competitive necessity for the feature.”) (quoting *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 165 (1995)).

## 21.09 EXPLANATORY: LIKELIHOOD OF CONFUSION – TRADEMARK/TRADE DRESS

In deciding whether there is a likelihood of confusion as to the [source, origin, sponsorship, or approval] of the defendant's [product][service] among an appreciable number of people who buy or use, or consider buying or using, the [product][service] or similar [products][services], you should consider the following:

*First*, the strength of [the plaintiff's symbol, term, or trade dress]. This means the degree to which purchasers or potential purchasers recognize the plaintiff's [trademark] [trade dress] as an indication of the origin of the plaintiff's product. A strong and distinctive mark is entitled to greater protection than a weak or commonplace one.<sup>1</sup>;

*Second*, the similarity between the plaintiff's [trademark] [trade dress] and the defendant's mark. This factor considers the overall impression created by plaintiff's mark in the marketplace and the defendant's use of similar language or terms to create a similar impression.;

*Third*, the degree to which the plaintiff's and the defendant's products compete with each other. If the services are more closely related, less similarity in the trademarks is necessary to support a likelihood of confusion. [Goods][Services] are in competitive proximity when there is similarity or overlap in their sales outlets, trade channels, and customers.;

*Fourth*, whether the defendant intended to pass off their product as that of plaintiff, or intended to confuse consumers as to the source or sponsorship of the defendant's [products][services]<sup>2</sup>;

*Fifth*, whether the defendant's use of the [trademark] [trade dress] has led to instances of actual confusion among purchasers or potential purchasers about the [source, origin, sponsorship, or approval] of the defendant's product. [However, actual confusion is not required for finding a likelihood of confusion]; and

*Sixth*, the degree of care reasonably expected of potential customers for the type of [product][service], its costs, and the conditions of purchase. You should consider potential customers to be ordinary ones, using ordinary caution, buying under the usual conditions, and giving such attention as such customers usually give in buying that class of [products][services].

The weight to be given to each of these factors is up to you to determine. No particular factor or number of factors is required to prove likelihood of confusion.

### Notes on Use

1. In cases of reverse confusion, the first element should contain the following language:

*First*, the strength of [the defendant's symbol, term, or trade dress]. This means the degree to which purchasers or potential purchasers recognize [the defendant's symbol or term] as an indication of origin of the defendant's goods. You may consider the previous instructions concerning distinctiveness to help you assess this factor.

2. In a reverse confusion case, the fourth element (defendant's intent) may not be present, and this factor may be omitted. *See Eyebobs, LLC v. Snap, Inc.*, 259 F. Supp. 3d 965, 976 (D. Minn. 2017) (“When reverse, rather than direct, confusion is alleged, ‘intent to confuse’ is unlikely to be present . . . . If such an intent to confuse does, in fact, exist in a reverse confusion case, it should weigh against the defendant in the same manner as it would in a direct confusion case.”) (quotation marks omitted); *Dream Team Collectibles, Inc. v. NBA Props., Inc.*, 958 F. Supp. 1401, 1415 (E.D. Mo. 1997) (stating that “the ‘intent’ element is essentially irrelevant in a reverse confusion case because . . . the defendant by definition *is not* palming off or otherwise attempting to create confusion as to the source of his product”) (quotation marks omitted)).

### Committee Comments

For Eighth Circuit precedent discussing the likelihood of confusion in cases of trademark or trade dress infringement, *see Sturgis Motorcycle Rally, Inc. v. Rushmore Photo & Gifts, Inc.*, 908 F.3d 313, 322 (8th Cir. 2018); *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 569 F.3d 383, 389 (8th Cir. 2009); *Duluth News-Trib. v. Mesabi Pub. Co.*, 84 F.3d 1093, 1096 (8th Cir. 1996) (plaintiff must show a likelihood of confusion among “an appreciable number of ordinary buyers as to the source of or association between” the plaintiff's and defendant's marks); *First Nat'l Bank in Sioux Falls v. First Nat'l Bank, S. Dakota*, 153 F.3d 885, 888 (8th Cir. 1998); *Gateway, Inc. v. Companion Prod., Inc.*, 384 F.3d 503, 509 (8th Cir. 2004); *Safeway Transit LLC v. Disc. Party Bus, Inc.*, 954 F.3d 1171, 1179 (8th Cir. 2020) (actual confusion not required but is “a relevant consideration in a typical trademark case involving two products or services in which the plaintiff alleges that the defendant's mark or trade dress is confusingly similar to its own.”) (quotation marks omitted)).

The factors set forth above are taken from *Co-Rect Prods., Inc. v. Marvy! Advert. Photography, Inc.*, 780 F.2d 1324, 1330 (8th Cir. 1985) (stating factors as follows: “(1) the strength of the owner’s mark; (2) the similarity between the owner’s mark and the alleged infringer’s mark; (3) the degree to which the products compete with each other; (4) the alleged infringer’s intent to ‘pass off’ its goods as those of the trademark owner; (5) incidents of actual confusion; and (6) the type of product, its costs and conditions of purchase”); *see also ZW USA, Inc. v. PWD Sys., LLC*, 889 F.3d 441, 446 (8th Cir. 2018); *B&B Hardware*, 569 F.3d at 389; *First Nat’l Bank*, 153 F.3d at 888; *Sensient Tech. Corp. v. SensoryEffects Flavor Co.*, 613 F.3d 754, 763-69 (8th Cir. 2010); and *SquirtCo. v. Seven-Up Co.*, 628 F.2d 1086, 1091 (8th Cir. 1980) (setting forth similar formulation of the factors).

“A strong and distinctive” mark is “entitled to greater protection than a weak or commonplace one.” *SquirtCo.*, 628 F.2d at 1091. “Two relevant measurements of a mark’s strength are its conceptual strength and its commercial strength.” *Lovely Skin, Inc. v. Ishtar Skin Prods., LLC*, 745 F.3d 877, 888 (8th Cir. 2014).

Regarding the fourth factor (defendant’s intent), “[w]hile proof of bad intent is not required for success in an infringement or unfair competition claim, the absence of such intent is a factor to be considered.” *Sensient Tech.*, 613 F.3d at 766 (quotation marks omitted).

Regarding the fifth factor (actual confusion), “weight is given to the number and extent of instances of actual confusion.” *Id.* at 768 (quotation marks omitted). But “the plaintiff is not required to bring forth incidents of actual confusion to succeed in an infringement case.” *Id.*

Regarding the sixth factor, the jury “must stand in the shoes of the ordinary purchaser, buying under the normally prevalent conditions of the market and giving the attention such purchasers usually give in buying that class of goods.” *Id.* at 769. The sixth factor, moreover, is “more important in confusion-of-source cases where the degree of care that the purchaser exercises in purchasing a product can eliminate the confusion that might otherwise exist.” *Frosty Treats Inc. v. Sony Computer Ent. Am. Inc.*, 426 F.3d 1001, 1010 (8th Cir. 2005)

Notably, “resolution of this issue does not hinge on a single factor but requires a consideration of numerous factors to determine whether under all the circumstances there is a likelihood of confusion.” *SquirtCo.*, 628 F.2d at 1091; *see also Lovely Skin*, 745 F.3d at 887 (8th Cir. 2014) (“[T]he relative weight of the factors depends on the facts of the individual case.” (quotation marks omitted); *Frosty Treats*, 426 F.3d at 1008 (“factors do not operate in a mathematically precise formula” (citation omitted)).

The Committee has used the phrase “purchaser or potential purchaser.” *See Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 716 (Fed. Cir. 1992) (likelihood of confusion inquiry “generally will turn on whether actual or potential ‘purchasers’ are confused.”). *Cf. First Nat’l Bank in Sioux Falls*, 153 F.3d at 888. However, the courts also recognize that there can be actionable likelihood of confusion among non-purchasers, as well. *See Meridian Mutual Ins. Co. v. Meridian Insurance Group, Inc.*, 128 F.3d 1111, 1118 (7th Cir. 1997).

## **21.10 EXPLANATORY: LIKELIHOOD OF CONFUSION – TRADEMARK/TRADE DRESS**

A likelihood of confusion may exist if there is "initial interest confusion," which is confusion that creates initial customer interest, even though no actual sale is finally completed as a result of the confusion. This initial confusion may result in the consumer falsely inferring an affiliation between the plaintiff and defendant, provide the defendant with an opportunity it otherwise would not have achieved, provide the defendant with borrowed credibility during the initial phases of a deal, or deprive the plaintiff of an actual opportunity. Even though the consumer eventually may realize the service provider is not the one originally sought, the consumer may stay with the competitor, so that the competitor has captured the trademark holder's potential visitors or customers.<sup>1</sup>

### **Notes on Use**

1. This instruction should only be added if sufficient evidence of initial interest confusion has been presented. *See Select Comfort Corp. v. Baxter*, 996 F.3d 925, 932 (8th Cir. 2021), *cert. denied sub nom. Dires, LLC v. Select Comfort Corp.*, 142 S. Ct. 561, 211 L. Ed. 2d 351 (2021) (“As noted, initial-interest confusion is ‘confusion that creates initial customer interest, even though no actual sale is finally completed as a result of the confusion.’ . . . This free ride may result in the consumer falsely inferring an affiliation between the junior and senior users, provide the junior user with an opportunity it otherwise would not have achieved, or deprive the senior user of an actual opportunity.”).

## **21.11 EXPLANATORY: STATUTORY NOTICE (Registered Marks)<sup>1</sup>**

The defendant had statutory notice that the plaintiff's trademark was registered if:

[First, the plaintiff displayed with the [trademark] [trade dress] the words, "Registered in the U.S. Patent and Trademark Office"; [or]

[Second, the plaintiff displayed with the [trademark] [trade dress] the words "Reg. U.S. Pat. & Tm. Off.>"; [or]

[Third, the plaintiff displayed with the [trademark] [trade dress] the letter R enclosed in a circle ®.]

### **Notes on Use**

1. This instruction should be given only in cases involving registered marks. *See* 15 U.S.C. § 1111; 15 U.S.C. § 1117.

### **Committee Comments**

The notice requirement under the Lanham Act § 29 applies only to registered marks. The notice requirement does not provide any limitation on damages under a § 43(a) count for infringement of an unregistered mark. *See* J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 19:144 (5th ed.). "This means that a trademark owner can sue under Lanham Act § 43(a) for damages from infringing acts occurring prior to registration unaffected by the notice requirement and under Lanham Act § 32(1) for damages for acts post-registration so long as the notice requirement is met." *Id.*

## 21.40 ELEMENTS OF CLAIM: TRADEMARK INFRINGEMENT

Your verdict must be for plaintiff [name] on plaintiff's claim [generally describe claim] if all of the following elements have been proved.<sup>1</sup>

*First*, the plaintiff owns [describe the plaintiff's symbol or term] as a trademark<sup>2</sup>;

*Second*, [the plaintiff's symbol or term] is a valid trademark<sup>3</sup>;

[*Third*, the defendant used [symbol or term used by the defendant] in interstate commerce.]<sup>4</sup>

[*Third*] [*Fourth*], the defendant used [symbol or term used by the defendant] in a manner that is likely to cause [confusion] [mistake] [deception] as to the [source, origin, sponsorship, or approval] of the defendant's product.<sup>5</sup>

If any of the above elements has not been proved, [or if defendant (insert name) is entitled to a verdict under Instruction No. \_\_\_\_\_ (insert number of affirmative defense instruction)], then your verdict must be for defendant [insert name].

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" or "preponderance of the evidence" is not necessary here. It can be included in Instruction 3.04.

2. See Model Instruction 21.02, which explains how a plaintiff may own a symbol or term as a trademark.

3. See Model Instructions 21.03–21.04 and 21.06–21.07, which explain certain considerations related to the validity of a trademark. If the case involves a registered trademark or trade dress that has become "incontestable" under 15 U.S.C. § 1115(b) because it has been in use for five consecutive years after registration and other statutory requirements have been met, see 15 U.S.C. §§ 1058 & 1065, then validity may be challenged only on the grounds enumerated in § 1115(b). See *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 196 (1985); *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 912 F.3d 445, 451 (8th Cir. 2018) ("Under Section 15 of the Lanham Act, Pub. L. No. 79-489, § 15, 60 Stat. 427, 433-34 (1946) (codified as amended at 15 U.S.C. § 1065), a registrant of a valid trademark who has continually utilized that trademark for five years after registration may have his mark declared incontestable.").

“Incontestability provides ‘conclusive evidence of the validity of [a] registered mark . . . and of the registrant’s exclusive right to use the registered mark in commerce.’” *B&B Hardware*, 912 F.3d at 451 (citing 15 U.S.C. § 1115(b)). “Incontestability entitles a trademark owner to a presumption that it has a valid, protectible mark and there is a likelihood of confusion between its mark and the defendant’s mark.” *B&B Hardware*, 912 F.3d at 453 (quotation marks omitted). In such a case, the court may omit the presumed element from this instruction (see Note 3 below), or the court may give an instruction that the plaintiff owns a valid trademark. In that event, element 2 of this instruction would be modified as follows:

*Second*, you are instructed that [the plaintiff’s symbol or term] is a valid trademark.

A similar modification may be made to the first element regarding ownership.

If the defendant asserts one of the defenses enumerated in § 1115(b), then the “affirmative defense” alternative discussed in Note 4 to this instruction should be used, along with the instruction for the particular defense at issue.

4. This element is generally not disputed by the time an infringement claim reaches trial. If this or any other particular element is undisputed or resolved as a matter of law, it may be eliminated.

5. *See* Model Instruction 21.09, which explains factors to consider when deciding likelihood of confusion. This instruction is drafted for a traditional trademark infringement claim based on forward confusion. If the case involves a claim for reverse confusion, the fourth element should say instead:

*Fourth*, the defendant used [symbol or term used by the defendant] in a manner that is likely to cause [confusion] [mistake] [deception] as to the [source, origin, sponsorship, or approval] of the plaintiff’s product.

*See Minnesota Pet Breeders, Inc. v. Schell & Kampeter, Inc.*, 41 F.3d 1242, 1246 (8th Cir. 1994) (“Reverse confusion occurs when a large junior user saturates the market with a trademark similar or identical to that of a smaller, senior user. In such a case, the junior user does not seek to profit from the good will associated with the senior user’s mark. Nonetheless, the senior user is injured . . . .”) (citation omitted).

### **Committee Comments**

*See* 15 U.S.C. § 1125(a); *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 569 F.3d 383, 389 (8th Cir. 2009) (“To prove a trademark infringement claim, a plaintiff must show that it has a valid, protectible mark and that there is a likelihood of confusion between its mark and the defendant’s mark.”).

If the case involves a registered trademark or trade dress that is still “contestable” under 15 U.S.C. § 1065, additional considerations apply. The presumption of validity that accompanies a contestable registered trademark shifts to the defendant the burden of producing evidence of invalidity; the presumption is extinguished once the defendant presents evidence sufficient to put validity at issue, a decision to be made by the court. *See Aromatique, Inc. v. Gold Seal, Inc.*, 28 F.3d 863, 869 (8th Cir. 1994). “[T]he presumption of validity that attaches to a § 2(f) registration

includes a presumption that the registered mark has acquired distinctiveness, or secondary meaning, at the time of its registration.” *Lovely Skin, Inc. v. Ishtar Skin Care Prod., LLC*, 745 F.3d 877, 882 (8th Cir. 2014) (citing *Aromatique*, 28 F.3d at 870).

For Eighth Circuit case law discussing the presumption of validity, *see also Fair Isaac Corp. v. Experian Info. Sols., Inc.*, 650 F.3d 1139, 1147 (8th Cir. 2011) (“Although a registered mark enjoys a presumption of validity, 15 U.S.C. § 1115(a), that presumption may be rebutted.”); *ZW USA, Inc. v. PWD Sys., LLC*, 889 F.3d 441, 449 (8th Cir. 2018) (“[I]f a mark is listed on the PTO’s Principal Register, the party challenging the mark’s validity bears the burden of showing the mark is not protected by the Lanham Act.”); *B&B Hardware*, 912 F.3d at 453 (once defendant “proved its affirmative defense of fraud in this case, [plaintiff] lost the benefits of incontestability, including the presumption of validity”); *see also Schwan’s IP, LLC v. Kraft Pizza Co.*, 460 F.3d 971, 974 (8th Cir. 2006) (no presumption of validity attaches where PTO denied plaintiff’s application to register mark).

The instruction, as drafted, assumes that the court has ruled that the defendant has met its burden of production, thus requiring the plaintiff to prove validity. If, however, the defendant does not meet its burden of production, the presumptions of validity and ownership under Section 1115(a) are unrebutted. In that case, the court may omit the presumed element from this instruction (see Note 3 above), or the court may give an instruction that Plaintiff owns a valid trademark. In that event, the second element of this instruction would be modified as follows:

2. You are instructed that [the plaintiff’s symbol or, term] is a valid trademark.

A similar modification may be made to the first element if ownership can be presumed because the defendant has not met the burden of production.

Use in interstate commerce is an element for a claim of trademark infringement under the Lanham Act. See 15 U.S.C. § 1127 (defining commerce as “all commerce which may lawfully be regulated by Congress.”); *see also J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition* § 32:5 (5th ed.); *Council of Better Bus. Bureaus, Inc. v. Bailey & Assocs., Inc.*, 197 F. Supp. 2d 1197, 1212 (E.D. Mo. 2002) (“Even local, intrastate acts of infringement are ‘in commerce’ where the acts have a substantial effect on interstate commerce. A substantial effect on interstate commerce can be found from local acts of infringement, as these tend to jeopardize the good name of the plaintiff’s product, or diminish the registrant’s ability to control and sustain its registration.”) (citation omitted); *Susan’s, Inc. v. Thomas*, 26 U.S.P.Q.2d 1804 (D. Kan. 1993) (use in commerce element satisfied by interstate sale or physical transportation of goods, as well as advertising and solicitation of sales across state lines).

Although the Committee has not found Eighth Circuit precedent addressing the issue, some courts acknowledge that “purchasing keywords containing a trademark to generate advertising from internet searches constitutes ‘use in commerce’ as required to maintain a claim of trademark infringement under the Lanham Act” *Fair Isaac Corp. v. Experian Info. Sols. Inc.*, 645 F. Supp. 2d 734, 760 (D. Minn. 2009), *aff’d*, 650 F.3d 1139 (8th Cir. 2011); *see also Hysitron Inc. v. MTS Sys. Corp.*, No. CIV 07-01533 ADM/AJB, 2008 WL 3161969, at \*2-3 (D. Minn. Aug. 1, 2008); *Int’l Profit Associates, Inc. v. Paisola*, 461 F.Supp.2d 672, 677 & n.3 (N.D.

Ill. 2006), citing *Buying for the Home, LLC v. Humble Abode, LLC*, 459 F. Supp. 2d 310, 323 (D.N.J. 2006) (noting conflicting decisions in other jurisdictions).

## 21.41 ELEMENTS OF CLAIM: TRADE DRESS INFRINGEMENT

Your verdict must be for plaintiff [name] on plaintiff's claim [generally describe claim] if all of the following elements have been proved.<sup>1</sup>:

*First*, the plaintiff owns [describe the plaintiff's product design, packaging, or label] as trade dress<sup>2</sup>;

*Second*, the plaintiff's [product design, packaging, or label] is valid<sup>3</sup>;

*Third*, the defendant used [product design, packaging, or label by the defendant] in interstate commerce without the plaintiff's consent; and

*Fourth*, the defendant used [product design, packaging, or label used by the defendant] in a manner that is likely to cause [confusion] [mistake] [deception] as to the [source, origin, sponsorship, or approval] of the defendant's product.<sup>4</sup>

If any of the above elements has not been proved, [or if defendant (insert name) is entitled to a verdict under Instruction No. \_\_\_\_\_ (insert number of affirmative defense instruction)], then your verdict must be for defendant [insert name].

### Notes on Use

1. If a particular element or elements is undisputed or resolved as a matter of law, it may be eliminated. Additionally, Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" or "preponderance of the evidence" is not necessary here. It can be included in Instruction 3.04.

2. See Model Instruction 21.02, which explains how a plaintiff may own a product design, packaging, or label as trade dress.

3. To be valid, trade dress must be both distinctive and not functional. See Model Instructions 21.03 and 21.05–21.07, which explain certain considerations related to the distinctiveness of trade dress. See Model Instruction 21.08, which explains how to determine whether trade dress is functional. The second element should be used for claims involving an unregistered trade dress. See 15 U.S.C. § 1125(a)(3). If the case involves a registered trade dress, then functionality is an affirmative defense.

If the case involves a registered trade dress that has become “incontestable” under 15 U.S.C. § 1115(b) because it has been in use for five consecutive years after registration and other statutory requirements have been met, see 15 U.S.C. §§ 1058 & 1065, then validity may be challenged only on the grounds enumerated in § 1115(b). See Note 1, Model Instruction 21.40 (Elements of Claim: Trademark Infringement). In such a case, the court may omit the presumed element from this instruction (*see* Note 1, above), or the court may give, for example, an instruction that the plaintiff owns a valid trade dress. In that event, the first and second elements of this instruction would be modified as follows:

*First*, you are instructed that the plaintiff owns [describe the plaintiff’s product, design, packaging, or label] as a valid trade dress.

4. *See* Model Instruction 21.09, which explains factors to consider when deciding likelihood of confusion.

### **Committee Comments**

*See* 15 U.S.C. § 1125(a); *Munro v. Lucy Activewear, Inc.*, 899 F.3d 585, 589 (8th Cir. 2018) (“To successfully allege a claim under the Lanham Act, a plaintiff must prove that his trade dress is: (1) distinctive; (2) nonfunctional; and (3) likely to be confused with the accused product.”) (quotation marks omitted); *Aromatique, Inc. v. Gold Seal, Inc.*, 28 F.3d 863, 868 (8th Cir. 1994).

## 21.42 ELEMENTS OF CLAIM: DERIVATIVE LIABILITY – CONTRIBUTORY INFRINGEMENT

Your verdict must be for plaintiff [name] on plaintiff's claim [generally describe claim] if all of the following elements have been proved.<sup>1</sup>

*First*, [name of direct infringer] infringed the plaintiff's [trademark] [trade dress], as [defined] in Instructions \_\_\_\_\_<sup>2</sup>; and

*Second*, [the defendant intentionally [induced; encouraged; suggested that] [name of direct infringer] [to] infringe the plaintiff's [trademark] [trade dress].]

[OR]

[The defendant continued to supply a product to [name of direct infringer] when the defendant knew or had reason to know that [name of direct infringer] was infringing the plaintiff's [trademark] [trade dress] in its [sale] [distribution] of that product.]

[OR]

[[Name of direct infringer] infringed the plaintiff's [trademark] [trade dress] on the defendant's premises, and the defendant knew or had reason to know that [name of direct infringer] was infringing the plaintiff's [trademark] [trade dress]. [You may find that the defendant knew or had reason to know that [name of direct infringer] was infringing the plaintiff's [trademark] [trade dress] if the defendant suspected wrongdoing and deliberately failed to investigate].]

If any of the above elements has not been proved, [or if defendant (insert name) is entitled to a verdict under Instruction No. \_\_\_\_\_ (insert number of affirmative defense instruction)], then your verdict must be for defendant [insert name].

### Notes on Use

1. In any case involving allegations of contributory infringement, the instructions relating to direct infringement should be given as well, so that the jury can determine whether direct infringement has occurred as required by this instruction. The instructions on direct infringement

may need to be modified, depending on whether the person accused of direct infringement is a party to the case. Additionally, Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” or “preponderance of the evidence” is not necessary here. It can be included in Instruction 3.04.

2. The number or title of the “elements of claim” instruction for trademark or trade dress infringement should be inserted here.

### **Committee Comments**

*See Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 854 (1982) (“[I]f a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorily responsible for any harm done as a result of the deceit.”). The Supreme Court endorsed the Second Circuit’s definition of inducement as “suggest[ing], even by implication,” that third parties infringe the trademark. *Id.* at 851-53.

Liability for infringement on a defendant’s premises. “Contributory liability may be imposed on the owner of a facility who turns a willful blind eye to ongoing trademark violations at the facility.” *Coach, Inc. v. Frison*, No. 4:10CV2289 RWS, 2013 WL 3786314, at \*4 (E.D. Mo. July 18, 2013) (“Coach has established its claim against Frison and the Flea Market for contributory trademark infringement. Frison willfully turned a blind eye to the sale of counterfeit Coach goods in his market and profited from those sales.”); *see also Hard Rock Café Licensing Corp. v. Concession Services, Inc.*, 955 F.2d 1143, 1149 (7th Cir. 1992) (“the Restatement of Torts tells us that CSI [flea-market landlord] is responsible for the torts of those it permits on its premises ‘knowing or having reason to know that the other is acting or will act tortiously . . . . In the absence of any suggestion that a trademark violation should not be treated as a common law tort, we believe that the *Inwood Labs.* test for contributory liability applies. CSI may be liable for trademark violations by Parvez [flea-market seller and direct infringer] if it knew or had reason to know of them.”).

## 21.43 ELEMENTS OF CLAIM: FALSE ADVERTISING UNDER LANHAM ACT

Your verdict must be for plaintiff [name] on plaintiff's claim [generally describe claim] if all of the following elements have been proved.<sup>1</sup>

*First*, the defendant made a false [or misleading] statement of fact in a commercial advertisement about the [nature; quality; characteristic; geographic origin] of [its own [product; service; commercial activities] [or] [the plaintiff's [product; service; commercial activities].] [A statement is misleading if it conveys a false impression and actually misleads a consumer.] [A statement can be misleading even if it is literally true or ambiguous.];<sup>2</sup>

*Second*, the statement actually deceived or had the tendency to deceive a substantial segment of the defendant's audience;

*Third*, the deception was material, in that it was likely to influence the purchasing decisions of consumers;

*Fourth*, the defendant caused the false statement to enter interstate commerce<sup>3</sup>; and

*Fifth*, the plaintiff has been or is likely to be injured as a result of the false statement, either by a direct diversion of sales from itself to the defendant or by a loss of goodwill associated with its products.<sup>4</sup>

If any of the above elements has not been proved, [or if defendant (insert name) is entitled to a verdict under Instruction No. \_\_\_\_\_ (insert number of affirmative defense instruction)], then your verdict must be for defendant [insert name].

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" or "preponderance of the evidence" is not necessary here. It can be included in Instruction 3.04.

2. If the particular case involves a statement that is alleged to be literally true or ambiguous yet conveys a false impression or is misleading in context, the bracketed language at the end of the first paragraph should be given.

3. *See* 15 U.S.C. § 1127 (defining commerce as “all commerce which may lawfully be regulated by Congress.”). The instruction may need to be adapted to the particular case being tried.

4. This instruction should be modified to account for situations where facts are not in dispute or the element has been resolved as a matter of law.

### **Committee Comments**

*See* 15 U.S.C. § 1125(a)(1)(B); *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998).

“The false statement necessary to establish a Lanham Act violation generally falls into one of two categories: (1) commercial claims that are literally false as a factual matter; and (2) claims that may be literally true or ambiguous but which implicitly convey a false impression, are misleading in context, or likely to deceive consumers.” *United Indus.*, 140 F.3d at 1180.

“Statements that are literally true or ambiguous but which nevertheless have a tendency to mislead or deceive the consumer are actionable under the Lanham Act. Where a commercial claim is not literally false but is misleading in context, proof that the advertising actually conveyed the implied message and thereby deceived a significant portion of the recipients becomes critical.” *Id.* at 1182 (citations omitted).

In addition to commercial claims that are literally false or literally true or ambiguous but misleading in context, some claims will fall into a third category known as puffery. *See United Indus.*, 140 F.3d at 1180. Puffery consists of “exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely and is not actionable under [the Lanham Act] § 43(a).” *Id.* Puffery may include “vague or highly subjective” claims of product superiority. *Id.* “However, false descriptions of specific or absolute characteristics of a product and specific, measurable claims of product superiority based on product testing are not puffery and are actionable.” *Id.*

For case law addressing the issue of interstate commerce, *see Futuristic Fences, Inc. v. Illusion Fence Corp.*, 558 F. Supp. 2d 1270, 1277 (S.D. Fla. 2008) (Advertising on the Internet and in media which reaches potential customers in other nations satisfies the “in commerce” requirement.); *Susan’s, Inc. v. Thomas*, 26 U.S.P.Q.2d 1804 (D. Kan. 1993) (furniture store in Kansas that advertises in media that cross state lines sufficient to trigger § 43(a) jurisdiction); *Jewel Cos. v. Jewel Merchandising Co.*, 201 U.S.P.Q. 24 (N.D. Ill. 1978) (defendant’s local sales and advertising that affected plaintiff’s interstate sales sufficient for jurisdiction under § 43(a)); *Larry Harmon Pictures Corp. v. Williams Restaurant Corp.*, 929 F.2d 662, 665 (Fed. Cir. 1991) (appellee’s restaurant was involved in interstate commerce, and service mark for restaurant met commerce requirement for registration under Lanham Act §3).

## **21.44 ELEMENTS OF CLAIM: TRADEMARK DILUTION**

### **Committee Comments**

The Committee has not proposed an instruction on trademark dilution under 15 U.S.C. § 1125(a). In October 2006, Congress made changes to the statute that significantly alter its meaning. The changed provisions have not yet been the subject of significant interpretation by the Eighth Circuit.

## 21.60 AFFIRMATIVE DEFENSE: NOMINATIVE FAIR USE

Your verdict must be for defendant [name] on plaintiff [name]’s trademark infringement claim if all of the following elements have been proved<sup>1</sup>:

*First*, the defendant used the trademark to refer to a product of the plaintiff that cannot be readily identified without using the trademark. [A product cannot be readily identified without using the trademark if there are no equally informative words to identify the product or there is no other effective way to compare, criticize, refer to or identify it without using the trademark.];

*Second*, the defendant used only as much of the trademark as was reasonably necessary to identify the product. [A reasonably necessary use of a trademark occurs when no more of the mark’s appearance is used than is needed to identify the product and enable consumers to understand the reference.]; and

*Third*, the defendant did not do anything in connection with using the trademark to suggest that the plaintiff sponsored or endorsed the defendant or its product.

[You may find for the defendant if all of the above elements have been proved, even if the defendant used the plaintiff’s trademark to compete with the plaintiff, or to make a profit.]<sup>2</sup>

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” or “preponderance of the evidence” is not necessary here. It can be included in Instruction 3.04.

2. This paragraph may be used in cases where the fair use defense is challenged because the defendant is using the plaintiff’s mark in competition with the plaintiff or to make a profit. *See New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 309 (9th Cir. 1992) (“Where, as here, the use does not imply sponsorship or endorsement, the fact that it is carried on for profit and in competition with the trademark holder’s business is beside the point.”).

### Committee Comments

This instruction is adapted in part from the Ninth Circuit’s Model Civil Jury Instruction 15.25. Nominative fair use refers to the defendant’s use of the plaintiff’s mark to identify the

plaintiff's goods or services. Although the Eighth Circuit has not considered the standards for the nominative fair use doctrine, the district courts in the Eighth Circuit have applied the Ninth Circuit's rule for nominative fair use. *See, e.g., Select Comfort Corp. v. Baxter*, 156 F. Supp. 3d 971, 987 (D. Minn. 2016) (citing *New Kids*, 971 F.2d at 308-09), *aff'd in part, rev'd in part on other grounds*, 996 F.3d 925 (8th Cir. 2021); *R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.*, 2001 WL 747422, at \*5-6 (N.D. Ill. 2001) (same).

## 21.61 AFFIRMATIVE DEFENSE: CLASSIC FAIR USE

Your verdict must be for defendant [name] on plaintiff [name]’s trademark infringement claim if all of the following elements have been proved<sup>1</sup>:

*First*, the defendant used [describe the defendant’s usage] in a way other than to indicate the source of the defendant’s product;

*Second*, the defendant only used [describe the defendant’s usage] to describe its product; and

*Third*, [describe the defendant’s usage] in good faith describes the defendant’s product.

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” or “preponderance of the evidence” is not necessary here. It can be included in Instruction 3.04.

### Committee Comments

This instruction is adapted in part from the Seventh Circuit’s Model Jury Instruction 13.5.2. Classic fair use refers to the defendant’s use of the plaintiff’s mark in connection with the defendant’s goods or services. Classic fair use is described in the Lanham Act as a defense to a trademark infringement action. 15 U.S.C. § 1115(b)(4). Although the Eighth Circuit has not considered the standards for the classic fair use doctrine, the district courts in the Eighth Circuit have applied the Seventh Circuit’s rule for classic fair use. *See, e.g., DowBrands, L.P. v. Helene Curtis, Inc.*, 863 F. Supp. 963, 969 (D. Minn. 1994) (applying Seventh Circuit’s formulation of “classic” fair use doctrine (citing *Sands, Taylor & Wood Co. v. Quaker Oats Co.*, 978 F.2d 947, 951 (7th Cir. 1992)); *Select Comfort Corp. v. Baxter*, 156 F. Supp. 3d 971, 987 (D. Minn. 2016) (citing *DowBrands*), *aff’d in part, rev’d in part on other grounds*, 996 F.3d 925 (8th Cir. 2021); *Rainforest Cafe, Inc. v. Amazon, Inc.*, 86 F. Supp. 2d 886, 906 (D. Minn. 1999) (same).

A defendant who asserts the fair use defense does not bear the burden of negating a likelihood of confusion; instead, the plaintiff continues to bear the burden of proving a likelihood of confusion as part of its *prima facie* case of infringement. *See KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004).

## 21.62 AFFIRMATIVE DEFENSE: CONTINUOUS PRIOR USE (Registered Marks)

Your verdict must be for defendant [name] on plaintiff [name]’s trademark infringement claim if all of the following elements have been proved<sup>1</sup>:

*First*, the defendant used the trademark before the plaintiff [[applied for registration of the] [registered the] [published the registered]] [trademark] [trade dress];

*Second*, the defendant [defendant’s assignor] [defendant’s licensor or licensee] continuously used the [trademark] [trade dress], without interruption, in [specific geographic region]; and

*Third*, the defendant [defendant’s assignor] [defendant’s licensor or licensee] began using the trademark without knowledge of the plaintiff’s prior use.

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” or “preponderance of the evidence” is not necessary here. It can be included in Instruction 3.04.

### Committee Comments

*See* 15 U.S.C. § 1115(a) (contestable marks subject to “any legal or equitable defense or defect, including those set forth in subsection (b) of this section . . .”), and § 1115(b)(5) (incontestable trademarks subject to defense “[t]hat the mark whose use by a party is charged as an infringement was adopted without knowledge of the registrant’s prior use and has been continuously used by such party or those in privity with him from a date prior to (A) the date of constructive use of the mark established pursuant to section 1057(c) of this title, (B) the registration of the mark under this chapter if the application for registration is filed before the effective date of the Trademark Law Revision Act of 1988, or (C) publication of the registered mark under subsection (c) of section 1062 of this title: *Provided, however*, That this defense or defect shall apply only for the area in which such continuous prior use is proved . . .”); *see also*, *e.g.*, *Wrist-Rocket Mfg. Co. v. Saunders Archery Co.*, 578 F.2d 727, 730 (8th Cir. 1978) (“It has been held that if two parties acquire common-law rights in a trademark in different areas and the prior user registers the mark, then the registered owner’s rights can become incontestable but the other common-law owner retains exclusive rights to the mark in areas where his rights antedated registration.”).

The scope of the specific geographic region is a question of fact that is determined by assessing factors including “plaintiff’s dollar value of sales at the time defendants entered the market, number of customers compared to the population of the state, relative and potential

growth of sales, and length of time since significant sales.” *Sweetarts v. Sunline, Inc.*, 380 F.2d 923, 929 (8th Cir. 1967); *see also Sweetarts v. Sunline, Inc.*, 436 F.3d 705, 711 (8th Cir. 1971) (addressing the plaintiff’s effective market area).

The junior user asserting a continuous prior use defense must show that it “has made continuous use of the mark prior to the issuance of the senior user’s registration and must further prove continued use up until trial.” J. Thomas McCarthy, *McCarthy on Trademarks* § 26:44 (4th ed. 2006), *citing Thrifty Rent-A-Car System, Inc. v. Thrift Cars, Inc.*, 831 F.2d 1177, 1183 (1st Cir. 1987); *Quiksilver, Inc. v. Kymsta Corp.*, 466 F.3d 749, 762 (9th Cir. 2006).

A junior user who seeks to enjoin the owner of a registered mark that is descriptive from entering a specific geographic region must show that the junior user has acquired secondary meaning in the mark before the date of registration. *See First Bank v. First Bank Sys., Inc.*, 84 F.3d 1040, 1046 (8th Cir. 1996) (“We agree with the district court that FB failed to prove that FIRST BANK had attained secondary meaning before 1986, which is well after FBS registered its FIRST BANK SYSTEM trademark in 1971.”).

## **21.63 AFFIRMATIVE DEFENSE: LACHES/ACQUIESCENCE**

### **Committee Comments**

The Lanham Act recognizes laches, acquiescence, and other equitable defenses to trademark infringement actions. 15 U.S.C. § 1115(b)(9). No instructions are provided on the defenses of laches or acquiescence because they are issues for the court, not the jury.

## 21.64 AFFIRMATIVE DEFENSE: FRAUD IN PROCUREMENT

Your verdict must be for defendant [name] on plaintiff [name]’s trademark infringement claim if all of the following elements have been proved<sup>1</sup>:

*First*, the plaintiff knowingly made [material misrepresentations] [and; or] [failed to disclose material information] to the Patent and Trademark Office; and

*Second*, the plaintiff did so with the intent to deceive the Patent and Trademark Office.

[Information that was misrepresented is “material” if it influenced the Patent and Trademark Office’s decision to register the [trademark] [trade dress]]. [Information is “material” if it would have caused the Patent and Trademark Office not to register the [trademark] [trade dress] had it been disclosed.]

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” or “preponderance of the evidence” is not necessary here. It can be included in Instruction 3.04.

### Committee Comments

See 15 U.S.C. § 1115(b)(1); *Fair Isaac Corp. v. Experian Info. Solutions, Inc.*, 650 F.3d 1139, 1148 (8th Cir. 2011).

“When drawing an inference of intent, the involved conduct, viewed in light of all the evidence . . . must indicate sufficient culpability to require a finding of intent to deceive.” *Fair Isaac Corp.*, 650 F.3d at 1149 (quoting *In re Boese Corp.*, 580 F.3d 1240, 1245 (Fed. Cir. 2009)). Because direct evidence of deceptive intent is seldom available, however, “intent can be inferred from indirect and circumstantial evidence. But such evidence must still be clear and convincing, and inferences drawn from lesser evidence cannot satisfy the deceptive intent requirement.” *Fair Isaac Corp.*, 650 F.3d at 1148 (quoting *Boese*, 580 F.3d at 1245); see also *Aromatique, Inc. v. Gold Seal, Inc.*, 28 F.3d 863, 877 (8th Cir. 1994) (“Proof that false statements were made to, or that facts were withheld from, the PTO, however, is not enough to show fraud for purposes of canceling a mark because of a party’s fraudulent conduct. In order to show that an applicant defrauded the PTO the party seeking to invalidate a mark must show that the applicant intended to mislead the PTO.”).

“To constitute ‘fraud’ the knowing misrepresentation to the PTO must be ‘material’ in the sense that but for the misrepresentation, the federal registration either would not or should

not have issued.” J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 31:67 (5th ed.).

## 21.65 AFFIRMATIVE DEFENSE: ABANDONMENT

Your verdict must be for defendant [name] on plaintiff [name]’s trademark infringement claim if you find that the plaintiff stopped using its [trademark] [trade dress] and intended not to resume use.

### Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” or “preponderance of the evidence” is not necessary here. It can be included in Instruction 3.04.

### Committee Comments

Abandonment is a defense to an action for trademark infringement. 15 U.S.C. § 1115(b)(2). A mark is presumed abandoned after three consecutive years of nonuse. *Id.* § 1127.

For authority addressing the elements of the abandonment defense, *see, e.g., Cmty. of Christ Copyright Corp. v. Devon Park Restoration Branch of Jesus Christ’s Church*, 634 F.3d 1005, 1010 (8th Cir. 2011); *Hiland Potato Chip Co. v. Culbro Snack Foods, Inc.*, 720 F.2d 981, 983-84 (8th Cir. 1983). Eighth Circuit law has recognized that the defendant “has the burden of proving abandonment by clear and convincing evidence.” *Cmty. of Christ*, 634 F.3d at 1010; *see also* J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 17:12 (5th ed.).

Section 1127 provides that nonuse of a registered mark for three consecutive years is *prima facie* evidence of abandonment. Although the Committee has not found Eighth Circuit precedent on the presumption of abandonment, the issue has been examined by district courts within the Circuit. A showing by the defendant of non-use of a registered mark for three consecutive years creates a rebuttable presumption of abandonment, “which shifts the burden of production to the mark owner to show use within the relevant period or an intent to resume use.” *Star Buffet, Inc. v. TGB Glory, LLC*, No. 4:17CV00533 SWW, 2019 WL 1435821, at \*4 (E.D. Ark. Mar. 29, 2019) (citing cases). The burden of persuasion remains with the defendant to prove abandonment. *See Wind Turbine Indus. Corp. v. Jacobs Wind Elec. Co.*, No. CIV. 09-36 MJD SRN, 2010 WL 4723385, at \*8 (D. Minn. Nov. 16, 2010).

## 21.70 DAMAGES: PLAINTIFF’S ACTUAL DAMAGES

If you find for the plaintiff under Instruction \_\_, and do not find for the defendant under Instruction \_\_ [and find that the defendant had statutory notice<sup>1</sup> or actual notice of the plaintiff’s registered trademark], you must award the plaintiff such sum as you find will fairly and justly compensate the plaintiff for the injury caused by the defendant’s [infringement] [false advertising].<sup>2</sup>

In making this determination, you may consider (1) injury to the plaintiff’s reputation; (2) injury to the plaintiff’s goodwill; (3) lost profits that the plaintiff would have earned but for the defendant’s [infringement] [false advertising]; and (4) the cost of corrective advertising reasonably required to correct any public confusion caused by the [infringement] [false advertising].<sup>3</sup>

### Notes on Use

1. See Model Instruction 21.11, which explains how to determine whether a defendant had statutory notice.

2. This instruction is drafted for use in infringement and false advertising cases, not dilution cases. As stated above, the Committee has not proposed an instruction for dilution under 15 U.S.C. § 1125(a) due to significant recent amendments to the statute.

3. The factors are taken from, e.g., *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1122 (8th Cir. 1999) (goodwill and business reputation); and *Lawn Managers, Inc. v. Progressive Lawn Managers, Inc.*, 959 F.3d 903, 914 (8th Cir. 2020) (corrective advertising). The list of actual damages is not meant to be exhaustive, and this instruction may need to be modified to reflect other types of damages claimed in a particular case or to ensure that no type of damages is duplicated.

### Committee Comments

See 15 U.S.C. § 1117(a); *Blue Dane Simmental Corp. v. Am. Simmental Ass’n*, 178 F.3d 1035, 1042 (8th Cir. 1999); *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998); *Rhone-Poulenc Rorer Pharms., Inc. v. Marion Merrell Dow, Inc.*, 93 F.3d 511, 515 (8th Cir. 1996) (“Plaintiff must prove both actual damages and a causal link between defendant’s violation and those damages.”).

There is no “bright-line rule” requiring the plaintiff to prove actual confusion as a prerequisite to recover monetary damages. *Masters v. UHS of Delaware, Inc.*, 631 F.3d 464, 472 (8th Cir. 2011).

For authority addressing the issue of loss of goodwill, *see Porous Media*, 173 F.3d at 1122 (jury was properly instructed that: “The goodwill of a company is an intangible business value which reflects the basic human tendency to do business with a merchant who offers products of the type and quality which the consumer desires and expects.”). For a discussion of judicial definitions of good will and methods for valuation of good will, *see J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition* §§ 2:17, 2:20, 2:21 (5th ed.). Because there may be more than one way to calculate the amount of lost goodwill, this portion of the instruction may need to be modified depending on the facts of a particular case.

## 21.71 DAMAGES: DEFENDANT’S PROFITS

In addition to any damages you award under Instruction \_\_\_\_, the plaintiff may recover the profits that the defendant gained from the [use of the [trademark] [trade dress]] [false advertising].<sup>1</sup> You may not, however, include in any award of profits any amount that you took into account in determining the plaintiff’s actual damages.

The defendant’s profits are gross revenues the defendant received due to [his][her][its] [use of the [trademark] [trade dress]] [false advertising], minus the defendant’s expenses, which are all [operating] [overhead] and production costs incurred in producing the gross revenue.

The plaintiff is entitled to recover the defendant’s total profits attributable to the infringement unless a portion of the profit is due to factors other than [use of the [trademark] [trade dress]] [false advertising]. You must not award damages for any profit you find was attributable to factors other than [use of the [trademark] [trade dress]] [false advertising].

### Notes on Use

1. The Court may use this instruction if it would like the jury to provide a factual finding regarding the amount of profits to be disgorged, if any. 6 McCarthy on Trademarks and Unfair Competition § 32:126 (5th ed.) (stating that although disgorgement of the defendants’ profits is a form of equitable relief under the Lanham Act, juries are routinely tasked with determining the defendant’s profits in an advisory role to assist the court in its equitable determination of whether to award defendant’s profits to the plaintiff).

### Committee Comments

See 15 U.S.C. § 1117(a); *Safeway Transit LLC v. Disc. Party Bus, Inc.*, 954 F.3d 1171, 1177 (8th Cir. 2020) (“[T]he Lanham Act contemplates that a disgorgement or accounting of profits may be appropriate to remedy unfair infringement. But the Lanham Act does not permit the award of monetary relief as a penalty. Thus, an injunction is the preferred Lanham Act remedy.”) (citations and quotation marks omitted); *Masters v. UHS of Del., Inc.*, 631 F.3d 464, 471, 473 (8th Cir. 2011) (citing 15 U.S.C. § 1117(a) (permitting a successful plaintiff, “subject to the principles of equity, to recover (1) defendant’s profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action,” and further acknowledging that “[d]isgorgement exists to deter would-be infringers and to safeguard against unjust enrichment”).

A plaintiff alleging trademark infringement need not prove that the defendant willfully infringed the plaintiff's trademark as a prerequisite to recovery of defendant's profits. *See Romag Fasteners, Inc v. Fossil, Inc.*, 140 S. Ct. 1492, 1494 (2020) (resolving circuit split and rejecting a "categorical rule" that a plaintiff must show the defendant willfully infringed its trademark in order to win a profits remedy); *see also Fair Isaac Corp. v. Fed. Ins. Co.*, 468 F. Supp. 3d 1110, 1117 n.7 (D. Minn. 2020).

Regarding establishing and calculating defendant's profits, *see Safeway Transit*, 954 F.3d at 1180 (acknowledging that "[t]he trademark holder has the burden to prove the defendant infringer's gross revenue from the infringement. Then the burden shifts to the defendant infringer to prove expenses that should be deducted from the gross revenue to arrive at the defendant infringer's lost profits."); *Lawn Managers, Inc. v. Progressive Lawn Managers, Inc.*, 959 F.3d 903, 913 (8th Cir. 2020) ("[I]n a trademark case, the defendant bears the burden of proving any claimed deductions from total profits."); *Truck Equip. Serv. Co. v. Fruehauf Corp.*, 536 F.2d 1210, 1222-23 (8th Cir. 1976) (considerations of willfulness and bad faith justify awarding all of defendant's profits); *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 973 (2d Cir. 1985) (defendant's own statements concerning profits provided sufficient basis for calculation of defendant's profits under 15 U.S.C. § 1117(a)).

Double recovery is not permitted. *See* J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 30:73 (5th ed.) ("damages and profits cannot be awarded simultaneously if it would result in overcompensation."); *Polo Fashions, Inc. v. Extra Special Products, Inc.*, 208 U.S.P.Q. 421 (S.D.N.Y. 1980) (damages and profits may not be awarded together if based on the same sales).

**21.80 GENERAL VERDICT FORM**

**Note:** Complete this form by writing in the name required by your verdict.

On plaintiff [name]’s claim against defendant [name], as submitted in Instruction No. \_\_\_\_\_, we find in favor of

\_\_\_\_\_ (Plaintiff [name]) or (Defendant [name])

[On plaintiff [name]’s claim against defendant [name], as submitted in Instruction No. \_\_\_\_\_, we find in favor of

\_\_\_\_\_ (Plaintiff [name]) or (Defendant [name])

**Note:** Complete the following paragraphs only if one or more of the above findings is in favor of the plaintiff.

We find plaintiff [name]’s actual damages to be:

\$ \_\_\_\_\_ (state the amount or, if none, write the word “none”)

[We find defendant [name]'s profits attributable to defendant [name]'s infringement to be:

\$ \_\_\_\_\_ (state the amount or, if none, write the word “none”).]<sup>2</sup>

\_\_\_\_\_  
Foreperson

Dated: \_\_\_\_\_

### **Notes on Use**

1. Add as many paragraphs as needed to account for the number of defendants and/or number of claims in the case.

2. Include this paragraph if submitting the amount of profits to the jury, as described in Note 1, Model Instruction 21.72 (Damages: Defendant's Profits).

## **21.90 SPECIAL VERDICT FORM: SPECIAL INTERROGATORIES**

To assist the Court in determining [*describe equitable issue or defense*], you are directed to consider and answer the following question[s]:

1. [Insert factual question[s] for jury, *e.g.*, Did the defendant act willfully?]