**4.10 Age Discrimination in Employment Act – 29 U.S.C. §§ 621-634**

In this case, [name of plaintiff] makes a claim under the federal law that prohibits employers from discriminating against an employee in the terms and conditions of employment because of the employee’s age. The federal law applies to employees who are at least 40 years old.

Specifically, [name of plaintiff] claims that [name of defendant] [describe adverse employment action] because of [his/her] age.

[Name of defendant] denies [name of plaintiff]’s claim and asserts that [describe the defendant’s defense].

To succeed on [his/her] claim against [name of defendant], [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of plaintiff] was [name of defendant]’s employee;

Second: [Name of plaintiff] was at least 40 years old at the time of [describe adverse employment action];

Third: [Name of defendant] [describe adverse employment action]; and

Fourth: [Name of defendant] took that action because of [name of plaintiff]’s age.

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

If you find that [name of plaintiff] [was [name of defendant]’s employee,] was at least 40 years old, and that [name of defendant] [describe adverse employment action], you must decide whether [name of defendant] took that action because of [name of plaintiff]’s age.

To determine that [name of defendant] [describe adverse employment action] because of [name of plaintiff]’s age, you must decide that [name of defendant] would not have [describe adverse employment action] if [name of plaintiff] had been younger but everything else had been the same.

[Name of defendant] denies that [he/she/it] [describe adverse employment action] because of [name of plaintiff]’s age and claims that it made the decision for [other reasons/another reason].

An employer may not discriminate against an employee because of age, but an employer may [describe adverse employment action] an employee for any other reason, good or bad, fair or unfair. If you believe [name of defendant]’s reason[s] for [his/her/its] decision to [describe adverse employment action], and you find that [name of defendant]’s decision was not because of [name of plaintiff]’s age, you must not second guess that decision, and you must not substitute your own judgment for [name of defendant]’s judgment – even if you do not agree with it.

[**Pretext (optional, see annotations):** As I have explained, [name of plaintiff] has the burden to prove that [name of defendant]’s decision to [describe adverse employment action] was because of [name of plaintiff]’s age. I have explained to you that evidence can be direct or circumstantial. To decide whether [name of defendant]’s decision [describe adverse employment action] was because of [name of plaintiff]’s age, you may consider the circumstances of [name of defendant]’s decision. For example, you may consider whether you believe the reason[s] [name of defendant] gave for the decision. If you do not believe the reason[s] [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true discriminatory reasons for the decision.]

[Including BFOQ affirmative defense: If you find by a preponderance of the evidence that [name of defendant] [describe adverse employment action] because of [name of plaintiff]’s age, you must decide whether [name of defendant] has established [his/her/its] affirmative defense.

To establish its affirmative defense, [name of defendant] must prove by a preponderance of the evidence that [he/she/it] [describe adverse employment action] because age is a “bona-fide occupational qualification.” It is not unlawful for an employer to [describe adverse employment action] an employee based on a bona-fide occupational qualification.

To establish that age is a “bona-fide occupational qualification,” [name of defendant] must prove both of the following elements by a preponderance of the evidence:

First: The age qualification is reasonably necessary for [name of plaintiff] to successfully perform [his/her] job; and

Second: [Name of defendant] had reasonable cause to believe that all, or substantially all, persons over the age qualification would be unable to perform the job safely and efficiently.

If you find that [name of defendant] has proved that age is a bona-fide occupational qualification, you must decide whether [name of defendant] has proved by a preponderance of the evidence that [he/she/it] [describe adverse employment action] because of the bona-fide occupational qualification.

If you find that [name of defendant] [describe adverse employment action] because of the bona-fide occupational qualification, you have found that [he/she/it] established [his/her/its] affirmative defense, and you will not decide the issue of [name of plaintiff]’s damages. But if you find that [name of defendant] has not established [his/her/its] affirmative defense, you must decide the damages issue.]

[Including seniority system affirmative defense: If you find by a preponderance of the evidence that [name of defendant] [describe adverse employment action] because of [name of plaintiff]’s age, you must decide whether [name of defendant] has established [his/her/its] affirmative defense. An affirmative defense allows a party to limit [his/her/its] liability.

To establish [his/her/its] affirmative defense, [name of defendant] must prove by a preponderance of the evidence that [he/she/it] [describe adverse employment action] because [he/she/it] was applying the terms of a bona-fide seniority system. It is not unlawful for an employer to [describe adverse employment action] based on a bona-fide seniority system.

To establish that [he/she/it] was applying the terms of a bona-fide seniority system, [name of defendant] must prove both of the following elements by a preponderance of the evidence:

First: [Name of defendant]’s seniority system used the employees’ length of service – not the employees’ age – as the primary basis for giving available job opportunities to [his/her/its] employees; and

Second: [Name of defendant]’s decision to [describe adverse employment action] was consistent with its seniority system.

If you find that [name of defendant] established both these elements by a preponderance of the evidence, you have found that [he/she/it] established [his/her/its] affirmative defense, and you will not decide the issue of [name of plaintiff] compensatory damages. But if you find that [name of defendant] has not established [his/her/its] affirmative defense, you must decide the damages issue.]

[**Without Affirmative Defense:** If you find in [name of plaintiff]’s favor for each fact [he/she] must prove, you must consider [name of plaintiff]’s compensatory damages.]

When considering the issue of [name of plaintiff]’s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]’s damages as a result of [describe adverse employment action], no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following element of damage, to the extent you find that [name of plaintiff] has proved it by a preponderance of the evidence, and no others: net lost wages and benefits from the date of [describe adverse employment action] to the date of your verdict.

[**Mitigation of Damages:** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to “mitigate” those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: work comparable to the position [name of plaintiff] held with [name of defendant] was available, and [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]’s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[**Willful Violation:** [Name of plaintiff] also claims that [name of defendant] willfully violated the law. You will only consider this issue if you find for [name of plaintiff] and award [him/her] compensatory damages.

If [name of defendant] knew that [his/her/its] [describe adverse employment action] violated the law, or acted in reckless disregard of that fact, then [his/her/its] conduct was willful. If [name of defendant] did not know, or knew only that the law was potentially applicable, and did not act in reckless disregard about whether the law prohibited its conduct, [his/her/its] conduct was not willful.]

**Special Interrogatories To The Jury**

**Do you find from a preponderance of the evidence:**

[ That [name of plaintiff] was [name of defendant]’s employee?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.]

That [name of plaintiff] was at least 40 years old at the time of the [describe adverse employment action]?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

That [name of defendant] [describe adverse employment action]?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

That [name of defendant] took that action because of [name of plaintiff]’s age?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

[ That [age is a bona-fide occupational qualification] [[name of defendant]’s seniority system used employees’ length of service and not the age of employees as the primary basis for giving available job opportunities to the employees]?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “No,” go to Question No. 7. If your answer is “Yes,” go to the next question.

That [[name of defendant] took the action you found it took because of the bona-fide occupational age qualification/[name of defendant]’s decision to take the action you found it took was consistent with [name of defendant]’s seniority system]?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “Yes,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “No,” go to the next question.

That [name of plaintiff] should be awarded damages?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “Yes,”

in what amount? $\_\_\_\_\_\_\_\_\_\_\_\_\_

[ That [name of defendant] willfully violated the law?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_]

So Say We All.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Foreperson’s Signature

Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_