**4.4 Public Employee – Equal-Protection Claim – Race/Sex Discrimination –**

**Hostile Work Environment – Co-worker Harassment**

**(Separate Liability for Public Body and Individual Supervisors)**

In this case, [name of plaintiff] claims that [name of defendant], while acting “under color” of state law, intentionally discriminated against [name of plaintiff] because of [his/her] [race/sex] in violation of [name of plaintiff]’s constitutional rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

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

The Fourteenth Amendment’s Equal Protection Clause prohibits discrimination against public employees on the basis of [race/sex]. It also prohibits creating a [racially/sexually] hostile work environment.

[The law that applies to [name of plaintiff]’s claims against [name of individual defendant] is different from the law that applies to [his/her] claim against [name of city], and you must consider each claim separately.]

First, I will explain the law you must apply to decide [name of plaintiff]’s claim against [name of individual defendant].

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

First: [Name of plaintiff] was harassed because of [his/her] [race/sex];

Second: The harassment created a hostile work environment for [name of plaintiff];

Third: [Name of individual defendant] had supervisory authority over [name of plaintiff] in the terms and conditions of [his/her] employment;

Fourth: [Name of individual defendant] knew about the hostile work environment;

Fifth: [Name of individual defendant] acted with deliberate indifference in not taking prompt remedial action to eliminate the hostile work environment;

Sixth: [Name of individual defendant]’s actions were “under color” of state law; and

Seventh: [Name of plaintiff] suffered damages because of the hostile work environment.

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

A [racially/sexually] “hostile work environment” exists if:

 [name of plaintiff] was subjected to [racially/sexually] offensive acts or statements – even if they were not specifically directed at [him/her];

 [name of plaintiff] did not welcome the offensive acts or statements, which means that [name of plaintiff] did not directly or indirectly invite or solicit them by [his/her] own acts or statements;

 the offensive acts or statements were so severe or pervasive that they materially altered the terms and conditions of [name of plaintiff]’s employment;

 a reasonable person – not someone who is overly sensitive – would have found that the offensive acts or statements materially altered the terms and conditions of the person’s employment; and

 [name of plaintiff] personally believed that the offensive acts or statements materially altered the terms and conditions of [his/her] employment.

To determine whether the conduct in this case was “so severe or pervasive” that it materially altered the terms and conditions of [name of plaintiff]’s employment, you should consider all the circumstances, including:

 how often the discriminatory conduct occurred;

 its severity;

 whether it was physically or psychologically threatening or humiliating; and

 whether it unreasonably interfered with [name of plaintiff]’s work performance.

A “material alteration” is a significant change in condition. Conduct that amounts only to ordinary socializing in the workplace does not create a hostile work environment. A hostile work environment will not result from occasional horseplay, [sexual flirtation,] offhand comments, simple teasing, sporadic use of offensive language, or occasional jokes related to [race/sex]. But discriminatory intimidation, ridicule, insults, or other verbal or physical conduct may be so extreme that it materially changes the employment terms and conditions.

For the first and second elements, you must decide whether [harasser], [name of plaintiff]’s co-worker, created a hostile work environment because of [name of plaintiff]’s [race/sex].

For the fourth and fifth elements, you may hold [name of individual defendant] responsible for the hostile work environment only if [name of plaintiff] proves by a preponderance of the evidence that [name of individual defendant] knew about the hostile work environment but permitted it to continue by failing to take prompt action to eliminate it. If you find that the harassment was so widespread and obvious that [name of individual defendant] should have been on notice of the need to act, then you may find that [name of individual defendant] “knew” about the hostile work environment. And if you find that [name of individual defendant] knew about the hostile work environment but failed to take prompt action to stop it, then you may find that [name of individual defendant] acted with deliberate indifference in not taking prompt remedial action to eliminate the hostile work environment.

For the seventh element, you must decide whether [name of plaintiff] suffered damages because of the hostile work environment. If the damages would not have existed except for the hostile work environment, then you may find that [name of plaintiff] suffered those damages because of the hostile work environment.

[To be used when the parties stipulate that defendants acted “under color” of state law: The parties have agreed that [name of individual defendant] acted “under color” of state law so you should accept that as a proven fact.]

[To be used when the parties dispute whether the defendants acted “under color” of state law: For the third and sixth elements, you must also decide whether [name of individual defendant] had supervisory authority over [name of plaintiff] and whether [he/she] acted “under color” of state law.

A government official acts “under color” of law when [he/she] acts within the limits of lawful authority. A government official also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

To find that [name of individual defendant] acted “under color” of state law, you must also find that [name of individual defendant] had supervisory authority over [name of plaintiff] in the terms and conditions of [his/her] employment and that [name of individual defendant] abused or misused that authority by allowing [name of plaintiff] to be subjected to a hostile work environment because of [his/her] [race/sex].]

Now I will explain the law you must apply to decide [name of plaintiff]’s claims against [name of city].

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

First: [Name of plaintiff] was subjected to a hostile work environment because of [his/her] [race/sex];

Second The hostile work environment was the result of a “policy or custom” of [name of city]; and

Third: [Name of plaintiff] suffered damages because of the hostile work environment.

[**If there are no individual defendants, insert “hostile work environment” paragraphs here.**]

A “policy or custom” includes a:

 rule or regulation enacted, adopted, or ratified by [name of city];

 policy statement or decision that [name of city]’s policymakers made; or

 practice or course of conduct that is so widespread that it has acquired the force of law – even if the practice has not been formally approved. You may find that a “policy or custom” existed if there was a practice that was so persistent, widespread, or repetitious that [name of city]’s policymaker[s] either knew about it, or should have known about it.

[Name of policymaker] is [name of city]’s “policymaker.”

If you find that [name of plaintiff] has proved each element of [his/her] claim against either [names of individual defendants], [name of city], or both, you must decide the issue of [name of plaintiff]’s 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 the hostile work environment, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [name of plaintiff] has proved them by a preponderance of the evidence, and no others:

 lost wages and benefits from the date of [discharge/denied promotion] to the date of your verdict; and

 emotional pain and mental anguish.

To determine the amount of [name of plaintiff]’s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

To determine whether and how much [name of plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury – tangible and intangible. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like mental anguish. You will determine what amount fairly compensates [him/her] for [his/her] claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

[**Mitigation of Damages:** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to “mitigate” those damages. For purposes of this case, the duty to mitigate damages requires [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.]

[**Punitive Damages:** To be used only for individual-capacity claims against individual defendants: [Name of plaintiff] also claims that [name of individual defendant]’s acts were done with malice or reckless indifference to [name of plaintiff]’s federally protected rights, which would entitle [him/her] to punitive damages in addition to compensatory damages. These damages are a punishment for [name of defendant] and as a deterrent to others. [Name of plaintiff] must prove by a preponderance of the evidence that [he/she] is entitled to punitive damages. You will only reach the issue of punitive damages if you find that [name of plaintiff] has proved the elements of [his/her] claim against [name of individual defendant] and you award [name of plaintiff] compensatory damages. You may not assess punitive damages against [name of city].

A person acts with malice if the person’s conduct is motivated by evil intent or motive. A person acts with reckless indifference to the protected federal rights of another person when the person engages in conduct with a callous disregard for whether the conduct violates those protected federal rights.

If you find that punitive damages should be assessed, you may consider the evidence regarding [name of defendant]’s financial resources in fixing the amount of such damages, [You also may assess punitive damages against one or more of the individual defendants, and not others, or against more than one individual defendant in different amounts.]]

**Special Interrogatories To The Jury**

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

 That [name of plaintiff] was harassed because of [his/her] [race/sex]?

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 the harassment created a hostile work environment for [name of plaintiff]?

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

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

 That [individual defendant] had supervisory authority over [name of plaintiff] in the terms and conditions of [name of plaintiff]’s employment?

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 [individual defendant] knew about the hostile work environment?

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

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

 That [individual defendant] acted with deliberate indifference in not taking prompt remedial action to eliminate the hostile work environment?

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

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

[ That [individual defendant]’s actions were “under color” of state law?

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

[ That the hostile work environment was the result of a “policy or custom” of [name of city]?

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

[If you answered “No” to both Questions No. 6 and 7, this will end your deliberations, and your foreperson should go to the end of this verdict form to sign and date it. If you answered “Yes” to either Question No. 6 or 7 (or both), go to the next question.]

 That [name of plaintiff] suffered damages because of the hostile work environment?

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

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

 That [name of plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

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

If your answer is “Yes,”

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

 That [name of plaintiff] should be awarded damages to compensate for emotional pain and mental anguish?

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

If your answer is “Yes,”

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

If you did not award damages in response to either Question No. 9 or Question No. 10, this will end your deliberations, and your foreperson should go to the end of this verdict form to sign and date it. If you awarded damages in response to Question No. 9 or Question No. 10 (or both), go to the next question.

 That punitive damages should be assessed against [name of defendant]?

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

If your answer is “Yes,”

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

So Say We All.

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

Foreperson’s Signature

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