**4.6 Title VII – Civil Rights Act – Workplace Harassment by Supervisor –**

**No Tangible Employment Action Taken**

**(with Affirmative Defense by Employer)**

In this case, [name of plaintiff] claims that [name of defendant] violated Federal Civil Rights statutes that prohibit employers from discriminating against employees in the terms and conditions of employment because of their [race/religion/sex/national origin]. These statutes prohibit the creation of a hostile work environment caused by harassment because of an employee’s [race/religion/sex/national origin].

Specifically, [name of plaintiff] claims that [his/her] supervisor harassed [him/her] because of [his/her] [race/religion/sex/national origin] and that the harassment created a hostile work environment.

[Name of defendant] denies [name of plaintiff]’s claims 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]’s supervisor harassed [him/her] because of [his/her] [race/religion/sex/national origin];

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

Third: [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 “hostile work environment” created by harassment because of [race/religion/sex/national origin] exists if:

[name of plaintiff] was subjected to offensive acts or statements about [race/religion/sex/national origin] – 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] 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 conditions. 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/religion/sex/national origin]. But discriminatory intimidation, ridicule, insults, or other verbal or physical conduct may be so extreme that it materially alters the terms and conditions of employment.

If you find that [name of plaintiff]’s supervisor harassed [him/her] because of [his/her] [race/religion/sex/national origin], and that the harassment created a hostile work environment, then you must decide whether [he/she] suffered damages as a result. 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.

[**Without Affirmative Defense:** If you find that [name of plaintiff] suffered damages because of the hostile work environment, you must decide the issue of [his/her] compensatory damages.]

[**Including Affirmative Defense:** If you find that [name of plaintiff] suffered damages because of the hostile work environment, you must decide whether [name of defendant] has established [his/her/its] affirmative defense.

To succeed on its affirmative defense, [name of defendant] must prove each of the following facts by a preponderance of the evidence:

First: [Name of defendant] exercised reasonable care to prevent and promptly correct any harassing behavior because of [race/religion/sex/national origin] in the workplace; and

Second: [Name of plaintiff] [unreasonably failed to take advantage of preventive or corrective opportunities [name of defendant] provided to avoid or correct the harm.] [took advantage of [name of defendant]’s preventative or corrective opportunities and [name of defendant] responded by taking reasonable and prompt corrective action.]

To determine whether [name of defendant] exercised reasonable care, you may consider whether:

[name of defendant] created an explicit policy against harassment because of [race/religion/sex/national origin] in the workplace;

[name of defendant] communicated the policy to [his/her/its] employees; and

the policy provided a reasonable process for [name of plaintiff] to complain to higher management.

[To determine whether [name of plaintiff] unreasonably failed to take advantage of a preventive or corrective opportunity [name of defendant] provided, you may consider, for example, whether [name of plaintiff] unreasonably failed to follow a complaint procedure [name of defendant] provided.]

If you find that [name of defendant] established [his/her/its] affirmative defense, you must indicate that on the verdict form, and you will not decide the issue of [name of plaintiff]’s damages. If you find that [name of defendant] did not establish [his/her/its] affirmative defense, you must decide the issue of [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 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:

net lost wages and benefits 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 must determine what amount will fairly compensate [him/her] for those claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

[**Mitigation of Damages:** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to “mitigate” those damages. For purposes of this case, the duty to mitigate damages requires [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:** [Name of plaintiff] also asks you to award punitive damages. The purpose of punitive damages is not to compensate [name of plaintiff] but, instead, to punish [name of defendant] for wrongful conduct and to deter similar wrongful conduct. You will only reach the issue of punitive damages if you find for [name of plaintiff] and award [him] [her] compensatory damages.

To be entitled to an award of punitive damages [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] acted with either malice or with reckless indifference toward [name of plaintiff]’s federally protected rights. Specifically, [name of plaintiff] must show that an employee of [name of defendant], acting in a managerial capacity, either acted with malice or with reckless indifference to [name of plaintiff]’s federally protected rights.

There is no bright-line rule about which employees act in a managerial capacity. You must determine whether an employee acted in a “managerial capacity” based upon the type of authority [name of defendant] gave the employee and the amount of discretion that the employee has in what is done and how it is accomplished.

To show that [name of defendant] acted with malice, [name of plaintiff] must show that an employee acting in a managerial capacity knew that federal law prohibits discrimination and discriminated against [name of plaintiff] anyway. To show that [name of defendant] acted with reckless indifference to [name of plaintiff]’s federally protected rights, [name of plaintiff] must show that an employee acting in a managerial capacity acted with serious disregard for whether the conduct violated federal law. Either malice or reckless indifference is sufficient to entitle [name of plaintiff] to an award of punitive damages; [name of plaintiff] need not prove both.

An employer may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where the managerial employees’ acts are contrary to the employer’s good faith efforts to comply with the law by implementing policies and programs designed to prevent unlawful discrimination in the workplace. However, the mere existence of policies prohibiting discrimination does not preclude punitive damages if the policies are ineffective.

There is no single factor that determines whether [name of defendant] acted with malice or with reckless indifference to [name of plaintiff]’s federally protected rights. In determining whether to award punitive damages, you may consider factors such as: [ whether [name of defendant] engaged in a pattern of discrimination toward its employees]; [ whether [name of defendant] acted spitefully or malevolently]; [ whether [name of defendant] showed a blatant disregard for civil legal obligations]; [ whether [name of defendant] failed to investigate reports of discrimination]; [ whether [name of defendant] failed to take corrective action concerning discriminatory acts or comments by its employees]; and [ whether the person accused of discrimination was included in the employer’s decision making process concerning [name of plaintiff]’s [discharge] [denied promotion].]

If you find that punitive damages should be assessed against [name of defendant], you may consider the evidence regarding [name of defendant]’s financial resources in fixing the amount of such damages.]

**Special Interrogatories To The Jury**

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

That [name of plaintiff]’s supervisor harassed [name of plaintiff] because of [his/her] [race/religion/sex/national origin]?

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 [name of defendant] exercised reasonable care to prevent and promptly correct any harassing behavior in the workplace because of [race/religion/sex/national origin]?

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

If your answer is “Yes,” go to the next question. If your answer is “No,” go to Question No. 5.

[That [name of plaintiff] unreasonably failed to take advantage of the preventive or corrective opportunities [name of defendant] provided to avoid or correct the harm.] [That [name of plaintiff] took advantage of the preventive or corrective opportunities provided by [name of defendant] and [name of defendant] responded by taking reasonable and prompt corrective action].

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] 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 Nos. 6 or 7, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If you awarded damages in response to Question Nos. 6 or 7 (or both), go to the next question.]

[ 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: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_