**4.8 Title VII – Civil Rights Act – Workplace Harassment –**

**Unwelcome Sexual Advances – Tangible Employment Action Taken**

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 the employee’s sex. These statutes prohibit sexual harassment that culminates in an adverse tangible employment action.

Specifically, [name of plaintiff] claims that [name of supervisor] discriminated against [him/her] by making unwelcome sexual advances toward [him/her] and that [name of supervisor] took an adverse tangible employment action against [him/her] because [he/she] rejected those unwelcome advances.

[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 supervisor] made unwelcome sexual advances toward [name of plaintiff];

Second: [Name of supervisor] took an adverse tangible employment action against [name of plaintiff];

Third: [Name of plaintiff]’s rejection of the unwelcome sexual advances was a motivating factor that prompted [name of supervisor] to take the adverse tangible employment action; and

Fourth: [Name of plaintiff] suffered damages because of the adverse tangible employment action;

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

A tangible employment action is a significant change in employment status. If you find that [name of supervisor] [describe adverse tangible employment action at issue], you have found that [name of supervisor] took an adverse “tangible employment action” against [name of plaintiff], and you must decide whether [name of plaintiff]’s rejection of [name of supervisor]’s unwelcome sexual advances was a motivating factor that prompted [name of supervisor] to take the tangible employment action. To prove that [his/her] rejection of [name of supervisor]’s unwelcome sexual advances was a motivating factor in [name of supervisor]’s decision, [name of plaintiff] does not have to prove that [his/her] rejection of the unwelcome sexual advances was the only reason that [name of supervisor] took the adverse tangible employment action. It is enough if [name of plaintiff] proves that [his/her] rejection of the unwelcome sexual advances influenced the decision. If [name of plaintiff]’s rejection of [name of supervisor]’s unwelcome sexual advances made a difference in [name of supervisor]’s decision, you may find that it was a motivating factor in the decision.

Unlawful sexual harassment may take the form of unwelcome sexual advances, and it is unlawful for a supervisor to change – or threaten to change – the terms and conditions of an employee’s employment to force or coerce, or to attempt to force or coerce, sexual favors from the employee.

A supervisor’s demand or threat for sexual favors must be one that a reasonable person would regard as a real or serious effort by the supervisor to gain a sexual favor, and unwelcome to the employee. That means that the employee did not expressly or implicitly welcome or invite the sexual advances, and the employee regarded the supervisor’s conduct as undesirable or offensive. [The fact that an employee may have consented to engaging in sex-related conduct in response to a demand or threat does not, by itself, establish that the employee invited or welcomed the conduct. But it is one of the factors you may consider.]

[**Including Affirmative Defense (if applicable, see annotations):** If you find that [name of plaintiff]’s rejection of [name of supervisor]’s unwelcome sexual advances was a motivating factor that prompted [name of supervisor] to take an adverse tangible employment action, you must decide whether [name of supervisor] has shown by a preponderance of the evidence that [he/she/it] would have [describe adverse tangible employment action] [name of plaintiff] even if [name of supervisor] had not taken [name of plaintiff]’s rejection of the unwelcome sexual advances into account. If you find that [name of plaintiff] would [describe adverse tangible employment action] for reasons other than [his/her] rejection of [name of supervisor]’s unwelcome sexual advances, you must make that finding in your verdict.

If you find for [name of plaintiff] and against [name of defendant] on this defense, you must decide whether [name of plaintiff] suffered damages because of the adverse tangible employment action.]

[**Without Affirmative Defense:** If you find that [name of plaintiff]’s rejection of [name of supervisor]’s unwelcome sexual advances was a motivating factor that prompted [name of supervisor] to take an adverse tangible employment action, you must decide whether [name of plaintiff] suffered damages because of the adverse tangible employment action.]

If the damages would not have existed except for the adverse tangible employment action, then you may find that [name of plaintiff] suffered those damages because of the adverse tangible employment action. If you find that [name of plaintiff] suffered damages because of the adverse tangible employment action, 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 adverse tangible 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 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 from the date of the adverse tangible employment action 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 made unwelcome sexual advances toward [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 plaintiff]’s supervisor took an adverse tangible employment action against [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 plaintiff]’s rejection of [name of supervisor]’s unwelcome sexual advances was a motivating factor that prompted [name of supervisor] to take the adverse tangible 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 supervisor] would have [describe adverse tangible employment action] [name of plaintiff] even if [name of supervisor] had not taken [name of plaintiff]’s rejection of the unwelcome sexual advances into account?

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 adverse tangible 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 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.

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Foreperson’s Signature

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