Instructions Regarding Section 1983 Employment Claims

Numbering of Section 1983 Employment Instructions

7.0 Section 1983 Employment Discrimination

7.1 Section 1983 Employment Discrimination – Mixed Motive

7.2 Section 1983 Employment Discrimination – Pretext

7.3 Section 1983 Employment Discrimination – Harassment

7.4 Section 1983 Employment – Retaliation – First Amendment

7.5 Section 1983 – Employment – Damages

7.0 Section 1983 Employment Discrimination

Comment

Comparison of Section 1983 employment discrimination and Title VII employment discrimination claims. A Section 1983 employment discrimination claim may be similar in many respects to a Title VII disparate treatment claim. Thus, some of the Title VII instructions may be adapted for use with respect to Section 1983 employment discrimination claims. This comment compares and contrasts the two causes of action; more specific comparisons concerning particular types of claims are drawn in the comments that follow.

Section 1983 requires action under color of state law. Title VII applies to both private and public employers.[1] By contrast, Section 1983 applies only to defendants who acted under color of state law.[2] *See, e.g., Krynicky v. University of Pittsburgh*, 742 F.2d 94, 103 (3d Cir. 1984) (holding that University of Pittsburgh and Temple University acted under color of state law); *see also supra* Comment 4.4.

An equal protection claim under Section 1983 requires intentional discrimination. Title VII authorizes claims for disparate impact. *See* Comment 5.1.6. The Section 1983 employment discrimination claims addressed in this comment rest on a violation of the Equal Protection Clause,[3] which requires a showing of intentional discrimination. *See, e.g., Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 274 (1979); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1293 (3d Cir. 1997) ("To prevail on her § 1983 equal protection claim, Robinson was required to prove that she was subjected to 'purposeful discrimination' because of her sex."); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990). Thus, disparate impact claims are not actionable under Section 1983. However, evidence of disparate impact may help a Section 1983 plaintiff to show purposeful

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[1] *See* 42 U.S.C. § 2000e(b) (defining "employer" to include – subject to certain exceptions – "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person"); *id.* § 2000e(a) (defining "person" to include "governments, governmental agencies, [and] political subdivisions"); id. § 2000e(h) (defining "industry affecting commerce" to include "any governmental industry, business, or activity").

[2] Some plaintiffs asserting intentional race discrimination may also bring a claim under 42 U.S.C. § 1981, which applies to both private and public employers. *See Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 609 (1987) (noting that "the Court has construed [Section 1981] to forbid all 'racial' discrimination in the making of private as well as public contracts").

[3] Plaintiffs bringing Section 1983 employment claims could also assert violations of other constitutional protections. *See, e.g.*, *Blanding v. Pennsylvania State Police*, 12 F.3d 1303, 1306-07 (3d Cir. 1993) (affirming dismissal of procedural due process claim because plaintiff did not have property interest in employment).

discrimination.

Section 1983 claims against individual defendants. In contrast to Title VII, which does not provide a cause of action against individual employees,[4] Section 1983 may provide a cause of action for unconstitutional employment discrimination by an individual, so long as the plaintiff shows that the defendant acted under color of state law.

The plaintiff can make this showing by proving that the defendant was the plaintiff's supervisor, or by proving that the defendant exercised de facto supervisory authority over the plaintiff.[5] *See Bonenberger v. Plymouth Tp.*, 132 F.3d 20, 23 (3d Cir. 1997) ("There is simply no plausible justification for distinguishing between abuse of state authority by one who holds the formal title of supervisor, on the one hand, and abuse of state authority by one who bears no such title but whose regular duties nonetheless include a virtually identical supervisory role, on the other."). To establish a Section 1983 claim against a supervisor based on the activity of a subordinate, the plaintiff must also satisfy the requirements for supervisory liability under Section 1983. *See, e.g., Robinson*, 120 F.3d at 1293; *Andrews*, 895 F.2d at 1478; *see supra* Comment 4.6.1.

Qualified immunity, when applicable, provides a defense to Section 1983 claims against state and local officials sued in their individual capacities.[6] *See supra* Comment 4.7.2; *see also* Comment 4.7.1 (concerning absolute immunity).

Section 1983 claims against municipal defendants. A Section 1983 employment discrimination claim against a municipal defendant requires a showing that the violation of plaintiff's constitutional rights resulted from a municipal policy or custom. *See, e.g., Andrews*, 895 F.2d at 1480; *see supra* Comments 4.6.3 - 4.6.8. This test differs from Title VII's test for respondeat superior liability. *See supra* Comments 5.1.3 - 5.1.5.

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[4] *See supra* Comment 5.1.3.

[5] For a discussion of caselaw from other circuits concerning the possible liability of non-supervisory co-workers for equal protection violations arising from sexual harassment, see Cheryl L. Anderson, *"Nothing Personal:" Individual Liability under 42 U.S.C. § 1983 for Sexual Harassment as an Equal Protection Claim*, 19 BERKELEY J. EMP. & LAB. L. 60, 92-98 (1998) (arguing that non-supervisory co-workers can violate equal protection by "us[ing] their position with a government employer as an opportunity to engage in severe and pervasive harassment of fellow employees"); *see also infra* Comment 7.3 .

[6] As noted above, a Section 1983 employment discrimination plaintiff must show intentional discrimination in order to establish an equal protection violation. For discussion of whether a defendant who intended to discriminate can receive the benefit of qualified immunity, *see Andrews*, 895 F.2d at 1480 ("Liciardello and Doyle objectively should have known the applicable legal standard, and thus are not protected by qualified immunity in treating, or allowing their subordinates to treat, female employees differently on the basis of gender in their work environment."); *see also supra* Comment 4.7.2 (discussing analogous questions).

Section 1983 does not provide a claim against the state. State governments are not "persons" who can be sued under Section 1983. *See Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1989).[7] By contrast, Title VII authorizes claims against state governments. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (rejecting state sovereign immunity defense to Title VII claim on the ground that Congress can validly abrogate state sovereign immunity when legislating pursuant to Section 5 of the Fourteenth Amendment).[8]

Section 1983 does not require employment discrimination plaintiffs to exhaust administrative remedies. In order to assert a Title VII employment discrimination claim, the plaintiff must first exhaust administrative remedies. *See, e.g., Williams v. Runyon*, 130 F.3d 568, 573 (3d Cir. 1997) ("In Title VII actions, failure to exhaust administrative remedies is an affirmative defense in the nature of statute of limitations."). There is no such exhaustion requirement for a Section 1983 employment discrimination claim.[9]

Section 1983 has a more generous limitations period than Title VII. As noted above, a person wishing to sue under Title VII must present the claim to the relevant agency within strict time limits. By contrast, the limitations period for a Section 1983 equal protection claim is borrowed from the relevant state statute of limitations for personal injury suits, *see Wilson v. Garcia*, 471 U.S. 261, 280 (1985), and is likely to be considerably longer.

Section 1983 employment discrimination remedies differ from Title VII remedies. Statutory caps apply to compensatory and punitive damages awards under Title VII. *See supra* Comments 5.4.1, 5.4.2. No such caps apply to Section 1983 employment discrimination claims. There may also be differences in the allocation of tasks between judge and jury concerning matters such as front pay and back pay. *Compare* Comments 5.4.3 and 5.4.4 (discussing back pay and front pay under Title VII) *with* Comment 7.5 (discussing back pay and front pay under Section 1983).

Title VII does not preempt employment discrimination claims under Section 1983. The Court of Appeals has rejected the contention that Title VII preempts Section 1983 remedies for employment discrimination. *See, e.g., Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1079 (3d Cir. 1990) ("[T]he comprehensive scheme provided in Title VII does not preempt section 1983,

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[7] Similarly, Section 1983 does not provide a cause of action against state officials in their official capacities. *See Will*, 491 U.S. at 71.

[8] Reasoning that *Fitzpatrick*'s holding does not foreclose inquiry into whether Title VII is a valid exercise of Congress's Section 5 enforcement powers, the Seventh Circuit recently considered that question and concluded that "the 1972 Act validly abrogated the States' Eleventh Amendment immunity with respect to Title VII disparate treatment claims." *Nanda v. Board of Trustees of University of Illinois*, 303 F.3d 817, 831 (7th Cir. 2002).

[9] Nor is the Section 1983 employment discrimination plaintiff required to exhaust state administrative remedies before suing. *See Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982).

and . . . discrimination claims may be brought under either statute, or both.").[10] Although *Bradley* predated the Civil Rights Act of 1991,[11] district courts within the Third Circuit have continued to apply *Bradley* since 1991. *See, e.g., Bair v. City of Atlantic City*, 100 F. Supp. 2d 262, 266 (D.N.J. 2000) ("The vast majority of courts, including the Third Circuit, hold that claims under Section 1983 and Title VII are not necessarily mutually exclusive; if the right which a plaintiff claims was violated is constitutionally based, and also a right protected by Title VII, a plaintiff may bring either a Title VII claim or a Section 1983 claim, or both.").

The usefulness of special interrogatories. When the plaintiff asserts claims against multiple defendants, or when the plaintiff asserts both Title VII claims and Section 1983 equal protection claims, the court should take care to distinguish the differing liability requirements; in this regard, it may also be useful to employ special interrogatories. *Cf. Gierlinger v. New York State Police*, 15 F.3d 32, 34 (2d Cir. 1994) ("Since separate theories of liability with different standards of individual involvement were presented to a jury, it would have been better practice and aided appellate review had the trial court made use of special interrogatories on the liability issues.").

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[10] *Compare Price v. Delaware Dept. of Correction*, 40 F.Supp.2d 544, 558 (D. Del. 1999) ("A claim of retaliation cannot be the sole basis for a § 1983 claim where there is no violation of the Constitution or federal law, other than the retaliation provision of Title VII.").

As to *Bivens* claims by federal employees, *see Brown v. General Services Administration*, 425 U.S. 820, 835 (1976) (holding that Title VII was the exclusive avenue for employment discrimination claims by federal employees in the competitive service); *Davis v. Passman*, 442 U.S. 228, 248-49 (1979) (holding that personal staff member of Member of Congress could bring *Bivens* claim for employment discrimination); RICHARD H. FALLON, JR., ET AL., THE FEDERAL COURTS & THE FEDERAL SYSTEM 816 n.4 (5th ed. 2003) (asking whether Congress's extension of Title VII remedies to House and Senate employees should preclude the remedy recognized in *Davis*).

[11] The Civil Rights Act of 1991 amended Title VII in a number of ways; among other changes, it authorized compensatory and punitive damages for intentional discrimination claims and provided a right to a jury trial on such claims, *see* P.L. 102-166, November 21, 1991, § 102, 105 Stat. 1071, 1072-74.

7.1 Section 1983 Employment Discrimination – Mixed Motive

Model

The Fourteenth Amendment to the United States Constitution protects persons from being subjected to discrimination, by persons acting under color of state law, on the basis of [describe protected class, e.g., sex]. In this case [plaintiff] is alleging that [defendant] [describe alleged disparate treatment] [plaintiff].

In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] [protected status] was a motivating factor in [defendant's] decision to [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove both of the following by a preponderance of the evidence:

First: [Defendant] [failed to hire] [failed to promote] [demoted] [terminated] [constructively discharged] [plaintiff]; and

Second: [Plaintiff's] [protected status] was a motivating factor in [defendant's] decision.

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal civil rights.

In showing that [plaintiff's] [protected class] was a motivating factor for [defendant's] action, [plaintiff] is not required to prove that [his/her] [protected status] was the sole motivation or even the primary motivation for [defendant's] decision. [Plaintiff] need only prove that [plaintiff's protected class] played a motivating part in [defendant's] decision even though other factors may also have motivated [defendant].

As used in this instruction, [plaintiff's] [protected status] was a "motivating factor" if [his/her] [protected status] played a part [or played a role] in [defendant's] decision to [state adverse employment action] [plaintiff].

[For use where defendant sets forth a "same decision" affirmative defense:

However, if you find that [defendant's] treatment of [plaintiff] was motivated by both discriminatory and lawful reasons, you must consider [defendant's] "same decision" defense. If [defendant] proves by a preponderance of the evidence that [defendant] would have treated [plaintiff] the same even if [plaintiff's] [protected class] had played no role in the employment decision, then your verdict must be for [defendant] on this claim.**]**

Comment

In mixed-motive cases where the defendant establishes a "same decision" defense, the defendant is not liable under Section 1983 for a constitutional violation. *See, e.g., Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-86 (1977) (in a First Amendment retaliation case, holding that "[t]he constitutional principle at stake is sufficiently vindicated if [the] employee is placed in no worse a position than if he had not engaged in the conduct"). By contrast, the establishment of a "same decision" defense will not shield a defendant from all Title VII liability in a mixed-motive case; rather, it will narrow the remedies awarded.[12] Instruction 7.1's treatment of the "same decision" defense accordingly differs from the treatment of that defense in Instruction 5.1.1 (mixed-motive instruction for Title VII claims).

The instruction given above is designed for use with respect to a claim against an individual official who took an adverse employment action against the plaintiff. Such claims will not present a difficult question concerning supervisory liability: If the defendant is proven to have taken the adverse employment action, then clearly the defendant meets the requirements for imposing supervisory liability, on the ground that the defendant had authority over the plaintiff and personally participated in the adverse action. If the plaintiff also asserts a claim against the supervisor of a person who took the adverse employment action, then the instruction should be augmented to present the question of supervisory liability to the jury. *See supra* Instruction 4.6.1. If the plaintiff is asserting a claim against a municipal defendant, the instruction should be augmented to present the jury with the question of municipal liability. *See supra* Instructions 4.6.3 - 4.6.8.

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[12] *See* 42 U.S.C. § 2000e-2(m) (providing that "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"); *id.* § 2000e-5(g)(2)(B) (limiting remedies under Section 2000e-2(m), in a case where the defendant "demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor," to declaratory relief, certain injunctive relief, and certain attorney's fees and costs).

Although the Court of Appeals has not discussed whether a similar approach should be applied to Section 1983 claims, at least one other Circuit has ruled that it should not. *See Harris v. Shelby County Bd. of Educ.*, 99 F.3d 1078, 1084 & n.5 (11th Cir. 1996) (contrasting Title VII claims with Section 1983 claims and noting that "with regard to employment discrimination claims brought pursuant to 42 U.S.C. § 1983, [the 'same decision'] defense effects a total avoidance of liability").

7.2 Section 1983 Employment Discrimination – Pretext

Model

The Fourteenth Amendment to the United States Constitution protects persons from being subjected to discrimination, by persons acting under color of state law, on the basis of [describe protected class, e.g., sex]. In this case [plaintiff] is alleging that [defendant] [describe alleged disparate treatment] [plaintiff].

In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] [protected status] was a determinative factor in [defendant's] decision to [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove both of the following by a preponderance of the evidence:

First: [Defendant] [failed to hire] [failed to promote] [demoted] [terminated] [constructively discharged] [plaintiff]; and

[Plaintiff's] [protected status] was a determinative factor in [defendant's] decision.

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal civil rights. Moreover, [plaintiff] is not required to produce direct evidence of intent, such as statements admitting discrimination. Intentional discrimination may be inferred from the existence of other facts.

[For example, you have been shown statistics in this case. Statistics are one form of evidence from which you may find, but are not required to find, that a defendant intentionally discriminated against a plaintiff. You should evaluate statistical evidence along with all the other evidence received in the case in deciding whether [defendant] intentionally discriminated against [plaintiff]].

[Defendant] has given a nondiscriminatory reason for its [describe defendant's action]. If you disbelieve [defendant's] explanations for its conduct, then you may, but need not, find that [plaintiff] has proved intentional discrimination. In determining whether [defendant's] stated reason for its actions was a pretext, or excuse, for discrimination, you may not question defendant's managerial judgment. You cannot find intentional discrimination simply because you disagree with the managerial judgment of [defendant] or believe it is harsh or unreasonable. You are not to consider [defendant's] wisdom. However, you may consider whether [defendant's] reason is merely a cover-up for discrimination.

Ultimately, you must decide whether [plaintiff] has proven that [his/her] [protected status]

was a determinative factor in [defendant's employment decision.] "Determinative factor" means that if not for [plaintiff's] [protected status], the [adverse employment action] would not have occurred.

Comment

The *McDonnell Douglas* framework applies to Section 1983 employment discrimination claims. *See, e.g., St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 n.1 (1993) (assuming "that the *McDonnell Douglas* framework is fully applicable to racial-discrimination-in-employment claims under 42 U.S.C. § 1983"); *Stewart v. Rutgers, The State University*, 120 F.3d 426, 432 (3d Cir. 1997) ("Our application of the *McDonnell Douglas-Burdine* framework is applicable to Stewart's allegation of racial discrimination under 42 U.S.C. §§ 1981 and 1983."); *McKenna v. Pacific Rail Service*, 32 F.3d 820, 826 n.3 (3d Cir. 1994) ("Although *McDonnell Douglas* itself involved [Title VII claims], the shifting burden analysis with which the case name is now synonymous also has been applied in section 1983 cases . . . ."); *Lewis v. University of Pittsburgh*, 725 F.2d 910, 915 & n.5 (3d Cir. 1983) .

Instruction 7.2 largely mirrors Instruction 5.1.2 (Title VII pretext instruction). Instruction 7.2's discussion of pretext substitutes the term "managerial judgment" for "business judgment," because the latter might seem incongruous in an instruction concerning a government entity.

The instruction given above is designed for use with respect to a claim against an individual official who took an adverse employment action against the plaintiff. Such claims will not present a difficult question concerning supervisory liability: If the defendant is proven to have taken the adverse employment action, then the defendant meets the requirements for imposing supervisory liability, on the ground that the defendant had authority over the plaintiff and personally participated in the adverse action. If the plaintiff also asserts a claim against the supervisor of a person who took the adverse employment action, then the instruction should be augmented to present the question of supervisory liability to the jury. *See supra* Instruction 4.6.1. If the plaintiff is asserting a claim against a municipal defendant, the instruction should be augmented to present the jury with the question of municipal liability. *See supra* Instructions 4.6.3 - 4.6.8.

7.3 Section 1983 Employment Discrimination – Harassment

No Instruction

Comment

The Court of Appeals has made clear that sexual harassment can give rise to an equal protection claim. It has also indicated that the elements of such a claim are not identical to those of a Title VII harassment claim (at least if the claim proceeds on a hostile environment theory). It has not, however, specified precisely the elements of an equal protection claim for hostile environment sexual harassment. This Comment discusses principles that can be drawn from relevant Third Circuit cases.

Discriminatory intent. As noted above, equal protection claims require a showing of discriminatory intent. Sexual harassment claims can meet that requirement. *See, e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478-79 (3d Cir. 1990) (upholding verdict for plaintiff on sexual harassment claims against city employees, based on conclusion that evidence supported finding of purposeful discrimination); *cf. Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986) (stating in Title VII case that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex"); *Azzaro v. County of Allegheny*, 110 F.3d 968, 978 (3d Cir. 1997) (en banc) (in assessing retaliation claim, explaining that "[t]he harassment [reported by the plaintiff] was a form of gender discrimination since Fusaro presumably would not have behaved in the same manner toward a supplicant male spouse of a female employee.").[13]

The requirement of action under color of state law. To establish a Section 1983 claim against an alleged harasser, the plaintiff must show that the defendant acted under color of state law. The Court of Appeals has suggested that this requires the defendant to have some measure of control or authority over the plaintiff. *See Bonenberger v. Plymouth Twp.*, 132 F.3d 20, 24 (3d Cir. 1997) ("Under these circumstances La Penta's role within the departmental structure afforded him sufficient authority over Bonenberger to satisfy the color of law requirement of section 1983.").[14]

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[13] *See also Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180, 1185 (7th Cir. 1986) ("Sexual harassment of female employees by a state employer constitutes sex discrimination for purposes of the equal protection clause of the fourteenth amendment."); Cheryl L. Anderson, *"Nothing Personal:" Individual Liability under 42 U.S.C. § 1983 for Sexual Harassment as an Equal Protection Claim*, 19 BERKELEY J. EMP. & LAB. L. 60, 80 (1998) (citing *Meritor Savings Bank* as support for argument that sex harassment can satisfy the intentional discrimination requirement for equal protection claims).

[14] The *Bonenberger* court noted that "a state employee who pursues purely private motives and whose interaction with the victim is unconnected with his execution of official

However, the Court of Appeals has made clear that this requirement can be met even if the defendant is not the plaintiff's formal supervisor: "A state employee may, under certain circumstances, wield considerable control over a subordinate whose work he regularly supervises, even if he does not hire, fire, or issue regular evaluations of her work." *Bonenberger*, 132 F.3d at 23.

Quid pro quo claims where adverse employment action follows. There appear to be commonalities between Title VII and Section 1983 quid pro quo claims where adverse employment action follows. *See, e.g., Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1296-99 & n.14 (3d Cir. 1997) (discussing merits of Title VII quid pro quo claim at length and briefly stating in footnote that "our discussion in this section applies equally to" a Section 1983 quid pro quo claim by the plaintiff). The instruction for such a Section 1983 claim would probably be quite similar, in most respects, to Instruction 5.1.3.[15]

As noted above, a Section 1983 plaintiff must show that the defendant acted under color of state law. The plaintiff can make that showing by demonstrating that the defendant exercised authority over the plaintiff. If the plaintiff shows that the defendant took an adverse employment action[16] against the plaintiff, that evidence should also establish that the defendant acted under color of state law.[17]

Hostile environment claims. The Court of Appeals has indicated that the elements of a hostile work environment claim under Section 1983 are not identical to those of a claim under Title

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duties does not act under color of law." *Bonenberger*, 132 F.3d at 24. It could be argued that when a co-worker who lacks even de facto supervisory authority over the plaintiff takes advantage of the plaintiff's presence in the workplace in order to subject the plaintiff to harassment, the harassment is connected with the defendant's execution of official duties in the sense that those duties provide the defendant with an otherwise unavailable opportunity to harass. However, the *Bonenberger* court's emphasis on whether the defendant had "control" or "authority" over the plaintiff, *see id.* at 23-24, suggests that the Court of Appeals would not necessarily embrace this expansive an interpretation of action under color of state law.

[15] Obviously, the prefatory language would be different, and the instruction would need to take account of the relevant theories of supervisory and municipal liability (*see supra* Instructions 4.6.1, 4.6.3 - 4.6.8).

[16] *Cf.* Instruction 5.1.3 (defining "tangible employment action" for purposes of Title VII harassment claims).

[17] *Cf. Bonenberger*, 132 F.3d at 28 ("Title VII *quid pro quo* sexual harassment generally requires that the harasser have authority to carry out the *quid pro quo* offer or threat.").

VII.[18] In *Andrews v. City of Philadelphia*, the court enumerated five elements "for a sexually hostile work environment [claim] under Title VII: (1) the employees suffered intentional discrimination because of their sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability." *Andrews*, 895 F.2d at 1482. The Section 1983 claim in *Andrews* had been tried to a jury while the Title VII claim had not, and the court was faced with the question of what effect the jury determinations on the Section 1983 claims should have on the court's resolution of the Title VII claims. The court stated:

> Section 1983 and Title VII claims are complex actions with different elements. Proof of some of these elements, particularly discrimination based upon sex and subjective harm is identical, and thus the court should be bound by the jury's determination on these issues. Other elements, particularly the objective element of the Title VII claim, are uniquely Title VII elements, and although the judge's decision here may be affected by certain findings of the jury, they are ultimately a decision of the court.

Andrews, 895 F.2d at 1483 n.4. *Andrews*, then, made clear that the elements of hostile environment claims under Title VII and under the Equal Protection Clause are not identical. But *Andrews* did not specify the elements of the latter type of claim; nor is it clear how such a claim should be affected, if at all, by later developments in sexual harassment law under Title VII. The paragraphs that follow, however, attempt to draw together existing Third Circuit doctrine on equal protection hostile environment claims.

As noted above, a defendant who subjects a plaintiff to harassment on the basis of a protected characteristic is guilty of intentional discrimination. If that defendant acted under color of state law, then he or she violated the Equal Protection Clause and may be liable under Section

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[18] Some other courts have noted differences as well. For example, the Seventh Circuit Court of Appeals has stated that on an equal protection claim "the ultimate inquiry is whether the sexual harassment constitutes intentional discrimination. This differs from the inquiry under Title VII as to whether or not the sexual harassment altered the conditions of the victim's employment." *Bohen*, 799 F.2d at 1187; *see also Ascolese v. Southeastern Pennsylvania Transp. Authority*, 902 F. Supp. 533, 547 (E.D. Pa. 1995) ("Because the analysis under section 1983 focuses on intentional discrimination, it differs from that under Title VII, in which the focus is on whether or not the sexual harassment altered the conditions of the victim's employment.") (citing *Bohen*).

On the other hand, some courts have indicated that the elements of Section 1983 sexual harassment claims mirror those of claims brought under Title VII. *See, e.g., Tuggle v. Mangan*, 348 F.3d 714, 720 (8th Cir. 2003) (applying elements of Title VII claim to Section 1983 harassment claim); *cf. Ascolese*, 902 F. Supp. at 548 (drawing upon Title VII caselaw concerning sexual harassment in order to address Section 1983 sexual harassment claim, while acknowledging that the Title VII precedent "does not apply directly").

1983.[19] In addition, the normal rules of supervisory and municipal liability apply in order to determine whether the harasser's supervisor and/or municipal employer are liable under Section 1983 for the harasser's equal protection violation.[20]

A subtler question arises if the harasser did not act under color of state law. As noted above, the Court of Appeals has indicated that a co-worker who lacks any control or authority over the plaintiff does not act under color of state law.[21] In such a case, the harasser apparently would not have committed an equal protection violation, which would mean that the harasser's supervisor (or the municipal employer) could be held liable under Section 1983 only if the supervisor defendant (or the municipal defendant) committed an equal protection violation. That raises the question of what level of action or indifference suffices to show intent to discriminate on the part of the supervisor or the municipality.

A plaintiff can show an equal protection violation by a supervisor who fails properly to address harassment by the plaintiff's co-workers, if the supervisor acted with intent to discriminate. For example, in *Andrews*, evidence justifying findings that one plaintiff's supervisor was aware of sexual harassment by the plaintiff's "male colleagues" and that the supervisor's failure "to investigate the source of the problem implicitly encouraged squad members to continue in their abuse" of the plaintiff provided an alternate ground for upholding the verdict for the plaintiff on the Section 1983 equal protection claim against her supervisor. *Andrews*, 895 F.2d at 1479. Similarly, the *Andrews* court sustained the jury verdict for the plaintiffs on their Section 1983 equal protection claims against the commanding officer of their division, based on evidence that would support a finding that he "acquiesced in the sexual discrimination against" the plaintiffs. *Id.* The Court of Appeals reasoned:

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[19] *See, e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990) (holding that jury verdict for plaintiff on Section 1983 equal protection claim against plaintiff's supervisor could be sustained on the ground that the supervisor "personally participated in" the sexual harassment of the plaintiff).

[20] *See, e.g., Bonenberger*, 132 F.3d at 25 (applying municipal liability doctrine in case involving alleged harassment by officer with de facto supervisory authority); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1293 (3d Cir. 1997) (in case involving alleged harassment by plaintiff's supervisor, applying supervisory liability doctrines to claims against police chief and assistant police chief).

[21] *See Zelinski v. Pennsylvania State Police*, 108 Fed. Appx. 700, 703 (3d Cir. 2004) (non-precedential opinion) (holding that defendant did not act under color of law when committing alleged harassment because he had neither formal nor de facto supervisory authority over plaintiff).

By contrast, the conclusion that the alleged harasser did not act under color of state law would not preclude Title VII liability for the employer. *See, e.g., Zelinski*, 108 Fed.Appx. at 704 (holding that district court should not have granted summary judgment dismissing Title VII harassment claim).

> There is evidence that Liciardello was aware of the problems concerning foul language and pornographic materials but did nothing to stop them. The language and the pictures were so offensive and regular that they could not have gone unnoticed by the man who was ultimately responsible for the conduct of the Division. He took no measures to investigate the missing case problems which Conn and Andrews, but none of the male officers, suffered. Additionally, he provided an important insight to his personal "boys will be boys attitude" toward sex-based harassment when he cautioned Conn, "You have to expect this working with the guys."

Andrews, 895 F.2d at 1479.

Thus, it would seem that an equal protection claim under Section 1983 arises if the harassment that gives rise to a hostile environment claim is (1) committed or caused by one with formal or de facto supervisory authority or (2) improperly addressed by one with formal or de facto supervisory authority under circumstances that show that the supervisory individual had an intent to discriminate. Similarly, it would seem that a municipal employer can be liable on the theory that it directly encouraged harassment of the plaintiff, or on the theory that it did not do enough to prevent the harassment.[22]

[22] *See Bohen*, 799 F.2d at 1187 ("[A] plaintiff can make an ultimate showing of sex discrimination either by showing that sexual harassment that is attributable to the employer under § 1983 amounted to intentional sex discrimination or by showing that the conscious failure of the employer to protect the plaintiff from the abusive conditions created by fellow employees amounted to intentional discrimination."); *cf. Reynolds v. Borough of Avalon*, 799 F. Supp. 442, 447 (D.N.J. 1992) (holding that "a reasonable jury might find that the risk of sexual harassment in the workplace is so obvious that an employer's failure to take action to prevent or stop it from occurring--even in the absence of actual knowledge of its occurrence--constitutes deliberate indifference, where the employer has also failed to take any steps to encourage the reporting of such incidents").

7.4 Employment Discrimination – Retaliation – First Amendment

Model

The First Amendment to the United States Constitution gives persons a right to [freedom of speech] [petition the Government for a redress of grievances].[23] Government employees have a limited right to engage in free speech on matters of public importance, and government employers must not retaliate against their employees for exercising this right. In this case [plaintiff] claims that [describe alleged protected activity], and that [defendant] retaliated against [plaintiff] by [describe alleged retaliation].[24]

It is my duty to instruct you on whether [plaintiff] engaged in activity that was protected by the First Amendment. In this case, I instruct you that the following activity was protected by the First Amendment:

- [Describe specifically the plaintiff's protected activity]. In the rest of this instruction, I will refer to these events as "[plaintiff's] protected activity."

In order for [plaintiff] to recover on this claim against [defendant], [plaintiff] must prove both of the following by a preponderance of the evidence:

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[23] As noted in the Comment, a First Amendment retaliation claim can be grounded on the Petition Clause instead of, or in addition to, the Free Speech Clause.

[24] The instruction given in the text assumes that there are no material disputes of historical fact that must be resolved before the court determines whether the plaintiff engaged in protected activity. Such questions may include, for example, what the plaintiff said, and in what context; and whether the defendant believed that the plaintiff had made the relevant statement. (Whether the defendant actually believed a certain set of facts concerning the plaintiff's protected activity appears to be a fact question for the jury. However, the reasonableness of the defendant's belief seems to be a question of law for the court. *See* Comment.)

If such factual disputes exist, it may be necessary to segment the jury's deliberations, as follows:

First, the court could instruct the jury on the factual questions relevant to the protected-activity determination. E.g.: It is your task to resolve the following disputes of fact: [Describe factual disputes that must be resolved in order for the court to determine whether plaintiff engaged in protected activity.] The verdict form includes places where you will write your answers to these questions.

Once the jury returns its answers concerning those fact questions, the court can determine the protected-activity question and can instruct the jury on the remaining prongs of the claim (as shown in the text).

Thus instructed, the jury can resume its deliberations and determine the claim.

First: [Defendant] [failed to promote] [terminated] [constructively discharged][25] [plaintiff]; and

Second: [Plaintiff's] protected activity was a motivating factor in [defendant's] decision.

In showing that [plaintiff's] protected activity was a motivating factor for [defendant's] action, [plaintiff] is not required to prove that [his/her] protected activity was the sole motivation or even the primary motivation for [defendant's] decision. [Plaintiff] need only prove that [his/her] protected activity played a motivating part in [defendant's] decision even though other factors may also have motivated [defendant]. [Plaintiff] could make this showing in a number of ways. The timing of events can be relevant, for example if [defendant's] action followed very shortly after [defendant] became aware of [plaintiff's] protected activity. However, a more extended passage of time does not necessarily rule out a finding that [plaintiff's] protected activity was a motivating factor. For instance, you may also consider any antagonism shown toward [plaintiff] or any change in demeanor toward [plaintiff].

[For use where defendant sets forth a "same decision" affirmative defense:

However, [defendant] argues that [he/she] would have made the same decision to [describe adverse action] whether or not [plaintiff] had engaged in the protected activity. If [defendant] proves by a preponderance of the evidence that [defendant] would have treated [plaintiff] the same even if [plaintiff's] protected activity had played no role in the employment decision, then your verdict must be for [defendant] on this claim.**]**

Comment

Structure of test. The Court of Appeals applies "a well-established three-step test to evaluate a public employee's claim of retaliation for engaging in activity protected under the First Amendment." *Hill v. City of Scranton*, 411 F.3d 118, 125 (3d Cir. 2005).[26] "First, the employee must show that the activity is in fact protected." *Id.* (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). "Second, the employee must show that the protected activity 'was a substantial factor in the alleged retaliatory action.'" *Id.* (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). "Third, the employer may defeat the employee's claim by demonstrating that the same adverse action would have taken place in the absence of the protected conduct." *Id.*

Comparison with Title VII. A plaintiff may have a valid Title VII retaliation claim but not a valid First Amendment retaliation claim. *See, e.g., Zelinski v. Pennsylvania State Police*, 108 Fed.

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[25] The examples given in the text do not exhaust the range of possible acts that can give rise to a retaliation claim; but the acts must, in the aggregate, be more than de minimis. *See* Comment.

[26] *See also Springer v. Henry*, 435 F.3d 268, 275 (3d Cir. 2006).

Appx. 700, 707-08 (3d Cir. 2004) (non-precedential opinion) (vacating grant of summary judgment dismissing Title VII retaliation claim, but affirming grant of summary judgment dismissing First Amendment retaliation claim). The disparity arises because the definitions of 'protected activity' differ depending on whether the claim is asserted under Title VII or under the First Amendment.

However, assuming that protected activity has been established, the causation analysis for a First Amendment claim is similar to that for a Title VII retaliation claim. *See Brennan v. Norton*, 350 F.3d 399, 420 (3d Cir. 2003) (stating, in the retaliation context, that "[t]he causation required to establish a claim under § 1983 is identical to that required under Title VII").[27] Thus, the model diverges from Instruction 5.1.7 on the question of protected activity, but is similar to Instruction 5.1.7 on the questions of causation.[28]

First element: protected activity. To be protected under the First Amendment, speech by a government employee "must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to '"the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."'" *Waters v. Churchill*, 511 U.S. 661, 668 (1994) (plurality opinion) (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983) (quoting *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568 (1968))).[29]

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[27] The *Brennan* court's statement to this effect should not be taken to assimilate First Amendment retaliation claims to Title VII claims more generally. *See Nicholas v. Pennsylvania State University*, 227 F.3d 133, 144 (3d Cir. 2000) ("First Amendment retaliation cases are not governed by Title VII's burden-shifting analysis, but rather by [the] *Mount Healthy* framework. In that case, the Supreme Court made it crystal clear that an employee may not recover in a dual-motives case if the employer shows that it would have taken the same action even absent the protected speech.").

In fact, though *Brennan* terms the causation analyses for First Amendment retaliation and Title VII retaliation "identical," the Court of Appeals on other occasions has used distinct tests for each. In *Azzaro*, for example, the Court of Appeals stated the prima facie case on a Title VII claim thus: "(1) [the plaintiff] engaged in a protected activity; (2) she was discharged after or contemporaneously with that activity; and (3) there was a causal link between the protected activity and the firing." *Azzaro v. County of Allegheny*, 110 F.3d 968, 973 (3d Cir. 1997) (en banc). By contrast, the First Amendment retaliation analysis was stated as follows: the court first was to ask "whether [plaintiff's reports] were protected by the First Amendment," and next was to ask "whether those reports were a motivating factor in the decision to discharge Azzaro and whether Azzaro would have been discharged for other reasons even in the absence of those reports." *Id.* at 975.

[28] Instruction 7.4 is not identical to Instruction 5.1.7 on causation; Instruction 7.4 follows the test set forth in the First Amendment retaliation cases.

[29] It should be noted that the First Amendment right to petition can provide an alternative means for an employee to establish the first element of the retaliation test. "In this circuit, any

Moreover, in order to be protected by the First Amendment, the plaintiff's statement ordinarily[30] must not be made pursuant to the plaintiff's job responsibilities[31] as a government employee: A closely divided Court held in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 1960.[32]

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lawsuit brought by an employee against a public employer qualifies as a protected 'petition' under the First Amendment so long as it is not 'sham litigation.'" *Hill*, 411 F.3d at 126 (quoting *San Filippo v. Bongiovanni*, 30 F.3d 424, 443 (3d Cir. 1994)).

> Although a plaintiff alleging retaliation for protected speech under § 1983 must ordinarily establish that his/her speech was a matter of public concern to qualify for the protections of the First Amendment's guarantee of free expression, the same is not true where the speech itself constitutes the plaintiff's lawsuit. . . . On the contrary, a plaintiff need only show that his/her lawsuit was not frivolous in order to make out a prima facie claim for retaliation under the Petition Clause.

Brennan v. Norton, 350 F.3d 399, 417 (3d Cir. 2003).

[30] The Supreme Court has noted "some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence." *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1962 (2006). In *Ceballos*, which involved a deputy district attorney who sued the County of Los Angeles, and also certain of his supervisors in the Los Angeles District Attorney's Office, the Court found it unnecessary to determine whether its analysis in *Ceballos* "would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.*

[31] The Court has not "articulate[d] a comprehensive framework for defining the scope of an employee's duties," but it has stressed that "[t]he proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." *Ceballos*, 126 S. Ct. at 1961-62.

[32] The Court of Appeals recently summed up the post-*Ceballos* test thus:

> A public employee's statement is protected activity when (1) in making it, the employee spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have "an adequate justification for treating the employee differently from any other member of the general public" as a result of the statement he made. . . . A public employee does not speak "as a citizen" when he makes a statement "pursuant to [his] official duties."

Before applying the *Connick* / *Pickering* test, the court must first determine the content of the relevant speech. In *Waters v. Churchill*, the Supreme Court addressed whether the analysis should proceed based upon "what the government employer thought was said, or . . . what the trier of fact ultimately determines to have been said." *Waters*, 511 U.S. at 664 (plurality opinion). The plurality rejected the latter test, because it reasoned that such a test "would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court." *Id*. at 676. But the plurality also rejected the notion that "the court must apply the *Connick* test only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusions." *Id*. at 677. Rather, the plurality concluded that "courts [should] look to the facts as the employer *reasonably* found them to be." *Id*. at 677 (emphasis in original).[33]

The plurality's approach struck a middle course between the approaches favored by the remaining Justices. Three Justices in *Waters* would have rejected the requirement that the employer's belief concerning the content of the speech be reasonable. *See Waters*, 511 U.S. at 686 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in the judgment). The other two Justices, by contrast, would have focused upon what the trier of fact ultimately determined the plaintiff had actually said (regardless of what the employer believed). *See id.* at 696 (Stevens, J., joined by

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Hill v. Borough of Kutztown, 455 F.3d 225, 241-42 (3d Cir. 2006). In *Hill*, the Court distinguished between retaliation based upon the plaintiff borough manager's reporting of harassing behavior and retaliation based upon the plaintiff's advocacy of a telecommunications project. Retaliation based on the reporting was not actionable, because reporting harassment formed part of the borough manager's duties. However, the claim of retaliation based on the plaintiff's advocacy of the telecommunications project should not have been dismissed at the 12(b)(6) stage, because the complaint could be read to allege that the plaintiff was speaking as a citizen rather than as part of his official duties. *See id.* at 242.

[33] However, it is important to note that if the plaintiff did not in fact engage in constitutionally protected activity, but the employer retaliates in the mistaken belief that the plaintiff did engage in such activity, the plaintiff does not have a First Amendment retaliation claim. "Plaintiffs in First Amendment retaliation cases can sustain their burden of proof only if their conduct was constitutionally protected, and, therefore, only if there actually was *conduct*." *Ambrose v. Township of Robinson, Pa.*, 303 F.3d 488, 495 (3d Cir. 2002) (emphasis in original) (noting that other courts have also concluded that "there can be no First Amendment claim when there is no speech by the plaintiff"); *see also Fogarty v. Boles*, 121 F.3d 886, 890 (3d Cir. 1997) ("[I]n the absence of speech, or, at the extreme, intended speech, there has been no constitutional violation cognizable under section 1983 based on an asserted 'bad motive' on the part of defendant."). *Compare Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 571 (3d Cir. 2002) (upholding retaliation claim under the Americans with Disabilities Act on "a perception theory of discrimination," on the ground that the relevant statutory language "focus[es] on the employer's subjective reasons for taking adverse action against an employee, so it matters not whether the reasons behind the employer's discriminatory animus are actually correct as a factual matter").

Blackmun, J., dissenting). Thus, as Justice Souter pointed out in his concurrence, the approach taken by the *Waters* plurality appears to be the one that courts should follow, because an approach favoring greater liability than the plurality's would contravene the approaches taken by a majority of Justices, while an approach favoring narrower liability would also contravene the approaches of a majority (albeit a different majority) of Justices.[34]

The *Waters* plurality did not explicitly address the question of who should determine what the employer reasonably believed.[35] However, the plurality's application of its test is indicative: it stated that "if petitioners really did believe Perkins-Graham's and Ballew's story, and fired Churchill because of it, they must win. Their belief, based on the investigation they conducted, would have been entirely reasonable." *Waters*, 511 U.S. at 679-80. The plurality's willingness to analyze the reasonableness of the employer's belief indicates that the plurality viewed the reasonableness of the belief as a question of law for the court. However, where there are material and disputed questions of historical fact – concerning the steps taken to investigate, or concerning whether the employer actually believed the relevant version of the employee's speech – those questions presumably would

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[34] As Justice Souter explained:

> Though Justice O'CONNOR's opinion speaks for just four Members of the Court, the reasonableness test it sets out is clearly the one that lower courts should apply. A majority of the Court agrees that employers whose conduct survives the plurality's reasonableness test cannot be held constitutionally liable (assuming the absence of pretext), see ante, at 1890-1891 (plurality opinion); post, at 1893-1896 (SCALIA, J., concurring in judgment); and a majority (though a different one) is of the view that employers whose conduct fails the plurality's reasonableness test have violated the Free Speech Clause, see ante, at 1888-1890 (plurality opinion); post, at 1898-1900 (STEVENS, J., dissenting); see also post, at 1899, n. 4 (STEVENS, J., dissenting) ("Justice O'CONNOR appropriately rejects [Justice SCALIA's] position, at least for those instances in which the employer unreasonably believes an incorrect report concerning speech that was in fact protected and disciplines an employee based upon that misunderstanding. I, of course, agree with Justice O'CONNOR that discipline in such circumstances violates the First Amendment").

Waters, 511 U.S. at 685 (Souter, J., concurring).

[35] The plurality framed the question thus: "Should the court apply the *Connick* test to the speech as the government employer found it to be, or should it ask the jury to determine the facts for itself?" *Waters*, 511 U.S. at 668. As noted in the text, the plurality's answer is that the court should apply the *Connick* test to the speech as the employer reasonably found it to be; but the plurality did not explain who should determine any disputes of material fact as to what the employer actually believed.

be for the trier of fact.[36]

Whether the plaintiff's statements were protected by the First Amendment is a question of law for the court. *See Azzaro v. County of Allegheny*, 110 F.3d 968, 975 (3d Cir. 1997) (en banc) ("We must first inquire whether Azzaro's reports to Fox and Sirabella were protected by the First Amendment. This is a question of law.").[37] Three conditions must be met in order for the plaintiff's statements to be protected. "First, the employee's [expressive] conduct must address a 'matter of public concern,' which is to be determined by the 'content, form, and context of a given statement, as revealed by the whole record.'" *Azzaro*, 110 F.3d at 976 (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)). Second, the employee's expressive conduct must not have been part of the employee's job duties. *See supra* (discussing *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006)). Third, "the value of that expression must outweigh 'the government's interest in the effective and efficient fulfillment of its responsibilities to the public.'" *Azzaro*, 110 F.3d at 976 (quoting *Connick*, 461 U.S. at 150).

A report of sexual harassment by a government official can constitute speech on a matter of public concern. In *Azzaro*, the plaintiff (a county employee) reported to her supervisor and to the County Director of Administration "an incident of sexual harassment by an assistant to the [County] Commissioner which occurred in the Commissioner's office during the course of an appointment Azzaro had made, in her capacity as the spouse of an employee, to plead for her husband's job." *Azzaro*, 110 F.3d at 978. Reasoning that the plaintiff's reports "brought to light actual wrongdoing on the part of one exercising public authority that would be relevant to the electorate's evaluation of the performance of the office of an elected official," the en banc majority held that the reports "should be regarded as a matter of public concern unless something in their form or context deprived them of their value to the process of self-governance." *Id.* at 978-79. Under *Azzaro*, some reports of sexual harassment by a government employee clearly will constitute speech on matters of public concern; but it may not be the case that all such speech meets that test. *See id.* at 978 n.4 (suggesting that in "a situation in which a public employee has filed a complaint about an isolated incident of what he or she perceived to be inappropriate conduct on the part of a non-supervisory co-worker," the report "would presumably be less important to an evaluation of the performance of the public

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[36] The Court of Appeals "ha[s] often noted that the first prong of the First Amendment retaliation test presents questions of law for the court." *Hill*, 411 F.3d at 127. *See also Curinga v. City of Clairton*, 357 F.3d 305, 310 (3d Cir. 2004) ("[T]he first factor is a question of law."); *Baldassare v. State of N.J.*, 250 F.3d 188, 195 (3d Cir. 2001) (stating that whether speech is on matter of public concern and whether *Pickering* balancing test is met "are questions of law for the court"); *McGreevy v. Stroup*, 413 F.3d 359, 364 (3d Cir. 2005) (same); *Green v. Philadelphia Housing Authority*, 105 F.3d 882, 885 (3d Cir. 1997) ("Determining whether Green's appearance is protected activity under Pickering is an issue of law for the court to decide."). Such statements, however, appear to focus on the point that application of the *Connell / Pickering* tests is a matter of law for the court – not on the question of who should determine any underlying disputes of historical fact.

[37] The underlying historical facts, if disputed, would presumably present a jury question.

office involved than the situation now before us"); *see id.* at 981 (Becker, J., joined by Scirica, Roth & Alito, JJ., concurring) ("It seems to me that there will be many complaints of sexual harassment, about more aggravated conduct than that described in footnote 4 of the opinion, which will not qualify as matters of public concern.").

If the court concludes that the plaintiff's speech addressed a matter of public concern and that the plaintiff was not speaking pursuant to his or her job responsibilities, then the court must proceed to balance "the public employee's interest in speaking about a matter of public concern and the value to the community of her being free to speak on such matters"[38] against "the government's interest as an employer in promoting the efficiency of the services it performs through its employees."[39] *Id.* at 980 (citing, inter alia, *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)); *see also Brennan v. Norton*, 350 F.3d 399, 413 (3d Cir. 2003) (explaining that the court should "consider the nature of the relationship between the employee and the employer as well as any disruption the employee's speech may cause, including the impact of the speech on the employer's ability to maintain discipline and relationships in the work place").[40]

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[38] *See also Baldassare v. State of N.J.*, 250 F.3d 188, 198 (3d Cir. 2001) ("[T]he public's interest in exposing potential wrongdoing by public employees is especially powerful.").

[39] In a 1994 decision, the Court of Appeals indicated that such balancing should occur only if the employer concedes that the speech played a factor in the dismissal:

> [A] public employer may dismiss an employee for speech addressing a matter of public concern if the state's interest, as an employer, in promoting the efficiency of its operations outweighs the employee's interest, as a citizen, in commenting upon matters of public concern. This balancing test comes into play only if the public employer concedes that it dismissed an employee because of the employee's protected speech but contends that it was justified in doing so. Rutgers denies that it dismissed San Filippo for his protected activities; accordingly, the balancing test has no application in the case at bar.

San Filippo v. Bongiovanni, 30 F.3d 424, 434 n.11 (3d Cir. 1994).

However, in at least one subsequent case the Court of Appeals performed the balancing analysis even though the defendant disputed whether the speech was a motivating factor. *See Azzaro*, 110 F.3d at 980 (performing balancing analysis); *id.* at 981 (finding "a material dispute of fact as to whether [plaintiff's] reports were a motivating factor in the discharge decision").

[40] In *Azzaro*, noting the "substantial public interest in Azzaro's revelations" and the "negligible" nature of any countervailing government interest, the Court of Appeals held that "the *Pickering* balance falls in Azzaro's favor." *Azzaro*, 110 F.3d at 980.

Second element: substantial factor.[41] The plaintiff must show a "causal link" between the protected speech and the adverse employment action.[42] *See, e.g., Thomas v. Town of Hammonton*, 351 F.3d 108, 114 (3d Cir. 2003); *see also Azzaro*, 110 F.3d at 981 (reversing summary judgment dismissing First Amendment retaliation claim, because there existed "a material dispute of fact as to whether [plaintiff's] reports were a motivating factor in the discharge decision").

"[F]or protected conduct to be a substantial or motivating factor in a decision, the decisionmakers must be aware of the protected conduct." *Ambrose v. Township of Robinson, Pa.*, 303 F.3d 488, 493 (3d Cir. 2002). If the plaintiff shows that the decisionmaker was aware of the protected conduct, then the plaintiff may use the temporal proximity between that knowledge and the adverse employment action to argue causation. "[A] suggestive temporal proximity between the protected activity and the alleged retaliatory action can be probative of causation," *Thomas*, 351 F.3d at 114, but "[e]ven if timing alone could ever be sufficient to establish a causal link, . . . the timing of the alleged retaliatory action must be 'unusually suggestive' of retaliatory motive before a causal link will be inferred." *Estate of Smith v. Marasco*, 318 F.3d 497, 512 (3d Cir. 2003) (quoting *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997)).[43]

Affirmative defense: same decision. As noted above, the second element requires the plaintiff to demonstrate that "the protected activity was a substantial or motivating factor for the adverse action." *Fultz v. Dunn*, 165 F.3d 215, 218 (3d Cir. 1998). If the plaintiff makes this showing, "the defendant can escape liability by showing that . . . he would have taken the same

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[41] The "substantial factor" and "same decision" inquiries "present[] question[s] of fact for the jury." *McGreevy v. Stroup*, 413 F.3d 359, 364 (3d Cir. 2005).

[42] The adverse action must be more than *de minimis*. *See McKee v. Hart*, 436 F.3d 165, 170 (3d Cir. 2006) ("[N]ot every critical comment–or series of comments–made by an employer to an employee provides a basis for a colorable allegation that the employee has been deprived of his or her constitutional rights."). However, "a plaintiff may be able to establish liability under § 1983 based upon a continuing course of conduct even though some or all of the conduct complained of would be *de minimis* by itself or if viewed in isolation." *Brennan v. Norton*, 350 F.3d 399, 419 n.16 (3d Cir. 2003); *see also Suppan v. Dadonna*, 203 F.3d 228, 234 (3d Cir. 2000) ("[A] trier of fact could determine that a violation of the First Amendment occurred at the time of the rankings on the promotion lists and that some relief is appropriate even if plaintiffs cannot prove a causal connection between the rankings and the failure to promote.").

[43] *Compare San Filippo*, 30 F.3d at 444 ("Although a dismissal that occurs years after protected activity might not ordinarily support an inference of retaliation, where, as here, a plaintiff engages in subsequent protected activity and the plaintiff is dismissed shortly after the final episode of such protected activity, a fact-finder may reasonably infer that it was the aggregate of the protected activities that led to retaliatory dismissal.").

action absent the protected activity." *Fultz*, 165 F.3d at 218.[44] The defendant has the burden of proof on this third prong of the test. *See Hill*, 411 F.3d at 126 n.11 ("[T]he defendant bears the burdens of proof and persuasion on the third prong.").[45] In other words, "the defendant[], in proving 'same decision,' must prove that the protected conduct was *not* the but-for cause." *Suppan v. Dadonna*, 203 F.3d 228, 236 (3d Cir. 2000).

[44] "'[S]ubstantial factor" does not mean 'dominant' or 'primary' factor. . . . Thus, even if a plaintiff shows that activity protected by the First Amendment was a 'substantial factor' in her termination, the defendant may show that some other factor unrelated to the protected activity was the but-for cause of the termination." *Hill*, 411 F.3d at 126 n.11.

[45] Thus, the Court of Appeals has termed the same-decision assertion an "affirmative defense." *Nicholas v. Pennsylvania State University*, 227 F.3d 133, 144 (3d Cir. 2000).

7.5 Section 1983 – Employment – Damages

Comment

Instruction 4.8.1 provides a general instruction concerning compensatory damages in Section 1983 cases;[46] though the Comment to Instruction 4.8.1 sets forth principles that govern employment claims under Section 1983, that instruction will require tailoring to the particularities of employment litigation. One set of questions that may arise relates to back pay and front pay. It is clear that a Section 1983 employment discrimination plaintiff can recover back pay and front pay in appropriate cases. What is less clear is the division of labor between judge and jury on these questions.[47]

Framework for analysis. The Supreme Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), provides an overarching framework for analyzing the right to a jury trial in Section 1983 cases.[48] In *Del Monte Dunes*, the Court held that "a § 1983 suit seeking legal relief is an action at law within the meaning of the Seventh Amendment." *Del Monte Dunes*, 526 U.S. at 709.[49] Specifically, the Court held that there is a Seventh Amendment right[50] to a jury determination of the question of liability in a Section 1983 suit seeking damages reflecting just compensation for a regulatory taking. *See id.* at 721. As the Court explained, "[e]ven

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[46] *See also* Instructions 4.8.2 (nominal damages) and 4.8.3 (punitive damages).

[47] For discussion of similar issues with respect to Title VII claims, see the Comments to Instructions 5.4.3 and 5.4.4.

[48] Back pay and front pay remedies for Title VII claims are governed by other statutes and precedents. *See* Comment 5.4.3 (discussing Title VII back pay awards in light of 42 U.S.C. §1981(b)(2), 42 U.S.C. § 2000e-5(g)(1), and *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001)); Comment 5.4.4 (discussing Title VII front pay awards in light of 42 U.S.C. § 1981a(a)(1) and *Pollard*).

[49] Justice Scalia would have held that all Section 1983 claims for damages carry a Seventh Amendment jury right. *See id.* at 723 (Scalia, J., concurring in part and in the judgment). However, both the plurality and the dissent were willing to scrutinize specific types of constitutional damages claims brought under Section 1983 to discern whether the particular type of claim triggered a jury right. *See id.* at 711-12 (Kennedy, J., joined by Rehnquist, C.J., and Stevens and Thomas, JJ.) (noting doubts as to whether claim-specific analysis was appropriate but engaging in that analysis anyway); *id.* at 751-52 (Souter, J., joined by O'Connor, Ginsburg and Breyer, JJ., concurring in part and dissenting in part) (rejecting Justice Scalia's proposed approach). None of the Justices, though, questioned the notion that a Section 1983 damages claim that was tort-like in nature and that sought legal relief should carry a right to a jury trial. *See, e.g., id.* at 709 (majority opinion); *id.* at 751 (concurrence/dissent).

[50] *See* U.S. Const. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ….").

when viewed as a simple suit for just compensation, . . . Del Monte Dunes' action sought essentially legal relief." *Id.* at 710. The Court relied on "the 'general rule' that monetary relief is legal," *id.* (quoting *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998) (quoting *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990))), and on the view that "[j]ust compensation . . . differs from equitable restitution and other monetary remedies available in equity, for in determining just compensation, 'the question is what has the owner lost, not what has the taker gained,'" *id.* (quoting *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910)).

Once a court determines that a Section 1983 suit seeks legal relief – thus triggering the right to a jury – the court must next ascertain "whether the particular issues" in question are "proper for determination by the jury." *Del Monte Dunes*, 526 U.S. at 718 (citing *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996)).[51] The court should first "look to history to determine whether the particular issues, or analogous ones, were decided by judge or by jury in suits at common law at the time the Seventh Amendment was adopted." *Del Monte Dunes*, 526 U.S. at 718. "Where history does not provide a clear answer," the court should "look to precedent and functional considerations." *Id.*

Back pay. If back pay is seen as a form of compensatory damages (measured in terms of lost wages), then it could be argued that there should be a right to a jury on Section 1983 claims for back pay. *See* DAN B. DOBBS, 2 LAW OF REMEDIES § 6.10(5), at 233 (2d ed. 1993). This view, however, is far from universally accepted, *see id.* at 231 ("The courts of appeal have taken at least five different positions about the right of jury trial in back pay claims under §§ 1981 and 1983."), and the Third Circuit caselaw is inconclusive.

The Court of Appeals has suggested that an award of back pay under Section 1983 ordinarily is an equitable remedy concerning which there is no right to a jury. *See Laskaris v. Thornburgh*, 733 F.2d 260, 263 (3d Cir. 1984) ("[A]lthough the request for back pay under section 1983 seeks only equitable relief . . . , a claim for compensatory and punitive damages is a legal claim entitling the plaintiff to a jury trial.").[52] Thus, for example, in *Savarese v. Agriss*, the Court of Appeals (in

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[51] As noted above, the relevant issue in *Del Monte Dunes* was one of liability. When the question at hand concerns which decisionmaker (judge or jury) should decide a remedies question, the analysis seems likely to turn principally on whether the remedy is equitable or legal in nature.

[52] The *Laskaris* court cited *Gurmankin v. Costanzo*, 626 F.2d 1115, 1122-23 (3d Cir. 1980) as support for this proposition. *Gurmankin*, however, did not concern the right to a jury trial. In *Gurmankin*, the Court of Appeals held that the trial judge's denial of back pay (after a bench trial) constituted an abuse of discretion. *See id.* at 1124-25. As support for the view that "backpay [is] an integral aspect of equitable relief to be awarded in a suit brought under section 1983 against a school district," *id.* at 1122, the Court of Appeals cited *Harkless v. Sweeny Independent School District*, 427 F.2d 319, 324 (5th Cir. 1970). *Harkless*, by contrast, did concern the jury issue: the *Harkless* court held that "a claim for back pay presented in an

vacating and remanding for a redetermination of damages and back pay) indicated that the question of compensatory damages was for the jury while the question of back pay was for the trial judge. *See Savarese v. Agriss*, 883 F.2d 1194, 1206 (3d Cir. 1989) ("[W]e will vacate both Savarese's compensatory damage award and the equitable award of back pay for Savarese and remand to the district court for a new trial on compensatory damages and a recalculation of back pay by the district judge.").

On at least one occasion, however, the Court of Appeals has appeared to contemplate a procedure by which both back pay and front pay were submitted to the jury.[53] In *Squires v. Bonser*,

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equitable action for reinstatement authorized by § 1983 is not for jury consideration nor are the factual issues which form the basis of the claim for reinstatement." *Harkless*, 427 F.2d at 324; *see also Johnson v. Chapel Hill Independent School Dist.*, 853 F.2d 375, 383 (5th Cir. 1988) ("A back pay award under Title VII is considered equitable rather than legal in nature, and its character does not change simply because the award is made pursuant to § 1981 or § 1983.").

Like the Fifth Circuit, the Fourth Circuit has held that back pay is for the court, not the jury, to determine. *See Smith v. Hampton Training School for Nurses*, 360 F.2d 577, 581 n.8 (4th Cir. 1966) ("[T]he hospital moved to have the question of back pay determined by a jury. But the claim is not one for damages; it is an integral part of the equitable remedy of reinstatement, and should be determined by the court.").

The First Circuit has taken the opposite view:

> In tort actions for personal injury tried to a jury, lost wages are invariably treated as being part of compensatory damages. . . . [T]he determination of back pay as a factor of compensatory damages involves the substance of a common-law right to a trial by jury.
>
> In addition to the seventh amendment implication, there is also a sound practical reason for having the jury factor in back pay when determining compensatory damages. Submission of the issue of back pay to the jury as a factor to be considered in its award of compensatory damages eliminates the inevitable overlap between compensatory damages and back pay. In most cases of an alleged unconstitutional firing, there will be evidence of the employee's pay. To expect a jury to ignore this is unrealistic, especially where it may constitute the major item of compensatory damages.

Santiago-Negron v. Castro-Davila, 865 F.2d 431, 441 (1st Cir. 1989). However, the *Santiago-Negron* court specified that "[w]here only reinstatement and back pay are requested or if they are the only issues, in addition to liability, remaining in the case then both reinstatement and back pay shall be for the court." *Id.*

[53] In addition, caselaw suggests that back pay may not be an equitable remedy when sought from an individual defendant. In a Section 1983 case that focused on official immunity, rather than on the right to a jury, the Court of Appeals stated that "[a]s to backpay and attorneys fees . . . a recovery against individual defendants would be in the nature of damages, rather than

the Court of Appeals held that the district court abused its discretion in denying reinstatement. *Squires v. Bonser*, 54 F.3d 168, 176 (3d Cir. 1995). Because an order granting reinstatement would render an award of front pay inappropriate, the court remanded for a new trial on compensatory damages. *See id.* at 177. The court's discussion evinced an assumption that the compensatory damages determination would include back pay. *See id.* at 176 n.15 (noting that in the previous trial the trial judge instructed the jury that the "[p]laintiff is entitled to be compensated for any wages that you find that he lost up to this date, or any wages that you find that he may lose in the future"); *id.* at 176 n.16 ("[A]sking the jury for a lump-sum award which includes front-pay when the plaintiff also seeks reinstatement. . . . wastes judicial resources in that if reinstatement is awarded a retrial is then required to parcel out the damages into component parts (i.e., front-pay versus back-pay).").

If the back pay issue is submitted to the jury,[54] the court could draft an instruction on that issue by making appropriate adaptations to Instruction 5.4.3 (concerning back pay under Title VII).

Front pay. Reinstatement is preferred over front pay.[55] The determination concerning reinstatement is for the district court.[56] If the district court determines that reinstatement is appropriate, then the district court should award reinstatement and should not permit the award of front pay.

Where an award of front pay is warranted, it may be the case that the amount of front pay

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as a part of the equitable remedy of reinstatement." *Skehan v. Board of Trustees of Bloomsburg State College*, 501 F.2d 31, 43 (3d Cir. 1974), *judgment vacated on other grounds*, 421 U.S. 983 (1975); *see also Figueroa-Rodriguez v. Aquino*, 863 F.2d 1037, 1043 n.7 (1st Cir. 1988) ("To say that an 'individual capacity' defendant is liable for 'back pay' is a misnomer; he may be liable for compensatory damages in the same amount (plaintiff's lost wages), but such liability must first hurdle any applicable immunity defense.")

[54] Even if there is no right to a jury determination on back pay, the court could submit the issue by stipulation of the parties or for an advisory verdict.

[55] "[A] denial of reinstatement is unwarranted unless grounded in a rationale which is harmonious with the legislative goals of providing plaintiffs make-whole relief and deterring employers from unconstitutional conduct." *Squires*, 54 F.3d at 172. "[R]einstatement is the preferred remedy to cover the loss of future earnings. . . . However, reinstatement is not the exclusive remedy, because it is not always feasible. . . . When reinstatement is not appropriate, front pay is the alternate remedy." *Feldman v. Philadelphia Housing Authority*, 43 F.3d 823, 831 (3d Cir. 1994), *opinion amended by order* (3d Cir. 1995).

[56] "Reinstatement is an equitable remedy available in unconstitutional discharge cases arising under § 1983. . . . The decision whether to award reinstatement thus lies within the discretion of the district court." *Squires*, 54 F.3d at 171 (citing *Versarge v. Township of Clinton, New Jersey*, 984 F.2d 1359, 1368 (3d Cir. 1993)).

should be determined by the jury,[57] though here, too, the Third Circuit caselaw is inconclusive.[58] In the context of the Age Discrimination in Employment Act, the Court of Appeals has treated the amount of front pay as a question for the jury. *See Maxfield v. Sinclair Intern.*, 766 F.2d 788, 796 (3d Cir. 1985) ("Since reinstatement is an equitable remedy, it is the district court that should decide whether reinstatement is feasible. . . . Of course the amount of damages available as front pay is a jury question."). The *Maxfield* court's reasoning suggests that front pay should be viewed as a legal remedy,[59] and thus that in Section 1983 cases where the court holds that front pay is appropriate the amount should be determined by the jury. Assuming that the amount of front pay is to be determined by the jury in cases where front pay is warranted, where the issue of reinstatement is

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[57] In *Feldman v. Philadelphia Housing Authority*, 43 F.3d 823 (3d Cir. 1994), *opinion amended by order* (3d Cir. 1995), the Court of Appeals held that the district court did not abuse its discretion in rejecting the remedy of reinstatement. *See id.* at 832. The district court had submitted the issue of front pay to the jury, and the Court of Appeals upheld the jury's award against an excessiveness challenge. *See id.* at 833.

The Court of Appeals' treatment of front pay in the context of sovereign immunity also provides oblique support for the view that front pay may properly be included within the scope of compensatory damages. In *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690 (3d Cir. 1996), the plaintiffs sought to cast their Section 1983 claim for front pay as an equitable claim, in order to avoid state sovereign immunity, *see id.* at 698. The Court of Appeals rejected this contention, holding "that 'front pay' relief, under the circumstances of this case, would provide nothing more than compensatory damages which would have to be paid from the Commonwealth's coffers." *Id.*

[58] A number of decisions from other circuits suggest that front pay in Section 1983 cases presents a question for the judge. *See, e.g.*, *Johnson v. Chapel Hill Independent School Dist.*, 853 F.2d 375, 383 (5th Cir. 1988) ("A front pay award . . . must be viewed as essentially equitable in nature."); *Biondo v. City of Chicago*, 382 F.3d 680, 683, 690 (7th Cir. 2004) (noting that front pay was "equitable relief" awarded by the district court); *Ballard v. Muskogee Regional Medical Center*, 238 F.3d 1250, 1253 (10th Cir. 2001) ("An award of front pay for claims under § 1983 is an equitable remedy; thus, the district court has discretion to decide whether such an award is appropriate."); *see also Grantham v. Trickey*, 21 F.3d 289, 296 n.5 (8th Cir. 1994) ("When reinstatement is not feasible, the court may grant front pay as an alternative equitable remedy.").

In the First Circuit "[a]wards of front pay . . . are generally entrusted to the district judge's discretion." *Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368, 380 (1st Cir. 2004). However, the *Johnson* court noted "some dispute . . . as to whether a jury should make calculations, if disputed, for purposes of the award." *Id.* at 380 n.8.

[59] The treatment of front pay under Title VII is not determinative in this regard. *Cf. Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 218 & n.4 (2002) (holding that plaintiffs' claim for restitution sought legal relief and thus was not cognizable under ERISA, and rejecting contrary argument founded upon characterization of back pay as equitable relief under Title VII because "Title VII has nothing to do with this case").

contested it seems advisable to submit the front pay issue to the jury along with other elements of compensatory damages.[60] However, to ensure that the resulting award can be adjusted where necessary, the court should require the jury to itemize how much of the compensatory damages award is attributable to front pay and how much to other items.[61]

If the front pay issue is submitted to the jury,[62] the court could draft an instruction on that issue by making appropriate adaptations to Instruction 5.4.4 (concerning front pay under Title VII).

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[60] Two reasons argue in favor of this approach: The trial judge may not have decided whether reinstatement is appropriate (prior to the submission of the case to the jury), and the trial judge's determination on reinstatement is subject to appellate review (albeit for abuse of discretion).

[61] The Court of Appeals has stated:

> [W]e discourage the practice of asking the jury for a lump-sum award which includes front-pay when the plaintiff also seeks reinstatement. Such a procedure wastes judicial resources in that if reinstatement is awarded a retrial is then required to parcel out the damages into component parts (i.e., front-pay versus back-pay). Accordingly, we believe the preferable course for a plaintiff seeking the equitable remedy of reinstatement is for such a plaintiff to ask for a jury interrogatory concerning the amount of damages attributable to front-pay in order to avoid a double recovery. In the future, we may require such a practice in order to preserve a claim for reinstatement.

Squires, 54 F.3d at 176 n.16.

[62] Even if there is no right to a jury determination on front pay, the court could submit the issue by stipulation of the parties or for an advisory verdict.