8 PJI 1.2 | ADEA | HARASSMENT — HOSTILE WORK ENVIRONMENT — TANGIBLE EMPLOYMENT ACTION

[Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this harassment was motivated by [plaintiff's] age.

[Employer] is liable for the actions of [names] in plaintiff's claim of harassment if [plaintiff] proves all of the following elements by a preponderance of the evidence:

First: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to plaintiff's claim] by [names].

Second: [Names] conduct was not welcomed by [plaintiff].

Third: [Names] conduct was motivated by the fact that [plaintiff] was [state plaintiff's age at the time of the alleged events giving rise to plaintiff's claim; must have been age 40 or older].

Fourth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's] position would find [plaintiff's] work environment to be hostile or abusive. This element requires you to look at the evidence from the point of view of a reasonable person of [plaintiff's age]'s reaction to [plaintiff's] work environment.

Fifth: [Plaintiff] believed [his/her] work environment to be hostile or abusive as a result of [names] conduct.

Sixth: [Plaintiff] suffered an adverse "tangible employment action" as a result of the hostile work environment; a tangible employment action is defined as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.

[For use when the alleged harassment is by non-supervisory employees:

Seventh: Management level employees knew, or should have known, of the abusive conduct. Management level employees should have known of the abusive conduct if 1) an employee provided management level personnel with enough information to raise a probability of age harassment in the mind of a reasonable employer, or if 2) the harassment was so pervasive

and open that a reasonable employer would have had to be aware of it.]

COMMENT

There is little Third Circuit case law on whether the ADEA prohibits harassment on the basis of age. See *Hildebrand v. Allegheny County*, 923 F.3d 128, 137 (3d Cir. 2019) (holding that the plaintiff "allege[d] sufficient facts to plausibly state an ADEA claim" where he "adequately allege[d] a hostile work environment, including page upon page of disparate treatment and adverse employment decisions based on his age[,]... claim[ed] he was retaliated against for complaining about the negative treatment, and... allege[d] his age was the motivation for his termination"). At least two other circuits have recognized ADEA age-harassment claims. See *Dediol v. Best Chevrolet*, Inc., 655 F.3d 435, 441 (5th Cir. 2011) (holding that a plaintiff can state a "hostile work environment claim based on age discrimination under the ADEA" and enumerating the following elements: "(1) [plaintiff] was over [sic] the age of 40; (2) the employee was subjected to harassment, either through words or actions, based on age; (3) the nature of the harassment was such that it created an objectively intimidating, hostile, or offensive work environment; and (4) there exists some basis for liability on the part of the employer"); *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830, 834 (6th Cir. 1996) ("While, as far as we can discern, no circuit has as yet applied the hostile-environment doctrine in an ADEA action... , we find it a relatively uncontroversial proposition that such a theory is viable under the ADEA.").

This instruction is substantively identical to Instruction 5.1.4, covering hostile work environment claims with a tangible employment action under Title VII. Like Title VII — and unlike Section 1981 — the ADEA regulates employers only, and not individual employees. Therefore, the instruction is written in terms of employer liability for the acts of its employees.

Respondeat superior liability for harassment by non-supervisory employees[10] exists only where "the defendant knew or should have known of the harassment and failed to take prompt remedial action." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990).

If the court wishes to provide a more detailed instruction on what constitutes a hostile work environment, such an instruction is provided in 8.2.1.

It should be noted that constructive discharge is the adverse employment action that is most common with claims of hostile work environment.[11] Instruction 8.2.2 provides an instruction setting forth the relevant factors for a finding of constructive discharge. That instruction can be used to amplify the term "adverse employment action" in appropriate cases.

The instruction's definition of "tangible employment action" is taken from *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

These ADEA instructions on harassment do not include a pattern instruction for quid pro quo claims. This is because quid pro quo claims are almost invariably grounded in sex discrimination, and the ADEA applies to age discrimination only. If an ADEA claim is ever raised on quid pro quo grounds, the court can modify Instruction 5.1.3 for that occasion.

For further commentary on hostile work environment claims, see the Comment to Instruction 5.1.4.

(Last Updated July 2019)

Footnotes

[10] In the context of Title VII claims, the Supreme Court has held that "an employee is a 'supervisor' for purposes of vicarious liability . . . if he or she is empowered by the employer to take tangible employment actions against the victim...." *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013). For further discussion of Vance, see Comment 5.1.4.

[11] As Comment 8.1.3 notes (by analogy to the framework for Title VII hostile environment claims) the employer may raise an affirmative defense under *Faragher v. Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), if no tangible employment action has been taken against the plaintiff. In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 140-41 (2004), the Court addressed the question of constructive discharge in a Title VII case, holding "that an employer does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a 'tangible employment action,' however, the defense is available to the employer whose supervisors are charged with harassment." Assuming that the same approach applies in ADEA cases, Instruction 8.1.2 is appropriate for use in cases where the evidence supports a claim that the constructive discharge resulted from an official act or acts. However, where the constructive discharge did not result from an official act, an affirmative defense is available to the employer and Instruction 8.1.3 should be used instead.