**10.1 Civil Rights—Title VII—Disparate Treatment—Without Affirmative Defense of “Same Decision”**

For the plaintiff’s claim that [he] [she] [other pronoun] was [discharged] [not hired] [not promoted] [demoted] [*state other adverse action*] by the defendant because of the plaintiff’s [[race] [color] [religion] [sex] [national origin]], the plaintiff has the burden of proving the following elements by a preponderance of the evidence:

1. the plaintiff was [discharged] [not hired] [not promoted] [demoted] [*state other adverse action*] by the defendant; [and]

2. the defendant [discharged] [failed to hire] [failed to promote] [demoted] [*state other adverse action*] the plaintiff because of the plaintiff’s [race] [color] [religion] [sex] [national origin] [.] [;]

[3. the plaintiff was qualified for [his] [her] [other pronoun] position [.] [;] [and]

[4. similarly situated individuals outside the plaintiff’s [race] [color] [religion] [sex] [national origin] were treated more favorably.]

If the plaintiff has proven each of these elements by a preponderance of the evidence, the plaintiff is entitled to your verdict.

**Comment**

To establish a prima facie case of disparate treatment under Title VII, a plaintiff must show “(1) he is a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably.” *Berry v. Dep't of Soc. Servs*., 447 F.3d 642, 656 (9th Cir. 2006). If it is disputed that plaintiff is qualified for position and that similarly situated individuals outside of plaintiff’s protected class were treated more favorably, add the bracketed elements. “Other employees are similarly situated to the plaintiff when they have similar jobs and display similar conduct.” *Id*. (quoting *Earl v. Nielsen Media Rsch., Inc*., 658 F.3d 1108, 1114 (9th Cir. 2011) (internal quotation marks omitted)).

When the alleged discrimination is based on sexual orientation, gender identity, transgender status, or the like, the word “sex” in the instruction should be modified or explained consistent with *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741, 1754 (2020) (holding employer violates Title VII by firing individual based on sexual orientation or gender identity). “Paramour preference,” however, does not constitute discrimination on the basis of sex. *Maner v. Dignity Health*, 9 F.4th 1114, 1116 (9th Cir. 2021).

Finally, even in the absence of a “same decision” (or “same action”) affirmative defense, a plaintiff might prefer to use an instruction that provides, as the second element, that the plaintiff’s protected characteristic was “a motivating factor” in the defendant’s employment decision. *See* 42 U.S.C. § 2000e-5(g)(2)(B). Based on 42 U.S.C. § 2000e-2(m), there does not appear to be any reason to deny a plaintiff that option. If a plaintiff so elects, a model instruction on that point is found in 10.2.

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