## 10.2 Civil Rights—Title VII—Disparate Treatment— “Sole

## Reason”—Elements and Burden of Proof

 As to the plaintiff’s claim that [his] [her] [[race] [color] [religion] [sex] [national origin]] was the sole reason for the defendant’s decision to [[discharge] [not hire] [not promote] [demote] [*state other adverse action*]] [him] [her], 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;

 2. the plaintiff was [discharged] [not hired] [not promoted] [demoted] [*state other adverse action*] solely because of the plaintiff’s [race] [color] [religion] [sex] [national origin].

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

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

 If you find that the plaintiff has proved each of these elements, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any one of these elements, your verdict should be for the defendant.

**Comment**

 *See* Comment to Instruction 10.1 (Civil Rights—Title VII—Disparate Treatment**—**When Evidence Supports “Sole Reason” or “Motivating Factor”).

“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.’” *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1021 (9th Cir. 2021) (quoting *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 an affirmative defense is asserted, this instruction should be accompanied by the appropriate affirmative defense instruction.

*Revised Dec. 2021*