**10.2 Civil Rights—Title VII—Disparate Treatment— With 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] [.] [;]]

[or]

[2. the plaintiff’s [race] [color] [religion] [sex] [national origin] was a motivating factor in the defendant’s decision to [discharge] [not hire] [not promote] [demote] [*state other adverse action*] the plaintiff] [.] [;]

[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.]

The defendant has the burden of proving by a preponderance of the evidence that the defendant would have [made the same decision] [taken the same action] regardless of the plaintiff’s [*protected characteristic*].

**Comment**

When the defendant is asserting a “same decision” (or “same action”) affirmative defense in a “mixed motive” case, it may be appropriate to allow the plaintiff to choose between the two versions of the second element shown above. As explained by the Supreme Court, Congress supplemented Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait or characteristic was a “motivating factor” in a defendant’s challenged employment practice. Civil Rights Act of 1991, § 107, 105 Stat. 1075, codified at 42 U.S.C. § 2000e-2(m); *see Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739-40 (2020). In *Bostock*, the Supreme Court described the “motivating factor” test as a “more forgiving standard.” *Id*. at 1740. Because it is a more forgiving standard, a plaintiff asserting a claim under Title VII should be allowed to choose whether to use that standard rather than “but-for causation.” When a plaintiff proves a violation under 42 U.S.C. § 2000e-2(m), using the more forgiving standard of “motivating factor,” however, a defendant may assert a “same decision” (or “same action”) affirmative defense under § 2000e-5(g)(2)(B) in an effort to foreclose compensatory and punitive damages.

“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 the plaintiff is qualified for the position and that similarly situated individuals outside of the 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*, 140 S. Ct. at 1741, 1754 (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).

**Sample Special Verdict for Use with Same Decision Affirmative Defense**

[1. Has the plaintiff proven by a preponderance of the evidence that 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]?

Yes \_\_\_\_\_ No \_\_\_\_\_]

[or]

[1. Has the plaintiff proven by a preponderance of the evidence that the plaintiff’s [race] [color] [religion] [sex] [national origin] was a motivating factor in the defendant’s decision to [discharge] [not hire] [not promote] [demote] [*state other adverse action*] the plaintiff]?

Yes \_\_\_\_\_ No \_\_\_\_\_]

*If the answer to Question No. 1 is “yes,” proceed to Question No. 2. If the answer to Question No. 1 is "no," do not answer any further questions [on the plaintiff’s claim of disparate treatment].*

2. Has the defendant proven by a preponderance of the evidence that the defendant’s decision to [*state adverse action*] also was motivated by a lawful reason?

Yes \_\_\_\_\_ No \_\_\_\_\_]

*If your answer to Question No. 2 is “yes,” proceed to Question No. 3. If your answer to Question No. 2 is “no,” proceed to Question No. 4.*

3. Has the defendant proven by a preponderance of the evidence that the defendant would have made the same decision to [*state adverse employment action*] even if the plaintiff’s [race] [color] [religion] [sex] [national origin] had played no role in the defendant’s decision to [*state adverse employment action*]?

Yes \_\_\_\_\_ No \_\_\_\_\_]

*If your answer to Question No. 3 is “yes,” do not answer any further questions on damages related to the plaintiff’s claim of disparate treatment. If your answer to Question No. 3 is “no,” proceed to Question No. 4.*

4. [The judge should draft further special verdict questions to cover damages, including punitive damages if appropriate.]

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