

640.27 EMPLOYMENT DISCRIMINATION – PRETEXT CASE.

NOTE WELL: This instruction is designed for what is known as a "pretext" case. See 42 U.S.C.A. § 1981.1 In a pretext case, the plaintiff seeks to prove that the reason given by the defendant for an adverse employment decision was, in reality, a pretext for a discriminatory decision. If, on the other hand, the plaintiff can present sufficiently direct evidence of discrimination, the plaintiff will qualify for the more favorable standards of liability applicable in "mixed-motive" cases. See Fuller v. Phipps, 67 F.3d 1137, 1141 (4th Cir. 1995), abrogated on other grounds, Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

If there are multiple claims of discriminatory acts, a separate issue should be submitted to the jury for each claim (one issue for race discrimination, one for sex discrimination, etc.).²

The (state number) issue reads:

"Did the defendant intentionally discriminate against the plaintiff [because of his [race] [sex] [age]] [as retaliation for his filing a complaint for discrimination] when the defendant [failed to hire] [fired] [disciplined] [failed to promote] [state other discriminatory act] the plaintiff?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, that the defendant intentionally³ discriminated against him because of his [race] [sex] [age] [having filed a complaint for discrimination].⁴

The plaintiff must prove that he was [not hired] [fired] [disciplined] [not promoted] [state other discriminatory act] because of his [race] [sex] [age] [having filed a complaint for discrimination].⁵ I instruct you that employers are prohibited from treating employees differently because of their [race] [sex] [age] [having filed a complaint for discrimination].

Finally, as to this issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant intentionally discriminated against the plaintiff [because of his [race] [sex] [age]][as retaliation for his having filed a complaint for discrimination] when the defendant [failed to hire] [fired] [disciplined] [failed to promote] [state other discriminatory act] the plaintiff then it would be your duty to answer this issue “Yes” in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue “No” in favor of the defendant.

1 An analysis under 42 U.S.C.A. § 1981 often mirrors the analysis that is required in reviewing Title VII claims. See *Forbes v. City of Durham*, __ N.C. App. __, __, 805 S.E.2d 159, 167 (2017) (“The models and standards developed in jurisprudence under Title VII of the Civil Rights Act of 1964 ... also apply to claims under § 1981.”) (citation omitted).

2 *Brewer v. Cabarrus Plastics, Inc.* 146 N.C. App. 82, 551 S.E.2d 902 (2001), *rev'd. on other grounds*, 357 N.C. 149, 579 S.E.2d 249 (2003); *Edwards v. Hardin*, 113 N.C. App. 613, 439 S.E.2d 808 (1994).

3 For an instruction on intent see N.C.P.I.-Civil 101.46.

4 The N.C. Supreme Court in a *per curiam* decision adopted the dissenting opinion from the Court of Appeals in *Brewer v. Cabarrus Plastics, Inc.*, 146 N.C. App. 82, 87, 551 S.E.2d 902, 906 (2001) (Walker, J., dissenting) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)), *rev'd*, 357 N.C. 149, 579 S.E.2d 249 (2003). See also *Love-Lane v. Martin*, 355 F.3d 766, 786-89 (4th Cir. 2004) (concluding the plaintiff failed to offer sufficient evidence of pretext to overcome the defendant's legitimate non-discriminatory reason); *Bryant v. Aiken Reg'l. Med. Ctrs., Inc.*, 333 F.3d 536, 545 (4th Cir. 2003) (holding there was sufficient evidence to support the jury's finding that the defendant unlawfully discriminated against the plaintiff because of her race).

5 *Brewer v. Cabarrus Plastics, Inc.*, 357 N.C. 149, 579 S.E.2d 249 (2003) (*per curiam*), *rev'g in part Brewer v. Cabarrus Plastics, Inc.* 146 N.C. App. 82, 551 S.E.2d 902 (2001) (approving the use of phrases such as “on account of” and “because of” in pretext cases because, unlike mixed motive cases, the plaintiff in a pretext case must demonstrate that discrimination was a determinative factor in the employment decision).