

640.28 EMPLOYMENT DISCRIMINATION - MIXED MOTIVE CASE.

NOTE WELL: This instruction is designed for what is known as a "mixed motive" case. This instruction is more favorable to the plaintiff than the "pretext" instruction (N.C.P.I.-Civil 640.27). The United States Supreme Court in Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) held that direct evidence of discrimination is not required in order to be entitled to a mixed motive instruction in an employment discrimination case under Title VII.¹

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 first 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 *his* [race] [sex] [age] [having filed a complaint for discrimination] was a motivating factor in the defendant's treatment of *him*. The plaintiff is entitled to prevail even if you find that the defendant's conduct was also motivated by a lawful reason.⁵

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. See 42 U.S.C. § 2000e. The plaintiff need only present sufficient evidence for a reasonable jury to conclude by a preponderance of the evidence that race, color, religion, sex or national origin was a motivating factor for the employment practice in question. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *Rowland v. Am. Gen. Fin., Inc.*, 340 F.3d 187 (4th Cir. 2003).

2. *Brewer v. Cabarrus Plastics, Inc.*, 146 N.C. App. 82, 87, 551 S.E.2d 902, 906 (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); *Ward v. City of San Jose*, 967 F.2d 280 (9th Cir. 1991).

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).

5. In a Title VII employment discrimination case, the defendant has a limited affirmative defense. If the defendant demonstrates that he would have taken the same action in the absence of the impermissible motivating factor, plaintiff is entitled only to declaratory relief, injunctive relief and attorney fees. 42 U.S.C. § 2000e-5(g)(2)(B).