

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

CHERIFA BELABBAS,)	
)	
Plaintiff,)	
)	Case No. 1:16-cv-07379-LGS
v.)	
)	
INOVA SOFTWARE INC., FRITZ)	
EISENHART, in his individual and)	
professional capacities, and GILLES)	
TOULEMONDE, in his individual and)	
professional capacities,)	
)	
Defendants.)	

JURY INSTRUCTIONS

I. GENERAL INSTRUCTIONS

Members of the jury, we have now come to the point in the case when it is my duty to instruct you on the rules of law that you must follow and apply in deciding this case.

As jurors it is your exclusive duty to decide all questions of fact submitted to you and for that purpose to determine the effect and value of the evidence.

You must not be influenced by sympathy, bias, prejudice, or passion.

You must follow the law as I explain it to you whether you agree with it or not. You are not to single out any particular part of the instructions and ignore the rest, but you are to consider all the instructions as a whole and regard each in the light of all the others.

All of the instructions are equally important. The order in which these instructions are given has no significance. You must follow all of the instructions and not single out some and ignore others.

A. Organization Not to Be Prejudiced

In this case, Defendant Inova Software is a business organization. The fact that a party in the case is an organization must not influence you in your deliberations or in your verdict.

You may not discriminate between businesses and natural individuals. Each is a person in the eyes of the law, and each is entitled to the same fair and impartial consideration and to justice by the same legal standards.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations of life. An organization is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, governments, and government entities, stand equal before the law, and are to be dealt with as equals in a court of justice.

It is your duty to decide this case with the same impartiality you would use in deciding a case between individuals.

A. Organizations/Corporations Act Through Their Authorized Employees or Agents

While Inova Software is a party in this case, that does not mean that only the actions of the business organization as one body shall be considered by you in determining its claims or defenses. A corporation or business organization acts not only through the policies and decisions it makes, but also through its designated supervisory employees, such as its managers, officers, and others designated by the corporation to act on its behalf.

Pay close attention to the remainder of these instructions. As you apply subsequent portions of these instructions, you will have to determine whether or not individual employees, managers, or agents were authorized to act on behalf of the party you are considering.

B. Burden of Proof and Consideration of the Evidence

I will now instruct you with regard to where the law places the burden of making out and supporting the facts necessary to prove the theories in the case.

When a party denies the material allegations of the other party's claims, the law places upon the party bringing a claim the burden of supporting and making out each element of each claim by the preponderance of the evidence.

The preponderance of the evidence means that amount of factual information presented to you in this trial which is sufficient to cause you to believe that an allegation is probably true. In order to preponderate, the evidence must have the greater convincing effect in the formation of your belief. If the evidence on a particular issue appears to be equally balanced, the party having the burden of proving that issue must fail.

You must consider all the evidence pertaining to every issue, regardless of which party presented it.

Where the plaintiff has the burden of proving particular facts as to the defendants, you must consider each defendant separately and determine whether or not the plaintiff has established by the greater weight or preponderance of the evidence the facts necessary as to the particular defendant you are considering.

C. Credibility and Weighing of Evidence

You, the members of the jury, are judges of the facts concerning the controversy involved in this lawsuit. In order for you to determine what the true facts are, you are called upon to weigh the testimony of every witness who appears before you and to give the testimony of the witnesses the weight, faith, credit, and value to which you think it is entitled.

You should consider the manner and demeanor of each witness while on the stand.

You must consider whether the witness impressed you as one who was telling the truth or one who was telling a falsehood, and whether or not the witness was a frank witness. You should consider the reasonableness or unreasonableness of the testimony of the witness; the opportunity or lack of opportunity of the witness to know the facts about which he or she testified; the intelligence or lack of intelligence of the witness; the interest of the witness in the result of the lawsuit, if any; the relationship of the witness to any of the parties to the lawsuit, if any; and whether the witness testified inconsistently while on the witness stand, or if the witness said or did something or failed to say or do something at any other time that is inconsistent with what the witness said while testifying.

These are the rules that should guide you, along with your common judgment, your common experience, and your common observations gained by you in your various walks of life, in weighing the testimony of the witnesses who have appeared before you in this case.

If there is a conflict between the testimony of different witnesses, it is your duty to reconcile that conflict if you can, because the law presumes that every witness has attempted to and has testified to the truth. But if there is a conflict in the testimony of the witnesses that you are not able

to reconcile in accordance with these instructions, then you must determine which of the witnesses you believe have testified to the truth and which ones you believe have testified to a falsehood.

Immaterial discrepancies do not affect a witness's testimony, but material discrepancies do. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

The preponderance of the evidence in a case is not determined by the number of witnesses testifying to a particular fact or a particular set of facts. Rather, it depends on the weight, credit, and value of the total evidence on either side of the issue, and of this you jurors are the exclusive judges.

If in your deliberations you come to a point where the evidence is evenly balanced and you are unable to determine which way the scales should turn on a particular issue, then you must find against the party upon whom the burden of proof has been cast in accordance with these instructions.

Remember, you are the sole and exclusive judges of the credibility or believability of the witnesses who testify in this case.

Ultimately, you must decide which witnesses you believe and how important you think their testimony was. You are not required to accept or reject everything a witness says. You are free to believe all, none, or part of any person's testimony.

D. Ms. Ling's Testimony

You have heard testimony from Ms. Ling, a former employee of Inova Software. She is not a party to this lawsuit. Accordingly, you will not be determining whether she is entitled to relief from Inova Software for allegedly discriminating or retaliating against her.

It will be for you to decide what weight, if any, to give Ms. Ling's testimony in determining the issues before you involving Inova Software, Mr. Eisenhart, and Mr. Toulemonde – namely, whether any or all of the Defendants discriminated or retaliated against Ms. Belabbas. You should consider, as you would with any witness, whether Ms. Ling's testimony is credible and how closely related the evidence of her circumstances are to Plaintiff's circumstances.

E. Impeachment — Inconsistent Statements or Conduct

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness's present testimony.

If you believe that any witness has been impeached and thus discredited, you may give the testimony of that witness such credibility, if any, you think it deserves.

If a witness is shown knowingly to have testified falsely about any material matter, you have a right to distrust such witness's other testimony and you may reject all the testimony of that witness or give it such credibility as you may think it deserves; you may, of course, accept any part you decide is true. This is all for you, the jury, to decide.

An act or omission is done "knowingly" if committed voluntarily and intentionally, and not because of mistake or accident, or some other innocent reason.

F. Direct and Circumstantial Evidence

There are two kinds of evidence: direct and circumstantial. Direct evidence is testimony by a witness about what a witness personally saw, heard, or did. Circumstantial evidence is indirect evidence—that is, proof of one or more facts from which one can find another fact.

You may consider both direct and circumstantial evidence in deciding this case. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

G. Evidence

You are to decide this case only from the evidence that was received—that is, evidence that was presented for your consideration during the trial. The evidence consists of:

1. The sworn testimony of the witnesses who have testified;
2. The exhibits that were received and marked as evidence;
3. Any facts to which the lawyers for all sides have agreed or stipulated.

H. Stipulations

Stipulations are facts all parties have agreed to. You must take the stipulations as true. In this case the parties have stipulated to the following:

- (i) Cherifa Belabbas commenced her employment with Vertical*i, Inc. in September 2009.
- (ii) Ms. Belabbas was born and raised in Belgium and is of Algerian descent.
- (iii) Ms. Belabbas is not of French nationality. She is a Semitic Arab-Berber.
- (iv) Vertical*i and Inova Software Inc. (“Inova”) merged in December 2010.
- (v) Ms. Belabbas earned \$103,567 in base salary and \$7,244 in commissions in 2014, for a total of \$110,811.
- (vi) Ms. Belabbas’ April 2, 2016 flight to Brussels for the 2016 BIO-Europe Spring Conference was cancelled.
- (vii) Ms. Belabbas’ employment with Inova Software, Inc. was terminated on May 3, 2016.

I. “Inferences” Defined

Although you are to consider only the evidence in this case, you are not limited to the statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You may draw from the facts that you find have been proved such reasonable inferences as seem justified in light of your experience.

Inferences are deductions or conclusions that reason and common sense lead you to make from facts established by the evidence in the case.

J. Statements and Arguments of Counsel

You must not consider as evidence any statements of counsel made during the trial.

If, however, counsel for the parties have stipulated to any fact, or any fact has been admitted by counsel, you will regard that fact as being conclusively established.

As to any questions to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection, and you must assume that the answer would be of no value to you in your deliberations.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the Court. Such matter is to be treated as though you had never known it.

You must never speculate to be true any insinuation suggested by a question asked of a witness. A question is not evidence. It may be considered only as it supplies meaning to the answer.

K. Totality of the Evidence

You should consider all of the evidence admitted in the case. Testimony and documents which the Court allowed into evidence over a hearsay objection may be considered by you as evidence, on the same basis as all other evidence, for the purpose for which it was admitted. For example, matters and things that a decision maker is told may be considered for the purpose of explaining the basis upon which that person acted or made a decision. This, of course, is all for you, the jury, to decide.

L. Limited Admission of Evidence

You will recall that during the course of this trial, certain evidence was admitted for a limited purpose only. You must not consider such evidence for any other purpose.

For example, evidence is admitted for the limited purpose of showing a witness's state of mind, or that the witness had notice of a particular issue. Evidence of a witness's state of mind is relevant only to show what the witness believed. Such evidence cannot be considered for the truth or accuracy of the belief. Likewise, evidence admitted only to show notice cannot be considered for the truth or accuracy of the matter it concerns.

M. Juror Notes

If you took notes, please remember that your notes are not evidence. You should keep your notes to yourself. They may only be used to help refresh your personal recollection of the evidence in this case. It is the evidence itself, and not your notes, that you should discuss with the other jurors.

If you cannot recall a particular piece of evidence, you should not be overly influenced by the fact that someone else on the jury appears to have a note regarding that evidence.

Remember, it is your recollection and the collective recollection of all of you upon which you should rely in deciding the facts in the case.

N. Comments by the Court

During the course of this trial, I occasionally asked questions of a witness in order to bring out facts not then fully covered in the testimony. Please do not assume that I hold any opinion on the matters to which my questions may have related. Remember that you, as jurors, are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts.

On the other hand, you are required to follow the Court's instructions on the law, whether you agree with these instructions or not.

O. Deposition Testimony

Certain testimony has been placed into evidence by the reading of portions of Sylvie Garlant's deposition. A deposition is testimony taken under oath in advance of this trial and preserved in writing or on video tape. You are to consider all such testimony as if it had been given in this Court.

P. Demonstratives

Certain demonstratives have been shown to you in order to help explain facts disclosed by books, records, and other documents that are in evidence in the case. These demonstratives are not themselves evidence or proof of any facts. If the demonstratives do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard the demonstratives.

II. STATEMENT OF THE CASE

A. Plaintiff's Statement of the Case

Plaintiff claims that, (1) she was assigned less favorable sales territories by Defendants because of her race, ethnicity, national origin, and/or gender; (2) her employment was ultimately terminated because of her race, ethnicity, national origin, gender and/or disability; and (3) that the Defendants engaged in unlawful retaliation in response to Plaintiff's protected activities.

B. Defendants' Statement of the Case

Defendants deny that Plaintiff was given less favorable sales territories. Defendants contend that all decisions regarding the allocation of sales territories were based on legitimate, nondiscriminatory business reasons unrelated to Plaintiff's race, ethnicity, national origin, or gender. Defendants also contend that Plaintiff's termination was based on legitimate non-discriminatory business reasons unrelated to Plaintiff's race, ethnicity, national origin, gender, disability, or any protected activity. Defendants further contend that Plaintiff did not make any protected complaints.

III. APPLICABLE LAW

A. Legal Theories of the Case

Turning now to the legal theories in the case, it is my duty to tell you what the law is. If a lawyer or party has told you that the law is different from what I tell you it is, you must, of course, take the law as I give it to you. That is my duty. But it is your duty, and your duty alone, to determine what the facts are and after you have determined what the facts are, to apply the law to those facts, free from any bias, prejudice, or sympathy, either one way or the other.

B. Nature of the Action/Separate Consideration of Each Claim

In this case, Ms. Belabbas has brought a case for workplace discrimination against Defendants Inova Software, Mr. Eisenhart, and Mr. Toulemonde. She alleges fourteen counts, that is, fourteen specific claims.

- Two counts for discrimination on the basis of race/ethnicity and retaliation under the Federal Civil Rights Act, 42 U.S.C. § 1981.
- Five counts for discrimination on the basis of ethnicity, race, national origin, gender, and disability under New York City Human Rights Law.
- One count for retaliation under New York City Human Rights Law.
- Six counts for aiding and abetting discrimination on the five aforementioned bases and retaliation under the New York City Human Rights Law.

You must consider each claim separately and decide each claim without regard to your determination as to any other claim.

I will instruct you on the applicable law for each of these claims. Some aspects of the (1) Federal Civil Rights Act, 42 U.S.C. § 1981, and (2) the New York City Human Rights Law operate the same way. I will first instruct you on these operations. I will then instruct you on the law for the claims brought only under the New York City Human Rights Law.

C. Intent & Pretext

Proof of intent is important to certain claims in this case. Intent refers to a defendant's state of mind when a defendant did what it or he did. It is not the role of the jury to simply second-guess employment decisions. An employer may generally act against an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all—but not for a discriminatory and/or retaliatory reason. All Defendants contend that there were legitimate, non-retaliatory and/or non-discriminatory reasons for their conduct and actions toward Ms. Belabbas. Ms. Belabbas contends that these explanations are pretextual; that is, that they are unworthy of belief and were not the real reason for each Defendant's conduct.

The law considers actions to be intentional if they are done voluntarily and deliberately. Discriminatory or retaliatory intent may be proven either by direct evidence, such as statements made by a person whose intent is at issue, or by circumstantial evidence from which you can infer or deduce a person's intent. Direct proof concerning state of mind is often not available and a plaintiff is not required to produce it.

Ms. Belabbas must show as to each Defendant, that the Defendant intentionally discriminated or retaliated against her. Ms. Belabbas is not required to produce direct evidence of intentional discrimination or retaliation. Intentional discrimination and retaliation may be inferred from the existence of other facts or the cumulative weight of circumstantial evidence. Because employers rarely leave a paper trail – or “smoking gun” – attesting to a discriminatory or retaliatory intent, plaintiffs, such as Ms. Belabbas, must often build their cases from indirect evidence and pieces of circumstantial evidence which undercut the credibility of the various testimony offered by the employer. Therefore, you may consider circumstantial evidence such as

the testimony and evidence offered by other employees, evidence relating to company-wide practices that may reveal patterns of discrimination against a group of employees, and other indirect evidence of discriminatory or retaliatory motive.

The process of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An inference is a deduction or conclusion which you, the jury, are permitted to draw – but not required to draw – from the facts which have been established by either direct or circumstantial evidence. In drawing inferences, you should exercise your common sense.

State of mind can be inferred from words, action, and conduct. State of mind can also be established by surrounding facts and circumstances at the time an action was taken, and the reasonable inferences to be drawn from those facts and circumstances. Circumstantial evidence of a retaliatory motive might include proof that protected activity was followed closely in time by the adverse action, or evidence that a plaintiff was treated differently than fellow employees who were similarly situated. Temporal proximity alone, however, is usually insufficient to establish a causal connection between a plaintiff's protected activity and the subsequent adverse action.

Thus, in making a determination as to whether there was intentional discrimination or retaliation in this case, you may consider any statement made, act done, and any act omitted by a person or entity whose intent is in issue. You may infer that a person or entity intends the natural and probable consequences of their actions. You may also consider all other facts and circumstances that you believe provide insight into a person's or entity's state of mind.

If you determine that Ms. Belabbas has shown by a preponderance of the evidence that the Defendant you are considering's stated reasons for taking actions against her were not the real reason, you may find that the Defendant you are considering's actions were in fact motivated by

discrimination and/or retaliation despite the stated legitimate reasons. If you find that the Defendant who you are considering's employee has given an implausible or unconvincing explanation for conduct, you may consider that fact as itself circumstantial evidence of discriminatory and/or retaliatory intent. The burden, however, always remains on Ms. Belabbas to prove by a preponderance of the evidence that the defendant you are considering acted with discriminatory and/or retaliatory intent.

D. Analysis of Section 1981 and the New York City Human Rights Law

As I just mentioned, Ms. Belabbas has alleged claims of employment discrimination and retaliation claims under both federal law, Section 1981, as well as the local law, the New York City Human Rights Law. The standards applicable to federal claims under Section 1981 are similar to those that govern claims brought under the New York City Human Rights Law. Accordingly, wherever possible, the federal and city employment discrimination and retaliation claims will be addressed together. This means certain jury instructions will apply to both the New York City Human Rights Law claims as well as the federal Section 1981 claims.

E. Section 1981 Law

As I mentioned, one of the statutes under which Plaintiff seeks relief is Section 1981. Section 1981 only prohibits racial discrimination as defined in this case. Therefore, in order to find any of the Defendants liable for discrimination or retaliation under Section 1981, you must determine whether the discrimination, if any, was based on race, and whether the retaliation, if any, was the result of a complaint of racial discrimination.

You are instructed that the statute is intended to protect against discrimination of identifiable classes of persons who are subjected to intentional discrimination because of their race, but not nation of origin.

F. The Purpose of the Statutes

You must determine whether any racial discrimination occurred. Racial discrimination in employment is illegal under both Section 1981 and the New York City Human Rights Law.

You are instructed that the statute is intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended to forbid. “Race” includes ethnicity for purposes of Section 1981.

G. Plaintiff's Discrimination Claims under Section 1981 and the New York City Human Rights Law

It is unlawful for an employer to intentionally discriminate against any person because of a protected characteristic such as race, ethnicity, gender, or national origin.

Ms. Belabbas claims that Defendants Inova Software, Mr. Eisenhart, and Mr. Toulemonde unlawfully discriminated against her because of her race or ethnicity in violation of Section 1981 and the New York City Human Rights Law.

Ms. Belabbas also claims that Defendants Inova Software, Mr. Eisenhart, and Mr. Toulemonde unlawfully discriminated against her because of her national origin and/or gender in violation of the New York City Human Rights Law.

Section 1981 and the New York City Human Rights Law both provide that it is an unlawful employment practice for an employer to discriminate in the terms and conditions of employment on the basis of an individual's race or ethnicity. The New York City Human Rights Law additionally provides that it is an unlawful employment practice for an employer to discriminate in the terms and conditions of employment on the basis of an individual's national origin and/or gender.

Terms and conditions of employment include compensation and other circumstances of employment.

To succeed on her claim, Ms. Belabbas must prove by a preponderance of the evidence each of the following two elements:

(1) **First Element – Adverse Employment Action.** Ms. Belabbas asserts that each Defendant took an adverse employment action against her. For purposes of the first element, Ms. Belabbas

asserts two distinct employment actions: (1) Defendants allegedly provided Ms. Belabbas with less favorable allocations of sales territory, clients, or accounts, and (2) Defendants' termination of her employment with Inova. Either of these actions, if proven by the greater weight or preponderance of the evidence, can satisfy the first element. Each must be considered in the context of the specific claim made.

(2) **Second Element – A Protected Characteristic was a Motivating Factor.** Ms. Belabbas's ethnicity, race, national origin, and/or gender must have been a motivating factor in the adverse employment action of Inova Software, and/or Mr. Eisenhart and/or Mr. Toulemonde.

Summary: If Plaintiff has proven, as to the Defendant you are considering, both of the elements required by a preponderance of the evidence, then as to that Defendant you must return a verdict for the Plaintiff. Conversely, if the Plaintiff has not proven as to that Defendant either of the elements required by a preponderance of the evidence, then you must return a verdict for the Defendant.

H. Termination is an Adverse Employment Action

The parties do not dispute that the first element –an adverse employment action– has been met as to some of Ms. Belabbas claims: namely, that Inova Software terminated Ms. Belabbas.

Ms. Belabbas brings claims that the termination of her employment with Inova was motivated, at least in part, by her race or ethnicity under Section 1981 and the New York City Human Rights Law. Ms. Belabbas also claims that her employment was terminated as a result of discrimination on the basis of her national origin, and/or gender under the New York City Human Rights Law. Plaintiff also claims that Defendants terminated her employment with Inova as a result of her disability, but I will instruct you on her disability claim in a separate instruction.

Because the parties do not dispute that her termination was an adverse employment action, satisfying element one, Ms. Belabbas need only prove element two – that her race, ethnicity, national origin, and/or gender were a “motivating factor” in Defendants’ decision to terminate her employment. A “motivating factor” is a factor that played some part in the defendant’s employment decision, even if the employer also had other, lawful motives that caused the employer’s decision.

If you do find that Ms. Belabbas’ race or ethnicity was a motivating factor in the decision to terminate her, even if her race was only one of other factors, then you must find the defendant you are considering liable for discrimination under Section 1981 and New York City Human Rights Law.

If you find that Ms. Belabbas’ ethnicity, national origin, and/or gender were motivating factors in the decision to terminate her, even if her ethnicity, national origin, and/or gender were

only one of other factors, then you must find the Defendant you are considering liable for discrimination under the New York City Human Rights Law.

It is your responsibility to decide whether Ms. Belabbas has proven each of her claims of discrimination by Defendants because of her race, ethnicity, national origin, and/or gender by a preponderance of the evidence.

If you find that Plaintiff's race was a motivating factor in the decision to terminate Ms. Belabbas' employment, then you must find the applicable individual manager and therefore Inova liable for discrimination under Section 1981. You should answer "Yes" to Question 5.A. on your Jury Verdict form if you find by a preponderance of evidence that Mr. Eisenhart was motivated, at least in part, to terminate Ms. Belabbas on the basis of race. You should answer "Yes" to Question 5.B. on your Jury Verdict form if you find by a preponderance of evidence that Mr. Toulemonde was motivated, at least in part, to terminate Ms. Belabbas on the basis of race. You should answer "Yes" to both Questions 5.A. and 5.B. if you find by a preponderance of evidence that both Mr. Toulemonde and Mr. Eisenhart were motivated, at least in part, to terminate Ms. Belabbas on the basis of race.

If you find that Plaintiff's national origin was a motivating factor in the decision to terminate Ms. Belabbas' employment, then you also must find the applicable manager and Inova liable for discrimination under the New York City Human Rights Law. You should answer "Yes" to Question 6.A. on your Jury Verdict form if you find by a preponderance of evidence that Mr. Eisenhart was motivated, at least in part, to terminate Ms. Belabbas on the basis of national origin. You should answer "Yes" to Question 6.B. on your Jury Verdict form if you find by a preponderance of evidence that Mr. Toulemonde was motivated, at least in part, to terminate Ms.

Belabbas on the basis of national origin. You should answer “Yes” to both Questions 6.A. and 6.B. if you find by a preponderance of evidence that both Mr. Toulemonde and Mr. Eisenhart were motivated, at least in part, to terminate Ms. Belabbas on the basis of national origin.

If you find that Plaintiff’s gender was a motivating factor in the decision to terminate Ms. Belabbas’ employment, then you also must find the applicable manager and Inova liable for discrimination under the New York City Human Rights Law. You should answer “Yes” to Question 7.A. on your Jury Verdict form if you find by a preponderance of evidence that Mr. Eisenhart was motivated, at least in part, to terminate Ms. Belabbas on the basis of gender. You should answer “Yes” to Question 7.B. on your Jury Verdict form if you find by a preponderance of evidence that Mr. Toulemonde was motivated, at least in part, to terminate Ms. Belabbas on the basis of gender. You should answer “Yes” to both Questions 7.A. and 7.B. if you find by a preponderance of evidence that both Mr. Toulemonde and Mr. Eisenhart were motivated, at least in part, to terminate Ms. Belabbas on the basis of gender.

If you find that Plaintiff’s ethnicity was a motivating factor in the decision to terminate Ms. Belabbas’ employment, then you also must find the applicable manager and Inova liable for discrimination under the New York City Human Rights Law. You should answer “Yes” to Question 9.A. on your Jury Verdict form if you find by a preponderance of evidence that Mr. Eisenhart was motivated, at least in part, to terminate Ms. Belabbas on the basis of ethnicity. You should answer “Yes” to Question 9.B. on your Jury Verdict form if you find by a preponderance of evidence that Mr. Toulemonde was motivated, at least in part, to terminate Ms. Belabbas on the basis of ethnicity. You should answer “Yes” to both Questions 9.A. and 9.B. if you find by a

preponderance of evidence that both Mr. Toulemonde and Mr. Eisenhart were motivated, at least in part, to terminate Ms. Belabbas on the basis of ethnicity.

If you find that Plaintiff failed to prove that a protected characteristic was a motivating factor in the decision to terminate Ms. Belabbas' employment, then Plaintiff has failed to meet her burden and you must find in favor of Defendants on this claim.

Specifically, if you find that Plaintiff failed to prove that race was a motivating factor in the decision to terminate Ms. Belabbas' employment, then Plaintiff has failed to meet her burden and you must find in favor of Defendants on this claim. In this case, you would answer "No" to Questions 5.A and 5.B. on your Jury Verdict Form.

If you find that Plaintiff failed to prove that national origin was a motivating factor in the decision to terminate Ms. Belabbas' employment, then Plaintiff has failed to meet her burden and you must find in favor of Defendants on this claim. In this case, you would answer "No" to Questions 6.A and 6.B. on your Jury Verdict Form.

If you find that Plaintiff failed to prove that gender was a motivating factor in the decision to terminate Ms. Belabbas' employment, then Plaintiff has failed to meet her burden and you must find in favor of Defendants on this claim. In this case, you would answer "No" to Questions 7.A and 7.B. on your Jury Verdict Form.

If you find that Plaintiff failed to prove that ethnicity was a motivating factor in the decision to terminate Ms. Belabbas' employment, then Plaintiff has failed to meet her burden and you must find in favor of Defendants on this claim. In this case, you would answer "No" to Questions 9.A and 9.B. on your Jury Verdict Form.

I. Discrimination Claims Based on Assignment of Sales Territories, Clients, or Accounts
May Be an Adverse Employment Action

Remember, in order to prove that the Defendant you are considering discriminated against Ms. Belabbas in the allocation of sales territories and/or clients in violation of Section 1981 and in violation of the New York City Human Rights Law, Plaintiff must prove the two elements previously discussed [see pages 30-31 discussion of (1) adverse employment action and (2) a protected characteristic was a motivating factor].

Both of these elements are disputed. First, you must consider whether Plaintiff has established by the greater weight or preponderance of the evidence that the Defendant you are considering took adverse employment action against Plaintiff in the allocation of sales territory, clients, or accounts.

An adverse employment action is an action that is serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment. In these claims, Ms. Belabbas asserts that she was allocated less favorable sales territory, clients, and accounts, and that this impacted her income. You, as the jury, must determine whether the allocations adversely affected her compensation. If you find that the allocations adversely affected her compensation, then this element has been met. If you find that the allocations did not adversely affect her compensation, then this element has not been met.

If the Plaintiff fails to establish that she was subjected to an adverse employment action, your inquiry stops here, and you must return a verdict for the Defendant that you are considering. If the Plaintiff does establish that she was subjected to an adverse employment action, then you must proceed to the second element.

The second element that the Plaintiff must establish by a preponderance of the evidence is that a protected characteristic was a motivating factor in the adverse employment action. If you find that Plaintiff has proved that the sales territory and accounts allocated to her were less favorable, then you must consider whether Plaintiff has proved that either Defendants Mr. Eisenhart or Mr. Toulemonde, and thus Inova Software, intentionally discriminated against her.

This means that Plaintiff must prove by a preponderance of the evidence that the assignment of less favorable sales territories was motivated, at least in part, by her race, ethnicity, national origin, and/or gender, even if other factors also may have played a role in her assignment of less favorable sales territory.

Ms. Belabbas does not have to prove that her race, ethnicity, national origin, and/or gender was the only reason that she was assigned less favorable territories, but only that they were a motivating factor, that is a cause or something that played a role in the decision to assign a less favorable sales territory and/or client list.

Defendants have offered nondiscriminatory reasons for the sales territory, client, and account allocations. Defendants do not have to convince you that their reasons are good. If you believe Defendants' stated reason and if you find that Defendants would have made the same decision with respect to the allocation of sales territory, clients, or accounts regardless of Plaintiff's race, ethnicity, national origin, and/or gender, then you must find for Defendants.

If you find that Plaintiff's race/ethnicity was a motivating factor in the decision to assign Plaintiff less favorable sales territories, clients, or accounts, then you must find the applicable individual manager and therefore Inova liable for discrimination under Section 1981. You should

answer “Yes” to Question 1.A. on your Jury Verdict form if you find by a preponderance of evidence that Mr. Eisenhart was motivated, at least in part, to assign Plaintiff less favorable sales territories, clients, or accounts on the basis of race/ethnicity. You should answer “Yes” to Question 1.B. on your Jury Verdict form if you find by a preponderance of evidence that Mr. Toulemonde was motivated, at least in part, to assign Plaintiff less favorable sales territories, clients, or accounts on the basis of race/ethnicity. You should answer “Yes” to both Questions 1.A. and 1.B. if you find by a preponderance of evidence that both Mr. Toulemonde and Mr. Eisenhart were motivated, at least in part, to assign Plaintiff less favorable sales territories, clients, or accounts Ms. Belabbas on the basis of race/ethnicity.

If you find that Plaintiff’s national origin was a motivating factor in the decision to assign Plaintiff less favorable sales territories, clients, or accounts, then you also must find the applicable manager and Inova liable for discrimination under the New York City Human Rights Law. You should answer “Yes” to Question 2.A. on your Jury Verdict form if you find by a preponderance of evidence that Mr. Eisenhart was motivated, at least in part, to assign Plaintiff less favorable sales territories, clients, or accounts on the basis of national origin. You should answer “Yes” to Question 2.B. on your Jury Verdict form if you find by a preponderance of evidence that Mr. Toulemonde was motivated, at least in part, to assign Plaintiff less favorable sales territories, clients, or accounts on the basis of national origin. You should answer “Yes” to both Questions 2.A. and 2.B. if you find by a preponderance of evidence that both Mr. Toulemonde and Mr. Eisenhart were motivated, at least in part, to assign Plaintiff less favorable sales territories, clients, or accounts on the basis of national origin.

You should answer “Yes” to Question 3.A. on your Jury Verdict form if you find by a preponderance of evidence that Mr. Eisenhart was motivated, at least in part, to assign Plaintiff less favorable sales territories, clients, or accounts on the basis of gender. You should answer “Yes” to Question 3.B. on your Jury Verdict form if you find by a preponderance of evidence that Mr. Toulemonde was motivated, at least in part, to assign Plaintiff less favorable sales territories, clients, or accounts on the basis of gender. You should answer “Yes” to both Questions 3.A. and 3.B. if you find by a preponderance of evidence that both Mr. Toulemonde and Mr. Eisenhart were motivated, at least in part, to assign Plaintiff less favorable sales territories, clients, or accounts Ms. Belabbas on the basis of gender.

You should answer “Yes” to Question 4.A. on your Jury Verdict form if you find by a preponderance of evidence that Mr. Eisenhart was motivated, at least in part, to assign Plaintiff less favorable sales territories, clients, or accounts on the basis of ethnicity. You should answer “Yes” to Question 4.B. on your Jury Verdict form if you find by a preponderance of evidence that Mr. Toulemonde was motivated, at least in part, to assign Plaintiff less favorable sales territories, clients, or accounts on the basis of ethnicity. You should answer “Yes” to both Questions 4.A. and 4.B. if you find by a preponderance of evidence that both Mr. Toulemonde and Mr. Eisenhart were motivated, at least in part, to assign Plaintiff less favorable sales territories, clients, or accounts Ms. Belabbas on the basis of ethnicity.

If you find that Plaintiff failed to prove that a protected characteristic was a motivating factor in the decision to assign Plaintiff less favorable sales territories, clients, or accounts, then Plaintiff has failed to meet her burden and you must find in favor of Defendants on this claim.

Specifically, if you find that Plaintiff failed to prove that race was a motivating factor in the decision to assign Plaintiff less favorable sales territories, clients, or accounts, then Plaintiff has failed to meet her burden and you must find in favor of Defendants on this claim. In this case, you would answer “No” to Questions 1.A and 1.B. on your Jury Verdict Form.

If you find that Plaintiff failed to prove that national origin was a motivating factor in the decision to assign Plaintiff less favorable sales territories, clients, or accounts, then Plaintiff has failed to meet her burden and you must find in favor of Defendants on this claim. In this case, you would answer “No” to Questions 2.A and 2.B. on your Jury Verdict Form.

If you find that Plaintiff failed to prove that gender was a motivating factor in the decision to assign Plaintiff less favorable sales territories, clients, or accounts, then Plaintiff has failed to meet her burden and you must find in favor of Defendants on this claim. In this case, you would answer “No” to Questions 3.A and 3.B. on your Jury Verdict Form.

If you find that Plaintiff failed to prove that ethnicity was a motivating in the decision to assign Plaintiff less favorable sales territories, clients, or accounts, then Plaintiff has failed to meet her burden and you must find in favor of Defendants on this claim. In this case, you would answer “No” to Questions 4.A and 4.B. on your Jury Verdict Form.

J. Actual Participants

Neither Mr. Eisenhart nor Mr. Toulemonde can be found liable if they did not actually participate in illegal discriminatory action against Ms. Belabbas. If you conclude that neither Mr. Eisenhart nor Mr. Toulemonde were actual participants, then neither of them nor Inova are liable. Conversely, if either actually participated in discrimination in violation of federal or city law, then both the individual participant and Inova are liable.

K. Plaintiff's Retaliation Claim Against Defendants Under § 1981 and the New York City Human Rights Law

As stated previously in these instructions, Plaintiff brings claims for retaliation against Defendants under Section 1981 and the New York City Human Rights Law. Plaintiff claims that the Defendants retaliated against her by terminating her for complaining that Defendants were engaging in unlawful discrimination. To make out a claim of retaliation, Plaintiff must prove each of the following essential elements:

First, Plaintiff engaged in Protected Activity. In order to establish that she engaged in Protected Activity, Ms. Belabbas must establish that she complained that she was being treated differently because of her race, ethnicity, national origin, and/or gender. The complaints do not have to be formal. Likewise, the complaints do not need to have been made in writing – oral complaints are sufficient. It need only be clear from the context of Ms. Belabbas's complaints that Inova Software and/or Mr. Eisenhart and/or Mr. Toulemonde understood, or reasonably could have understood that she intended to complain about discrimination.

Plaintiff must have complained of discrimination based on a reasonable and good faith belief that she experienced discrimination on the basis of race, ethnicity, national origin, or gender. To succeed on this claim, Plaintiff is not required to prove that the conduct complained of was, in fact, discrimination on the basis of race, ethnicity, national origin, and/or gender. What Plaintiff must prove is that it was reasonable for her to believe that the underlying conduct that she opposed was discrimination on the basis of race, ethnicity, national origin, and/or gender, and that in fact she truly believed that the underlying conduct that she opposed was discrimination on the basis of race, ethnicity, national origin, and/or gender. You should find that Ms. Belabbas

engaged in protected activity if Defendants had a basis to realize that she was complaining about unlawful discrimination, irrespective of the actual words that she used in making her complaints.

Second, Plaintiff must prove that the Defendant you are considering was aware of Plaintiff's Protected Activity. In other words, Plaintiff must establish that Defendants had a reasonable basis to realize that she was complaining about unlawful discrimination, irrespective of the actual words that she used in making her complaints.

Third, Plaintiff must prove that Plaintiff was then subjected to an adverse employment action by the Defendant you are considering. Recall that both parties agree that termination is an adverse employment action, and therefore this third element is satisfied.

Fourth, Plaintiff must prove that her Protected Activity was the reason for the Defendant you are considering's decision to take the adverse action. To satisfy this element, it must be the case that the Defendant you are considering would not have taken the adverse action except as a response to, that is, but for the Plaintiff's protected activity. This is the standard under Section 1981.

A different standard applies to the New York City Human Rights Law. Under the New York City Human Rights Law, the protected activity has to be only a motivating factor in the adverse employment action decision. Remember, a motivating factor is a factor that plays some part in the Defendant's employment decision, even if the employer also has other, lawful motives.

The Defendant you are considering must have taken the adverse action because of an intent to retaliate against Plaintiff for complaining about employment discrimination.

Summary: If Plaintiff has proven as to the Defendant you are considering each of the elements required by a preponderance of the evidence, then as to that Defendant you must return a verdict for the Plaintiff. You should answer “Yes” to Question 10.A. if you find that each of the elements have been met by a preponderance of the evidence to the standard required by Section 1981 as to Mr. Eisenhart. You should answer “Yes” to Question 10.B. if you find that each of the elements have been met by a preponderance of the evidence to the standard required by the New York City Human Rights Law as to Mr. Eisenhart. You should answer “Yes” to Question 10.C. if you find that each of the elements have been met by a preponderance of the evidence to the standard required by Section 1981 as to Mr. Toulemonde. You should answer “Yes” to Question 10.D. if you find that each of the elements have been met by a preponderance of the evidence to the standard required by the New York City Human Rights Law as to Mr. Toulemonde. You should answer “Yes” to Questions 10.A., 10.B., 10.C., and 10.D. if each of the above elements have been met by a preponderance of the evidence as to both Mr. Eisenhart and Mr. Toulemonde.

Conversely, if the Plaintiff has not proven as to the Defendant you are considering each of the elements required by a preponderance of the evidence, then you must return a verdict for that Defendant. You should answer “No” to Question 10.A. if you do not find that each of the elements have been met by a preponderance of the evidence to the standard required by Section 1981 as to Mr. Eisenhart. You should answer “No” to Question 10.B. if you do not find that each of the elements have been met by a preponderance of the evidence to the standard required by the New York City Human Rights Law as to Mr. Eisenhart. You should answer “No” to Question 10.C. if you do not find that each of the elements have been met by a preponderance of

the evidence to the standard required by Section 1981 as to Mr. Toulemonde. You should answer “No” to Question 10.D. if you do not find that each of the elements have been met by a preponderance of the evidence to the standard required by the New York City Human Rights Law as to Mr. Toulemonde. If you do not find that each of the elements have been met as to either Mr. Eisenhart or Mr. Toulemonde, then you should answer “No” to Questions 10.A., 10.B., 10.C. and 10.D.

L. Plaintiff's Disability Discrimination Claim under the New York City Human Rights Law

In addition to her claims of discrimination on the basis of Plaintiff's race, ethnicity, national origin, and gender, Plaintiff has also brought claims that Defendants discriminatorily terminated her employment because of her disability in violation of the New York City Human Rights Law. It is unlawful to discriminate against an individual on the basis of disability under the New York City Human Rights Law. In order to prove her claim, Plaintiff must prove that Inova terminated her employment because of her alleged disability. First, you must determine whether Inova knew that Plaintiff suffered from a disability when they decided to terminate her employment. In order to establish that she suffered from a disability, Plaintiff must show that she experienced a "physical, medical, mental or psychological impairment, or [had] a history or record of such impairment." The New York City Human Rights Law further defines a "physical, medical, mental or psychological impairment" as:

- (1) "an impairment of any system of the body" or
- (2) "a mental or psychological impairment."

However, even if you determine Inova did not know that Plaintiff suffered from a disability, or if you determine that Plaintiff's medical condition did not constitute a disability, she can still establish her claim if she can prove that Inova perceived, or regarded her as, disabled. In other words, Defendants might have believed that she was disabled, even if her condition did not satisfy the legal definition of the term "disability." If you have found that Plaintiff has demonstrated that Inova knew that she had a disability, or that Inova perceived her as being disabled, you must then determine whether this was a "motivating factor" in their decision to

terminate her. In other words, Plaintiff must prove that her termination was motivated at least in part by her disability or because Defendants perceived her to be disabled.

Summary: If you find that Plaintiff has proved her claim of disability discrimination, as to the Defendant you are considering, then you must find in her favor as to her claim for disability discrimination under the New York City Human Rights Law. In this case, you should answer “Yes” to Question 8.A. if you find that Plaintiff has proved her claim of disability discrimination as to Mr. Eisenhart. You should answer “Yes” to Question 8.B. if you find that Plaintiff has proved her claim of disability discrimination as to Mr. Toulemonde. You should answer “Yes” to both Questions 8.A. and 8.B. if you find that Plaintiff has proved her claim of disability discrimination as to both.

Conversely, if you find that Plaintiff failed to prove that her alleged disability was a motivating factor in the termination, then you must find in favor of Defendant you are considering on this claim. In this case, you should answer “No” to Question 8.A. if you find that Plaintiff has failed to prove her claim of disability discrimination as to Mr. Eisenhart. You should answer “No” to Question 8.B. if you find that Plaintiff has failed to prove her claim of disability discrimination as to Mr. Toulemonde. You should answer “No” to both Questions 8.A. and 8.B. if you find that Plaintiff has failed to prove her claim of disability discrimination as to both.

M. At-Will Employment

When considering Plaintiff's claims, you should keep in mind that absent an employment contract, employment is "at-will." That is to say that the employer may terminate an employee at any time, with or without cause, so long as the reason for the termination is not an illegally discriminatory or retaliatory reason.

N. The Business Judgment Rule

The law allows an employer, such as Inova Software, broad discretion in the implementation of its legitimate business objectives, including the supervision and management of its employees and their work assignments. An employer is legally entitled to exercise its own business judgment when making a business decision. Neither you nor I can second guess that business decision.

In other words, Plaintiff may not prevail merely because you do not agree with Defendants' decisions or think the decisions were unfair, unjust or a mistake. The fact that an employer's decision may seem stupid, incorrect, unfair, unwise – or even that a business judgment was based on personal animosity – is irrelevant. The question is not whether Defendants' methods were sound, or their judgments the best ones or the right ones or the fair ones, or whether you would have done the same thing if you were in the employer's shoes at the time. Instead, the only issue before you is whether the Defendant you are considering was motivated by Plaintiff's race, ethnicity, national origin, gender, or disability, or acted in retaliation against Plaintiff's protected activity when making the decisions regarding Plaintiff's employment; not whether Defendants made the right decision.

O. Speculation

Although Plaintiff is not required to produce direct evidence of intentional discrimination or retaliation, Plaintiff's speculation, personal beliefs or opinions about Defendants' reasons for their actions are not a substitute for actual evidence. You may not use speculation to infer discrimination. Rather, in order for you to find in Plaintiff's favor on her discrimination claims, Plaintiff must offer non-conclusory evidence to prove that her race, ethnicity, national origin, gender, or disability played a role in any unfair treatment of the Plaintiff.

If you find that the Plaintiff has failed to offer non-conclusory evidence of discrimination based on Plaintiff's race, ethnicity, national origin, gender, or disability that can be connected to individual defendants Fritz Eisenhart and Gilles Toulemonde or the decisionmakers of Defendant Inova then you must find that the evidence weights in favor of Defendants and find in favor of Defendants. Defendant's speculation, personal beliefs, or opinions about the reasons for their actions likewise are not a substitute for actual evidence.

IV. DAMAGES

A. General Damages Instructions

I am about to instruct you on the issue of damages. The fact that I am giving you these instructions should not be considered as an indication of my view as to which party is entitled to your verdict in this case.

If you find that Ms. Belabbas has satisfied her burden of proving that Defendants discriminated against her, then you must consider the issue of what damages Defendants should pay her.

If you find that Plaintiff has not satisfied her burden of proof as to any claim, you may not consider the question of damages as to that claim, and you must not answer any of the questions on the following pages.

Ms. Belabbas has the burden of proving the nature, extent, duration, and consequences of the damages sought. This means that Ms. Belabbas must establish that she actually incurred a loss of earnings. She must also establish the amount of her individual losses with reasonable certainty; however it is not necessary that she prove the amount of damages with mathematical precision. If you should find that Ms. Belabbas is entitled to damages, you may award Ms. Belabbas only an amount that will reasonably compensate her for the damage you find she has sustained as a direct cause of Defendants' actions or inactions.

Based on the causes of action Ms. Belabbas has alleged, there are four types of damages you may award her:

(1) **Economic Damages** – These are the damages directly related to lost or reduced income, wages and other compensation that Ms. Belabbas may be entitled to recover. In determining economic damages, you will have to separately consider Back Pay Damages (damages up to the date of the trial) and Front Pay Damages (damages from the date of the trial going forward);

(2) **Compensatory Damages** – This type of damages provides an award to compensate Ms. Belabbas for pain and suffering and emotional distress, including feelings of depression, anxiety and/or humiliation, and/or harm to reputation that she may have suffered;

(3) **Punitive Damages** – These are damages that you may award to punish Defendants for especially egregious conduct and to deter Defendants and others from engaging in similar conduct in the future; and

(4) **Nominal Damages** – These are damages, which are typically a minimal amount, awarded because a statute or law has been violated without any regard to the actual damages that Ms. Belabbas may have suffered as a result of that violation.

B. Back Pay

If you determine that Ms. Belabbas was terminated as a result of unlawful discrimination or retaliation and/or that she was assigned less favorable territories as a result of discrimination, she may recover the wages and other benefits she would have earned if she had not been subject to unlawful conduct by Defendants. An award of back pay runs from the date of the unlawful conduct to the date of the judgment in this action. Thus, if you determine that Ms. Belabbas was assigned less favorable sales territories because of discriminatory reasons, you must determine the total compensation she would have earned during her employment had she not been assigned such territories. Similarly, if you determine that Ms. Belabbas was terminated as a result of unlawful discrimination and/or retaliation, you must determine the total amount of compensation Ms. Belabbas would have earned between May 3, 2016 and October 15, 2019. You should also include any anticipated pay raises, step increases, and other compensation increases or payments necessary to make Ms. Belabbas whole in determining your total award of back pay damages.

Write the total dollar amount of money, if any, that Ms. Belabbas is owed in back pay damages in the space provided in Question 12.A. of your Jury Verdict form. You may calculate this amount from Questions 12.B. and 12.C.

The total dollar amount of backpay should be separated according to the cause of Plaintiff's damages. Write how many dollars of this total, if any, are attributable to Defendants' decision to assign her less favorable sales territory, clients, or accounts in the space provided in Question 12.B. of your Jury Verdict form. Write how many dollars of this total, if any, are attributable to Defendants' decision to terminate Plaintiff's employment in the space provided in Question 12.C. of your Jury Verdict form. The answers to Questions 12.B. and 12.C. added together must total

the same dollar amount that you wrote as the answer to Question 12.A. This avoids duplication of damages.

Next, you, the jury must determine the damages amount, if any, for each Defendant. Write how many dollars of this total, if any, is attributable to Defendant Mr. Eisenhart in the space provided in Question 12.D. of your Jury Verdict form. Write how much back pay, if any, is attributable to Defendant Mr. Toulemonde in the space provided in Question 12.E. of your Jury Verdict form. Write how much back pay, if any, is attributable to Defendant Inova Software in the space provided in Question 12.F. of your Jury Verdict form. No answer in questions 12.D., 12.E., and 12.F. can exceed the answer in Question 12.A. Since each Defendant may be, but is not necessarily, liable for the full amount of back pay, it is for the jury, based on the evidence in the case, to decide the amount of back pay damages attributable to each Defendant. While the Plaintiff can only recover one time for the total amount of back pay, your individual award totals can exceed the total in Question 12.A. This is what is called joint and severable liability.

C. Front Pay

If you determine that Ms. Belabbas was terminated as a result of unlawful discrimination or retaliation, she also may recover front pay for wages and other benefits she would have earned in the future if she had not been terminated. Front pay is separate and distinct from back pay. The purpose of front pay is to compensate an employee who has been discriminated or retaliated against for any continuing harm caused by her employer's unlawful conduct.

In calculating front pay, you must determine the total salary Ms. Belabbas would have received from the date of your verdict until the date she would have ended her employment with Inova if Defendants had not terminated her. In other words, you must determine how many years into the future that compensation should be awarded based on how long you believe Ms. Belabbas would have continued working for Inova if Defendants had not terminated her. You should also include any anticipated pay raises, step increases, and other compensation increases or payments necessary to make Ms. Belabbas whole in determining your total award of front pay damages. You may consider the number of years between the verdict up to the anticipated date that Ms. Belabbas would be eligible for retirement.

In determining the amount that Ms. Belabbas would have earned from Inova, you must first determine whether Defendants assigned Ms. Belabbas less favorable sales territories as a result of unlawful discrimination. If you find that Ms. Belabbas has proven this aspect of her claim, you should use the amount of compensation that Ms. Belabbas would have earned had she not been assigned such unfavorable sales territories.

Once you have determined the time frame for awarding front pay, and what Ms. Belabbas would have earned from Inova during that period of time, you should consider any compensation

Ms. Belabbas can be expected to earn from any future employment if she makes good faith attempts to maximize her income. Then subtract the amount that Ms. Belabbas can be expected to actually earn from future employers, from the compensation she would have received if she remained employed at Inova. This amount represents the front pay damages you can award.

Ms. Belabbas seeks front pay damages based on her unlawful termination. Therefore, if you determine that Ms. Belabbas was terminated as a result of discrimination and/or retaliation, you must determine whether to award front pay damages to her, and, if you do award front pay damages, you must decide the amount.

Write the total dollar amount of money, if any, that Ms. Belabbas is owed in front pay damages in the space provided in Question 13.A. of your Jury Verdict form. This number may be computed from your answers to Questions 13.B. and 13.C.

The dollar amount of front pay should be separated according to the cause of Plaintiff's damages. Write how many dollars of this total, if any, are attributable to Defendants' decision to assign her less favorable sales territory, clients, or accounts in the space provided in Question 13.B. of your Jury Verdict form. Write how many dollars of this total, if any, are attributable to Defendants' decision to terminate Plaintiff's employment in the space provided in Question 13.C. of your Jury Verdict form. The answers to Questions 13.B. and 13.C. added together must total the same dollar amount that you wrote as the answer to Question 13.A. This avoids the duplication of damages.

Next, you, the jury, must determine the damages amount, if any, for each Defendant. Write how much front pay, if any, is attributable to Defendant Mr. Eisenhart in the space provided in Question 13.D. of your Jury Verdict form. Write how much front pay, if any, is attributable to

Defendant Mr. Toulemonde in the space provided in Question 13.E. of your Jury Verdict form. Write how much front pay, if any, is attributable to Defendant Inova Software in the space provided in Question 13.F. of your Jury Verdict form. Since each Defendant may be, but is not necessarily, liable for the full amount of front pay, it is for the jury, based on the evidence in the case, to decide the amount of front pay damages attributable to each Defendant. While the Plaintiff can only recover one time for the total amount of front pay, your individual award totals can exceed the total in Question 13.A. This is what is called joint and severable liability.

D. Mitigation of Damages

Any person who claims damages as a result of an allegedly wrongful act of another has a duty under the law to use reasonable diligence under the circumstances to “mitigate,” or minimize, those damages. In other words, since Plaintiff claims damage as a result of Defendants’ alleged wrongful acts, she has a duty, under the law, to take all reasonable steps to seek out, and take advantage of suitable/comparable employment opportunities.

Unlike the other claims in these instructions, on the issue of mitigation, Defendants bear the burden of proof and must demonstrate, by a preponderance of the evidence, that suitable/comparable work exists and that the employee has not made reasonable efforts to find it. An employer however is released from the duty to establish comparable/suitable work exists if they can prove that the employee made no reasonable efforts to seek such employment. Therefore, the first question is, has the Defendant proven by a preponderance of the evidence that the Plaintiff failed to make reasonable efforts to find suitable/comparable employment.

If you find that Defendants have proved that Ms. Belabbas failed to mitigate her damages, you should answer “Yes” to Question 14 in your Jury Verdict form. However, if you find that Defendants have failed to satisfy the burden, then you should answer “No” in response to Question 14 in your Jury Verdict form.

If you find by a preponderance of the evidence that Defendants have not demonstrated that Plaintiff failed to adequately mitigate her damages, you must next consider whether Plaintiff was able to obtain suitable/comparable employment to her employment with Defendants. If Plaintiff did, but resigned such employment for personal reasons or due to a change in personal circumstances, you must find that Plaintiff has failed to mitigate her damages with respect to front

pay, and decline to award her any front pay damages. By contrast, if you find that Plaintiff resigned from such employment due to intolerable or unreasonable working conditions or as part of an earnest search for better employment, you must find that Plaintiff has adequately mitigated her damages with respect to front pay.

The question whether Ms. Belabbas acted “reasonably” with respect to mitigation of damages is one for you to decide, as sole judges of the facts. Although the law will not allow an injured plaintiff to sit idly by when presented with an opportunity to mitigate, the law does not require an injured plaintiff to exert herself unreasonably or incur unreasonable expense in an effort to mitigate, and it is Defendants’ burden to prove that the damages reasonably could have been avoided.

If you have determined that Ms. Belabbas has failed to mitigate her damages, then it is important to establish the date on which that occurred in order to determine any recovery for front pay and/or back pay. Ms. Belabbas cannot recover either front pay or back pay for any period after which she had failed to mitigate her damages. Your answer, if you determine there was a failure to mitigate, according to the date after which that occurred, should be inserted in response to Questions 15 and 16, and you should proceed to answer Question 17 and follow the instructions in the Jury Verdict form.

If you have duplicated damages, indicate “Yes” for Questions 12.G. and 13.G. on your Jury Verdict form. Additionally, write the amount that has been duplicated below in Questions 12.H. and 13.H. respectively.

E. Compensatory Damages

If you find that Defendants discriminated against Plaintiff based on her race, ethnicity, national origin, gender or disability, or retaliated against her for her protected activity, then you must determine an amount that is fair compensation for Plaintiff's emotional pain and suffering that she has proved that she suffered as a result of Defendants' conduct. You may award compensatory damages only for injuries Plaintiff proves were caused by Defendants' wrongful conduct. The damages that you award must be fair compensation – no more and no less.

No evidence of the monetary value of such intangible things as pain and suffering has been, or need to be, introduced into evidence.

There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award that you make should be fair in light of the evidence presented at trial.

In determining the amount of damages you decide to award, you should be guided by common sense. You must use sound judgment in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation, or guesswork. On the other hand, the law does not require that Plaintiff prove the amount of her losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

Enter the total dollar amount, if any, that the Plaintiff is owed in compensatory damages in the space provided on Question 20.A. in your Jury Verdict form. Next, you, the jury, must determine the damages amount, if any, for each Defendant. Write how much of the compensatory damages, if any, is attributable to Defendant Mr. Eisenhart in the space provided

in Question 20.B. of your Jury Verdict form. Write how much of the compensatory damages, if any, is attributable to Defendant Mr. Toulemonde in the space provided in Question 20.C. of your Jury Verdict form. Write how much of the compensatory damages, if any, is attributable to Defendant Inova Software in the space provided in Question 20.D. of your Jury Verdict form. Since each Defendant may be, but is not necessarily, liable for the full amount of compensatory damages, it is for the jury, based on the evidence in the case, to decide the amount of compensatory damages attributable to each Defendant. While the Plaintiff can only recover one time for the total amount of compensatory damages, your individual award totals can exceed the total in Question 20.A. This is what is called joint and severable liability.

F. Speculative Damages

You may not speculate, guess, or infer damages. Damages must be reasonable and based upon the evidence before you. You must determine the appropriate amount of damages, if any, based upon the evidence presented and not because you feel sympathy for Plaintiff.

G. Duplicative Damages are Not Allowed

You may not award damages more than once for the same injury. For example, if Plaintiff were to prevail on two different theories and establish a one-dollar injury, you are not permitted to award Plaintiff one dollar on each theory. Plaintiff is not entitled to recover more than you determine she has lost. For example, if you choose to award Plaintiff damages under her discrimination and/or retaliation claims, you must consider the amount awarded in such a manner that Plaintiff does not receive a greater award than the loss she has proven to have sustained. If you have incorrectly allocated damages, resulting in some duplication, indicate that this has occurred in your Jury Verdict form by answering yes to Questions 12.G or 13.G. and writing how much was duplicated and where in the following questions 12.H. and 13.H.

H. Nominal Damages

If you return a verdict for Plaintiff on a discrimination or retaliation claim but find that she has failed to prove that she has suffered any actual damages, then you must return an award of nominal damages not to exceed the sum of one dollar. Nominal damages must be awarded when a plaintiff has been deprived of a right but has suffered no actual damages as a natural consequence of that deprivation. Therefore, if you find that Plaintiff has suffered no damages as a result of Defendants' conduct other than the fact of a deprivation of a legal right, you should award nominal damages not to exceed one dollar. You may not award both nominal and compensatory damages. Plaintiff either was measurably injured, in which case you would award compensatory damages, or not, in which case you would award nominal damages. If you find that Plaintiff should ONLY be awarded Nominal damages, write \$1 in the space provided for Question 22 in your Jury Verdict form.

I. Punitive Damages

Plaintiff claims that the acts of Defendants were done with malice or reckless indifference to Plaintiff's federally protected rights and that as a result there should be an award of what are called "punitive" damages. A jury may award punitive damages to punish a defendant, or to deter the defendant and others like the defendant from committing such conduct in the future.

An award of punitive damages under Section 1981 is permissible against Mr. Eisenhart and/or Mr. Toulemonde in this case only if you find by a preponderance of the evidence that Mr. Eisenhart and/or Mr. Toulemonde personally acted with malice or reckless indifference to Plaintiff's federally protected rights. An action is with malice if a person knows that it violates the federal law prohibiting discrimination and does it anyway. An action is with reckless indifference if taken with knowledge that it may violate the law.

An award of punitive damages under the New York City Human Rights Law is only appropriate if you find by a preponderance of the evidence that Mr. Eisenhart and/or Mr. Toulemonde engaged in discrimination with willful or wanton negligence, or recklessness, or a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard. This standard is different and lower than the standard under Section 1981.

An award of punitive damages is discretionary; that is, if you find that the legal requirements for punitive damages are satisfied then you may decide to award punitive damages, or you may decide not to award them. I will now discuss some considerations that should guide your exercise of this discretion.

If you have found the elements permitting punitive damages, as discussed in this instruction, then you should consider the purposes of punitive damages. The purposes of punitive

damages are to punish a defendant for a malicious or reckless disregard of federal rights, or to deter a defendant and others like the defendant from doing similar things in the future, or both. Thus, you may consider whether to award punitive damages to punish Defendants. You should also consider whether actual damages standing alone are sufficient to deter or prevent Defendants from again performing any wrongful acts that may have been performed. Finally, you should consider whether an award of punitive damages in this case is likely to deter others from performing wrongful acts similar to those Defendant(s) may have committed.

If you decide to award punitive damages, then you should also consider the purposes of punitive damages in deciding the amount of punitive damages to award. That is, in deciding the amount of punitive damages, you should consider the degree to which Defendant(s) should be punished for the wrongful conduct at issue in this case, and the degree to which an award of one sum or another will deter Defendant(s) or others from committing similar wrongful acts in the future.

You may assess punitive damages against any, or all, of the Defendants, or you may refuse to impose punitive damages. If punitive damages are imposed on more than one Defendant, the amounts for each may be the same or they may be different.

Enter the total dollar amount, if any, that the Plaintiff is owed in punitive damages in the space provided on Question 21.A. in your Jury Verdict form. Next, you, the jury, must determine the damages amount, if any, for each Defendant. Write how much of the punitive damages, if any, is attributable to Defendant Mr. Eisenhart in the space provided in Question 21.B. of your Jury Verdict form. Write how much of the punitive damages, if any, is attributable to Defendant Mr. Toulemonde in the space provided in Question 21.C. of your Jury Verdict form. Write how much

of the punitive damages, if any, is attributable to Defendant Inova Software in the space provided in Question 21.D. of your Jury Verdict form. Since each Defendant may be, but is not necessarily, liable for the full amount of punitive damages, it is for the jury, based on the evidence in the case, to decide the amount of punitive damages attributable to each Defendant. While the Plaintiff can only recover one time for the total amount of punitive damages, your individual award totals can exceed the total in Question 21.A. This is what is called joint and severable liability.

V. VERDICT

Finally, ladies and gentlemen, we come to the point where we will discuss the form of your verdict and the process of your deliberations. You will be taking with you to the jury room a verdict form that will reflect your findings. The verdict form reads as follows:

[Read Verdict Form]

You will be selecting a presiding juror after you retire to the jury room. That person will preside over your deliberations and be your spokesperson here in court. When you have completed your deliberations, your presiding juror will fill in and sign the verdict form.

Each of you should deliberate and vote on each issue to be decided.

Before you return your verdict, however, each of you must agree on the answer to each question so that each of you will be able to state truthfully that the verdict is yours.

The verdict you return to the Court must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to each answer. Your verdict must be unanimous.

It is your duty to consult with one another and to reach an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and to change your mind if you are convinced that you were wrong. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

We will be sending with you to the jury room all of the exhibits that have been marked and received in the case. You may not have seen all of these previously and they will be there for your review and consideration. You may take a break before you begin deliberating, but do not begin to deliberate and do not discuss the case at any time unless all of you are present together in the jury room. Some of you have taken notes. I remind you that these are for your own individual use only and are to be used by you only to refresh your recollection about the case. They are not to be shown to others or otherwise used as a basis for your discussion about the case.

If a question arises during deliberations and you need further instructions, please write your question on a sheet of paper, knock on the door of the jury room, and give the question to the court security officer.

I will review your question, and after consulting with all counsel in the case, will either respond to your question in writing or have you return to the courtroom for further oral instructions. Please understand that I may only answer questions about the law and I cannot answer questions about the evidence. I caution you, however, that with regard to any message or question you might send me, you should not tell me your numerical division at any time.

I remind you that you are to decide this case based only on the evidence you have heard in court and on the law I have given you. You are prohibited from considering any other information and you are not to consult any outside sources for information. You must not communicate with or provide any information, photographs, or video to anyone by any means about this case or your deliberations. You may not use any electronic device or media, such as a telephone, cell phone, smart phone or computer; the Internet, any text or instant messaging service; or any chat room,

blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate with anyone or to conduct any research about this case.

VI. CONTENTS

I. GENERAL INSTRUCTIONS.....	1
A. Organization Not to Be Prejudiced	3
A. Organizations/Corporations Act Through Their Authorized Employees or Agents.....	4
B. Burden of Proof and Consideration of the Evidence.....	5
C. Credibility and Weighing of Evidence.....	6
D. Ms. Ling’s Testimony	8
E. Impeachment — Inconsistent Statements or Conduct	9
F. Direct and Circumstantial Evidence	10
G. Evidence	11
I. “Inferences” Defined	13
J. Statements and Arguments of Counsel	14
K. Totality of the Evidence	15
L. Limited Admission of Evidence.....	16
M. Juror Notes	17
N. Comments by the Court.....	18
O. Deposition Testimony	19
P. Demonstratives	20
II. STATEMENT OF THE CASE.....	21
A. Plaintiff’s Statement of the Case.....	21
B. Defendants’ Statement of the Case	21
III. APPLICABLE LAW	22
A. Legal Theories of the Case.....	22
B. Nature of the Action/Separate Consideration of Each Claim	23
C. Intent & Pretext	24
D. Analysis of Section 1981 and the New York City Human Rights Law	27
E. Section 1981 Law.....	28
F. The Purpose of the Statutes.....	29
G. Plaintiff’s Discrimination Claims under Section 1981 and the New York City Human Rights Law	30
H. Termination is an Adverse Employment Action.....	32

I.	Discrimination Claims Based on Assignment of Sales Territories, Clients, or Accounts May Be an Adverse Employment Action	36
J.	Actual Participants	41
K.	Plaintiff’s Retaliation Claim Against Defendants Under § 1981 and the New York City Human Rights Law	42
L.	Plaintiff’s Disability Discrimination Claim under the New York City Human Rights Law 46	
M.	At-Will Employment.....	48
N.	The Business Judgment Rule	49
O.	Speculation.....	50
IV.	DAMAGES.....	51
A.	General Damages Instructions	51
B.	Back Pay.....	53
C.	Front Pay	55
D.	Mitigation of Damages.....	58
E.	Compensatory Damages.....	60
F.	Speculative Damages	62
G.	Duplicative Damages are Not Allowed.....	63
H.	Nominal Damages	64
I.	Punitive Damages	65
V.	VERDICT	68