

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION**

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EQUAL EMPLOYMENT OPPORTUNITY	)	
COMMISSION,	)	
Plaintiff,	)	
v.	)	No. 2:13-cv-2712-SHL-cgc
	)	
MEMPHIS FOODS, L.L.C. d/b/a KFC,	)	
Defendant.	)	

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**JURY INSTRUCTIONS**

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Ladies and gentlemen of the jury, we have now come to the point in the case when it is my duty to instruct you in the law that applies to the case and you must follow the law as I provide it to you.

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 are not to single out any particular part of the instructions and ignore the rest, but rather you are to consider all the instructions as a whole and regard each in the light of all the others.

## I. GENERAL INSTRUCTIONS

### Role of EEOC in Enforcing Title VII

The Equal Employment Opportunity Commission (the “EEOC”) is the Plaintiff in this case. The EEOC is an agency of the United States Government that is responsible for enforcing the federal laws prohibiting employment discrimination, including Title VII of the Civil Rights Act of 1964, as amended (“Title VII”). When a person feels that his or her employer has discriminated against them, that person may file a charge of discrimination with the EEOC. A person who files such a charge is called a Charging Party. The EEOC has the authority to file a lawsuit against an employer on behalf of the Charging Party and other individuals harmed by the alleged discriminatory practices. In a lawsuit against an employer, the EEOC seeks to enforce federal law on behalf of the public policy of the United States, otherwise known as the public interest. The EEOC may seek remedies for the Charging Party. The EEOC brings this lawsuit on behalf of Ornessia Golden (“Ms. Golden”).

Corporate Defendant:  
All Persons Equal Before the Law

In this case, the Defendant, Memphis Foods, LLC (“Memphis Foods”), is a corporation. The fact that a corporation is a party must not prejudice you in your deliberations or in your verdict.

You may not discriminate between corporations and natural individuals. Both are persons in the eyes of the law, and both are 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. A corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, partnerships, unincorporated associations, and other organizations, stand equal before the law, and are to be dealt with as equals in a court of justice.

While Memphis Foods is the Defendant in this case, that does not mean that only the actions of one body can be considered by you in determining its liability in this case. A corporation acts not only through the policies and decisions that it makes, but also through its designated supervisory employees, such as its managers, Personnel Department, and Human Resources Department and others designated by Memphis Foods 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 Memphis Foods employees were authorized to act on its behalf.

Nature of the Claims

The EEOC brought this lawsuit in 2013 after a sexual harassment charge was filed against Defendant Memphis Foods, LLC. EEOC alleges that Memphis Foods subjected Ms. Golden to a sexually hostile work environment through one of its managers, McKinley Howard (“Mr. Howard”). The EEOC further alleges that after Ms. Golden complained about the sexual harassment, Memphis Foods retaliated against her by preventing her from reporting to work and then terminating her. Defendant Memphis Foods denies these claims. It will be your responsibility to decide whether the Plaintiff EEOC has proven its claims against the Defendant by a preponderance of the evidence.

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, as in this case, the Defendant denies the material allegations of the Plaintiff's claim, the law places upon the Plaintiff the burden of supporting and making out its claim upon every essential element of its claim by the greater weight or preponderance of the evidence.

"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. To establish "preponderance," 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 — in this case, the Plaintiff — must fail.

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

Weighing the Evidence

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

You will note the manner and demeanor of witnesses 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, among other things, 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 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. This list is not exhaustive.

If a witness is shown to have knowingly testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you may think it deserves. An act or omission is done "knowingly" if it is done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

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 in life, in weighing the testimony of the witnesses who have appeared before you in this case. If there is

a conflict in the testimony of the 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 which you are not able to reconcile, following these instructions, then it is with you absolutely to determine which ones 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 greater weight or preponderance of the evidence in a case is not determined by the number of witnesses testifying to a particular fact or a particular state 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 the jury must find against the Plaintiff, who bears the burden of proof.

Request for Admission

During the course of the trial you may have heard reference to “requests for admission.”

An admission is an acknowledgment of a fact by a party. You are to consider information admitted in response to a request for admission to be true for the purposes of this case.



Direct and Circumstantial Evidence

There are two kinds of evidence: direct and circumstantial. Direct evidence is testimony by a witness about what that witness personally saw or 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.

Statements of Counsel

You must not consider as evidence any statements of counsel made during the trial or any demonstrative aids used by counsel. 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 by the court. Such matter is to be treated as though you never heard it.

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

Totality of the Evidence

The jury may consider all 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 which 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.

Theories of the Parties

This is a case about alleged sexual harassment and retaliation in employment. In this case, the EEOC alleges that Ms. Golden was subjected to a hostile work environment because of her sex/gender in violation of Title VII and that she was retaliated against for complaining about the harassment.

Defendant Memphis Foods denies Plaintiff's allegation that Ms. Golden was subjected to a hostile work environment or that it retaliated against her. Memphis Foods contends that Ms. Golden was not subject to unwelcome sexual harassment and that Memphis Foods did not retaliate against her for complaining about the alleged sexual harassment.

### III. GENERAL INSTRUCTIONS ON THE APPLICABLE LAW

Turning now to the legal theories in the case, it is my duty to tell you what the law is. If any lawyer 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. However, it is your duty, and yours alone, to determine what the facts are and after you have determined what the facts are, to apply those facts to the law as I give it to you, free from any bias, prejudice or sympathy, either one way or the other.

Title VII Language – Sex Discrimination

The EEOC first alleges that Ms. Golden was subjected to a hostile work environment based on sexual harassment by Memphis Foods in violation of Title VII. The language of Title VII that is applicable to Plaintiff's discrimination claim provides:

It shall be an unlawful employment practice for an employer –

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his or her compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .

42 U.S.C. § 2000e-2(a)(1).

Title VII – Sex Discrimination Policy

The policy of Title VII is to provide a work environment free from discrimination based on sex, race, color, national origin, or religion. Under Title VII, it is illegal to discriminate against an employee because of the employee's gender.

An employee is not entitled to a friendly, congenial, or pleasant work place. Title VII does not create a general civility code. In other words, Title VII does not create a federal remedy for all offensive language and conduct in the workplace, nor does it require refinement or sophistication, or a happy workplace. Title VII only guarantees a workplace free of unlawful discrimination.

Hostile Work Environment – Elements of Proof

In order for it to recover on its hostile work environment claim based on sexual harassment under Title VII, the EEOC must prove the following elements by a preponderance of the evidence:

1. That Ms. Golden was a member of a protected class;
2. That Ms. Golden was subjected to unwelcome harassment;
3. That the harassment was based on Ms. Golden's gender;
4. That the harassment created both an objectively and subjectively hostile work environment;
5. That Memphis Foods is liable or vicariously liable for the harassment.

Remember that the individuals perpetrating the discrimination must have been employed by Memphis Foods in a managerial capacity and must have been acting within the course and scope of their employment.



In determining whether or not Ms. Golden was subjected to a hostile work environment based on her sex/gender, you, the jury, must decide if the conduct of the Defendant was severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive.

Hostile environment sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, comments with sexual overtones, unwanted touching of the body, or other verbal or physical sex-based conduct that unreasonably interferes with the individual's work performance or creates an intimidating, hostile, or offensive working environment.

Harassment is unwelcome and hostile if, considering all the evidence, it is sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and to create an abusive work environment, or unreasonably interfere with an employee's work performance.

The more severe the conduct, the less pervasive it must be for you to find that it is hostile.

In determining whether conduct is hostile, you may consider whether:

1. The conduct was verbal, physical, or both;
2. The conduct occurred one time or repeatedly; and
3. The conduct was plainly offensive.

Harassment Unwelcome

Plaintiff must prove by a preponderance of the evidence that the alleged harassment was unwelcome. In determining whether the alleged harassment was unwelcome, you may consider whether Plaintiff participated in the alleged harassment. In other words, if Ms. Golden herself engaged in the conduct for which she is now complaining, or solicited, or incited it, you may determine that the alleged harassment was not unwelcome.

To state the law another way, in order to find that the conduct at issue was unwelcome, you must find that the Plaintiff has proved by a preponderance of the evidence that Ms. Golden did not solicit or invite the conduct of Mr. Howard and regarded the conduct as undesirable or offensive. It is not sufficient for Ms. Golden to simply state after the fact that the conduct was unwelcome. She must have shown by her own conduct at the time that the conduct of Mr. Howard was unwelcome.

Harassment “Because of Sex”

Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at discrimination “because of sex.” Plaintiff must prove that the harassment actually constituted discrimination because of Ms. Golden’s sex. In other words, Plaintiff must prove by a preponderance of the evidence that Ms. Golden was harassed specifically because she is female. Plaintiff must prove that the alleged harasser was motivated by Ms. Golden’s gender. In other words, if Mr. Howard’s conduct towards male co-workers was the same as towards Ms. Golden, you may determine that the alleged harassment was not “because of sex.” Any alleged harassment that was motivated by any reason other than Ms. Golden’s gender is not illegal.

Objective Standard

In evaluating Plaintiff's hostile work environment based on sexual harassment, you may also consider the following factors:

1. The total physical environment of Ms. Golden's work area;
2. The degree and type of behavior that filled the environment of the workplace, both before and after Ms. Golden arrived;
3. The reasonable expectations of Ms. Golden upon entering the environment;
4. The nature of the unwelcome acts or words;
5. The frequency of the offensive encounters;
6. The severity of the conduct;
7. The context in which the sexual harassment occurred;
8. Whether the conduct was unwelcome;
9. The effect on Ms. Golden's psychological well-being;
10. Whether the conduct was physically threatening;
11. Whether the conduct was merely an offensive utterance; and
12. Whether it unreasonably interfered with Ms. Golden's work performance.

In determining whether a hostile work environment existed, you must consider the evidence from the perspective of a reasonable person in the position of Ms. Golden. This is an objective standard, and you must look at the evidence from the perspective of a reasonable person's reaction to a similar environment under similar circumstances. You cannot view the evidence from the perspective of an overly sensitive person. Rather, you must evaluate the total circumstances and determine whether the alleged harassing behavior could be objectively

classified as the kind of behavior that would alter the conditions of employment and create a hostile or offensive working environment or unreasonably interfere with a person's performance of her job duties.

Subjective Standard

I instruct you that you must also determine whether Ms. Golden perceived that the environment was hostile, that is, that Ms. Golden subjectively found the conduct at Memphis Foods to be severe and pervasive. Even if the objective (i.e., reasonable person) hostile environment element just discussed has been proven by the greater weight or preponderance of the evidence, if Ms. Golden herself did not perceive the environment to be a hostile environment as defined, then she cannot recover under this theory. This element, like every other element described in these instructions, must be established by the greater weight or preponderance of the evidence before you can return a verdict for Ms. Golden.

Remember, both the subjective and objective elements of hostile work environment must be proven by the greater weight or preponderance of the evidence. If either is not proven, then you must return a verdict for the Defendant.

Employer Liability

To establish her claim of a hostile work environment based on sex/gender discrimination, the plaintiff must prove, by a preponderance of the evidence, that the defendant, Memphis Foods, is liable for a sexually hostile work environment. The appropriate standard in determining employer liability where a supervisor is involved is that it is not enough for an employer to take corrective action; employers have an affirmative duty to prevent discrimination by supervisors. Based upon the evidence presented in this case, Mr. Howard was a supervisor. This issue has been resolved and you do not need to further address this issue.

Vicarious Liability

If you find that McKinley Howard sexually harassed Ornessia Golden, you must determine whether the Defendant Memphis Foods is liable for his actions. Whether the Defendant is liable may depend on whether a tangible employment action was taken against Ms. Golden. A “tangible employment action” is a significant change in the employment relationship, such as firing, denial of a raise, bonus, promotion, overtime pay, or holiday pay, demotion, undesirable reassignment, substantial changes in the work schedule, or a decision causing a significant change in benefits.

Accordingly, if you find that Mr. Howard harassed Ms. Golden and that his harassing behavior culminated in a tangible employment action, Defendant is automatically liable for discrimination under Title VII.



Tangible Employment Actions

Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. These actions are significant changes in employment status such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, a change in benefits, or other factors unique to a particular situation.

Effect if Tangible Employment Action is Taken by a Supervisor

If you find by a preponderance of the evidence that Mr. Howard harassed Ms. Golden and you find by a preponderance of the evidence that the harassing behavior culminated in a tangible employment action, then Defendant is automatically vicariously liable.

Effect if no Tangible Employment Action Taken

If you find that no tangible employment action was taken against Ms. Golden, and you find by a preponderance of the evidence that McKinley Howard subjected Ms. Golden to severe or pervasive discrimination because of her sex/gender, Defendant will be liable for the discrimination unless the Defendant proves by a preponderance of the evidence that:

1. The Defendant exercised reasonable care to both prevent and correct promptly any discriminating behavior; and

2. The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the Defendant or to otherwise avoid harm.

Factors in determining whether an employer has exercised reasonable care to prevent discrimination include:

1. Whether Defendant has disseminated a meaningful and effective policy on discrimination;

2. Whether Defendant's management made meaningful and effective efforts to monitor the conduct of its supervisors;

3. Whether the anti-discriminatory policy includes a credible assurance that the discriminating supervisors can be bypassed in registering complaints; and

4. Whether employees have been trained regarding their rights and responsibilities under the antidiscrimination policy.

Title VII Language – Retaliation

The EEOC also alleges that Memphis Foods retaliated against Ms. Golden because she complained about the sexual harassment she allegedly suffered on the job in violation of Title VII. The language of Title VII that is applicable to Plaintiff's retaliation claim provides:

(a) It shall be an unlawful employment practice for an employer to discriminate against any of [its] employees. . . because [the employee] has opposed any practice made an unlawful employment practice by [Title VII], or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].

42 U.S.C § 2000e-3(a).

Retaliation – Elements of Proof

To establish a case of unlawful retaliation, the Plaintiff EEOC must prove, by a preponderance of the evidence, each one of the following elements:

1. That Ms. Golden engaged in protected activity by making a complaint of discrimination to persons of authority within the company, opposing the discrimination, or participating in an investigation into discrimination;
2. That Defendant had knowledge of the claimant's protected activity;
3. That thereafter, Ms. Golden suffered an adverse employment action; and
4. That there was a causal connection between Ms. Golden's protected activity and the adverse employment action.

Protected Activity

Protected activity encompasses opposition to any practice rendered unlawful by Title VII, including sexual harassment. “Opposing” carries its ordinary meaning. That is, to resist or antagonize, to contend against, to confront or withstand. Making a complaint to a supervisor is deemed protected activity, even where the supervisor is also the alleged sexual harasser. An employee has engaged in the most basic form of protected activity when she asks her supervisor to stop the harassing conduct.

Protected activity also encompasses participation in an investigation of behavior made unlawful by Title VII. If a claimant made a charge, testified, assisted, or participated in any manner in an investigation or proceeding under Title VII, he or she has engaged in protected activity.

Employer's Knowledge

An employer is deemed to have notice of harassment reported to any supervisor or department head who has been authorized – or is reasonably believed by a complaining employee to have been authorized – to receive and respond to or forward such complaints to management. An employer is deemed to have knowledge even where the complaint is made to the supervisor who is also the alleged sexual harasser.

Adverse Employment Action

Adverse employment action is a materially adverse change in the terms and conditions of the claimant's employment. Mere inconvenience, alteration of job responsibilities, or a bruised ego is not enough for adverse employment action. An adverse employment action is a significant change in the employment relationship, such as firing, denial of a raise, bonus, promotion, overtime pay, or holiday pay, demotion, undesirable reassignment, substantial changes in the work schedule, or a decision causing a significant change in benefits. A termination is, in fact, an adverse employment action.



Causal Connection

Close timing between protected activity and an adverse action against Ms. Golden may provide the causal connection needed to make out a *prima facie* case of retaliation.

Retaliation – Burden Shifting Framework

If the government proves these preliminary elements of a retaliation claim, the burden shifts to Memphis Foods to articulate a legitimate, non-retaliatory reason for taking any adverse action against Ms. Golden. If Memphis Foods has articulated a legitimate, non-retaliatory reason, then you must determine if the Plaintiff has proven that the reason given by Defendant is a pretext and that the Defendant in fact was motivated by unlawful retaliation. In other words, the burden shifts to the EEOC to prove that Memphis Foods's reason was not the real reason for the action taken; the motivating factor was the Plaintiff's protected activity. Stated alternatively, the EEOC must prove that Memphis Foods fired Ms. Golden because she engaged in protected activity.

#### IV. DAMAGES

In this case, if you find for the Defendant on both Question No. 1 and Question No. 2 of the Verdict Form as to Plaintiff's claim of hostile work environment and retaliation, you will not be concerned with the question of damages on the Verdict Form. But if you find in favor of the Plaintiff on either or both of its claims you will then turn to the question of damages. It is my duty to instruct you as to the proper measure of damages to be applied in that circumstance.

The fact that I instruct you as to the proper measure of damages should not be considered as an indication of any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance in the event you should find in favor of the Plaintiff from a preponderance of the evidence in the case, in keeping with the other instructions I have given you.

Compensatory Damages

If you find in favor of Plaintiff EEOC, then you must award such sum as you find by the preponderance of the evidence will fairly and justly compensate Ms. Golden for any damages you find she sustained as a direct result of the sexual harassment and/or retaliation to which she was subjected during her employment at Memphis Foods.

Plaintiff's claim for damages for Ms. Golden includes damages for emotional distress. Emotional distress is mental distress, mental suffering or mental anguish. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, inconvenience, and loss of enjoyment of life. If you find that the Defendant discriminated against Ms. Golden by subjecting her to sexual harassment or retaliation, then you must determine an amount that is fair compensation for her damages.

You may award these damages only for injuries that are proved to have been caused by Defendant's allegedly wrongful conduct. The damages that you award must be fair compensation, no more and no less.

No evidence of monetary value of such intangible injuries such as pain and suffering, humiliation or inconvenience has been, or need be, introduced into evidence. A person claiming such injury need not prove injury by use of an expert. You may determine whether or not Ms. Golden suffered injuries by the testimony presented by witnesses. There is no exact standard for fixing the compensation to be awarded for these elements of damages. Any award you make should be fair in light of the evidence presented at trial.

In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award

damages based on sympathy, speculation, or guess work. On the other hand, the law does not require that the plaintiff prove the amount of these losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture, and you may not award damages under this instruction by way of punishment or through sympathy.

Backpay and Mitigation

Regarding lost wages, Title VII imposes a duty upon Ms. Golden to look for another position to mitigate or lessen her damages. The duty to mitigate, however, does not require her to go into another line of work, accept a demotion, or take a demeaning position. The burden of proving that Ms. Golden did not make reasonable efforts to mitigate her damages, which includes the burden of proving the availability of substantially equivalent employment, is on Defendant Memphis Foods.

To meet this burden, Memphis Foods must prove that:

- 1) There were substantially equivalent positions which were available; and
- 2) Ms. Golden failed to use reasonable care and diligence in seeking those positions.

Substantially equivalent positions are positions which would have provided “virtually identical” promotional opportunities, compensation, job responsibilities, working conditions, and status. The reasonableness of the effort to find substantially equivalent employment should be evaluated in light of Ms. Golden’s individual characteristics and the job market at the time. Ms. Golden is only required to make reasonable efforts to mitigate damages, a burden that is not onerous and does not require her to be successful in mitigation.

So, if you should find from a preponderance of the evidence that Ms. Golden failed to seek out or take advantage of an employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of her damages by the amount that could have been reasonably realized if she had taken advantage of such opportunity. If you determine that Ms. Golden is entitled to damages, you also must reduce these damages by what Ms. Golden actually earned since her termination.

Punitive Damages

If you find for the government on its claim that Memphis Foods harassed Ms. Golden due to her sex and/or retaliated against her because of her complaint, you may, but are not required to, award punitive damages to Ms. Golden as well. The purpose of punitive damages is to punish defendants and to deter defendants and others from committing similar acts in the future.

Punitive damages may be considered if, and only if, the Plaintiff has shown that the Defendant has acted with malice or with reckless indifference to federally protected rights of Ms. Golden not to be subjected to sexual harassment or retaliation in the workplace.

If you decide to award punitive damages, you will not assess an amount of punitive damages at this time. You will report your finding to the court.

Evidence Required for Punitive Damages

The EEOC has the burden of proving that punitive damages should be awarded, and the amount, by a preponderance of the evidence. Punitive damages may be considered if, and only if, the Plaintiff has shown by a preponderance of the evidence that Defendant has acted with either “malice” or “reckless indifference.” You may consider an award of punitive damages only if you find that Ms. Golden has suffered actual damage as a legal result of the Defendant’s fault.

“Malice” in this context means that the individuals perpetrating the discrimination or retaliation engaged in intentional wrongdoing. A person acts maliciously when the person is motivated by ill will, hatred or personal spite. “Reckless indifference” in this context means that the individuals perpetrating the discrimination or retaliation acted in the face of a perceived risk that their actions will violate federal law. An employer must have acted in the face of a perceived risk that its actions will violate federal law in order to be liable for punitive damages under Title VII of the Civil Rights Act of 1964. Thus, in this case Memphis Foods may only be liable for punitive damages under Title VII of the Civil Rights Act of 1964 for a malicious or recklessly indifferent discrimination against Ms. Golden due to her sex or retaliation for engaging in protected activity.

Even if you find that one or more of Memphis Foods’s employees acted with malice or with reckless indifference to Ms. Golden’s federally protected rights, that does not automatically mean that Memphis Foods itself is liable for punitive damages. The government must establish that the malice or reckless indifference by the employee should be imputed to Memphis Foods. You may only award punitive damages against Memphis Foods because of an act by one of its employees or agents if you find that:

- (a) Memphis Foods authorized both the doing of the illegal act and the manner of the



illegal act;

(b) The employee who acted with malice or with reckless indifference to Ms. Golden's federally protected rights was unfit and Memphis Foods was reckless in hiring him or her;

(c) Memphis Foods ratified or approved the illegal act; or

(d) The employee or agent was employed in a managerial capacity and was acting within the scope of his or her employment.

You may not determine that an employee was employed in a managerial capacity based solely on the fact that an employee's job title is "manager" or "supervisor." Instead, you should review the type of authority that the employer has given to the managerial employee, the amount of discretion that the employee has in what is done and how it is accomplished. An employee must be important, but does not have to be in the employer's top management, officers, or directors to be acting in a managerial capacity. The employee acts within the scope of employment if "the conduct is the kind the employee is employed to perform, it occurs substantially within the authorized time and space limits of his employment, and it is actuated, in least in part, by a purpose to serve the employer." However, the employer may not be held liable for punitive damages because of discriminatory acts of its managerial employees where the employer has proven by a preponderance of the evidence that the discriminatory acts by such managerial employees are contrary to the employer's own good faith effort to comply with the law by implementing policies and programs designed to prevent such unlawful discrimination in the workplace.

## V. VERDICT FORM

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 where you record your decisions. 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.

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

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without giving up your individual judgments. 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 change your opinion if convinced it is erroneous. 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 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 twelve 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.