The definition of "motivating factor" is derived from the following: (1) Tex. Lab. Code § 21.125(a), which provides that "an unlawful employment practice is established when the complainant demonstrates that race, color, sex, national origin, religion, age, or disability was a motivating factor for an employment practice, even if other factors also motivated the practice"; and (2) section 709 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e.

The substance of the permissive inference portion of the question is derived from *Ratliff v. City of Gainsville*, 256 F.3d 355, 360-62 (5th Cir. 2001) and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 US 133, 148 (2000).

Circumstantial evidence. A circumstantial evidence instruction may be appropriate. See PJC 100.8. *See also Ratliff v. City of Gainesville*, 256 F.3d 355, 359–62 (5th Cir. 2001); *Quantum Chemical Corp.*, 47 S.W.3d at 481–82.

Race and color. Discrimination because of or on the basis of race or color is prohibited by Tex. Lab. Code § 21.051. Though often intertwined, race and color are distinct bases of discrimination prohibited by the statute. *Cf. Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 609 (1987); *see also Wiltz v. Christus Hospital St. Mary*, No. 1:09-CV-925, 2011 WL 1576932, at *4 (E.D. Tex. Mar. 10, 2011).

National origin. Discrimination because of or on the basis of national origin includes discrimination because of the national origin of an ancestor. Tex. Lab. Code § 21.110. It may also include, but is not limited to, the denial of equal employment because of an individual's, or his ancestor's, place of origin; or because an individual

has the physical, cultural, or linguistic characteristics of a national origin group. 29 C.F.R. § 1606.1.

Age. Discrimination because of or on the basis of age applies only to discrimination against an individual forty years of age or older. Tex. Lab. Code § 21.101. There are, however, limited exceptions. *See* Tex. Lab. Code § 21.054(b) (relating to training programs), § 21.103 (compulsory retirement for certain key and pensioned employees), § 21.104 (peace officers and firefighters).

Sex. Discrimination because of or on the basis of sex includes discrimination because of pregnancy, childbirth, or a related medical condition. Tex. Lab. Code § 21.106. See PJC 107.15. Title VII's prohibition of sex discrimination encompasses "the entire spectrum of disparate treatment of men and women in employment," including sexual harassment. *Alamo Heights Independent School District v. Clark*, 544 S.W.3d 755, 771 (Tex. 2018) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)).

Moreover, title VII's protection against workplace discrimination on the basis of sex applies to harassment between members of different genders as well as the same gender. *Clark*, 544 S.W.3d at 771-72 (citing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998)).

Religion. Discrimination because of or on the basis of religion may include discrimination on the basis of religious observance, practice, or belief. Tex. Lab. Code § 21.108. See PJC 107.16.

Disability. For discrimination because of or on the basis of disability, see the questions and instructions in PJC 107.11, 107.12, 107.13, and 107.14.

Disparate treatment versus disparate impact. There is a difference between disparate treatment (Tex. Lab. Code § 21.051(1)) and disparate impact (Tex. Lab. Code §§ 21.051(2), 21.122) cases. PJC 107.6 submits disparate treatment. In a disparate impact case, an employer may be held liable for unintentional discrimination where an employment practice or criterion, neutral on its face, has a disproportionate effect or impact on a protected group. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Chapter 21 defines "disparate impact" as a practice where the employer "limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee." Tex. Lab. Code § 21.051(2). For example, height and weight requirements may unlawfully discriminate against women and some ethnic or racial minorities. *Dothard v. Rawlinson*, 433 U.S. 321 (1977). Education requirements may impact impermissibly on historically disadvantaged minority groups. *See Griggs*, 401 U.S. at 431–33. Disparate impact is not restricted to objective criteria or written tests with a discriminatory effect. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 989–91 (1988).

"Business necessity" is an affirmative defense to a disparate impact claim, except in the case of age-related claims (see below), if an employer can show that the job requirement is job-related and justified by a valid business necessity. Tex. Lab. Code § 21.115. "Business necessity" is never a justification, however, for intentional discrimination (disparate treatment). Tex. Lab. Code § 21.123.

Submission of disparate impact cases. Tex. Lab. Code § 21.122 sets forth the elements and burden of proof necessary in a disparate impact case and is the basis of the Committee's following suggested questions and instructions:

QUESTION _____

Did *Don Davis*'s requirement that [*describe specific employment practice*] have a disparate impact on [*name of protected group, e.g., women, racial minorities*]?

"Disparate impact" is established if an employer uses a particular employment practice, even if apparently neutral, that has a significant adverse effect on the basis of [*race, color, sex, national origin, etc.*].

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question _____ [*disparate impact question*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was *Don Davis*'s requirement that [*describe specific employment practice*] job-related to the position in question and consistent with business necessity?

An employment practice is job-related if the practice clearly relates to skills, knowledge, or ability required for successful performance on the job. For an employment practice to be consistent with business necessity, it must be necessary to safe and efficient job performance.

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question _____ [*employment practice question*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Has *Don Davis* refused to adopt an "alternative employment practice" to the job requirement inquired about in Question _____ [*disparate impact question*]?

An "alternative employment practice" is an employment practice that serves the employer's legitimate interest in an equally effective manner, but

which does not have a disparate impact on [*name of protected group, e.g., women, racial minorities*].

Answer "Yes" or "No."

Answer: _____

"Disparate impact" was defined by the Supreme Court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). The "significant adverse effect" language originated in *Connecticut v. Teal*, 457 U.S. 440, 448 (1982) (holding that a disparate impact claim under title VII is established when "an employer uses a nonjob-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant adverse effect on minorities or women"). That language has not been expressly used by Texas courts. The Austin Court of Appeals has described disparate impact cases as those that involve facially neutral practices "that operate to exclude a disproportionate percentage of persons in a protected group and cannot be justified by business necessity." *Wal-Mart Stores, Inc. v. Davis*, 979 S.W.2d 30, 44 (Tex. App.—Austin 1998, pet. denied). The requirements of business necessity are set forth in Tex. Lab. Code §§ 21.115, 21.122(a)(1). Tex. Lab. Code § 21.122(a)(2) states the burden of proof with respect to showing an alternative employment practice to be that "in accordance with federal law as that law existed [on] June 4, 1989"—a reference to the 1991 amendments to title VII that codified those burdens following the June 5, 1989, Supreme Court decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Therefore, the burden of proof, on a showing of disparate impact, is on the employer

to demonstrate that the practice is "job-related" and consistent with business necessity. *Dothard*, 433 U.S. at 329. The instruction on "job-relatedness" is derived from *Albemarle Paper Co.*, 422 U.S. at 425; *Contreras v. City of Los Angeles*, 656 F.2d 1267 (9th Cir. 1981); and 29 C.F.R. § 1607. *See also* Tex. Lab. Code § 21.115; *Davis v. Richmond, Fredericksburg & Potomac Railroad Co.*, 803 F.2d 1322, 1327–28 (4th Cir. 1986); *EEOC v. Rath Packing Co. Creditors' Trust*, 787 F.2d 318, 328 (8th Cir. 1986). The "alternative employment practice" definition is derived from *Watson*, 487 U.S. at 998.

Disparate impact cases: age. Like race, color, disability, religion, sex, and national origin, age is a protected category under the Texas Labor Code. Tex. Lab. Code § 21.051; *see also* Tex. Lab. Code § 21.101. Under federal law, age discrimination is governed by the Age Discrimination in Employment Act of 1967 (ADEA) and its subsequent amendments (29 U.S.C. §§ 621–634). Tex. Lab. Code § 21.122(b) states that to determine the availability of and burden of proof applicable to a disparate impact case involving age discrimination, the court shall apply the judicial interpretation of the ADEA and its subsequent amendments.

"Disparate impact" claims based on age discrimination were first recognized by the Supreme Court in *Smith v. City of Jackson*, 544 U.S. 228 (2005). The scope of disparate impact under the ADEA is significantly narrower than disparate impact under title VII. *Smith*, 544 U.S. at 240–41. This is in part because the ADEA includes a narrowing provision providing that it is not unlawful for an employer "to take any action otherwise

prohibited . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f).

Unlike the business-necessity test articulated under title VII, the reasonableness inquiry does not inquire whether there are other means by which an employer can accomplish its goals. *Smith*, 544 U.S. at 243. The U.S. Supreme Court held that whether the challenged employment action is based on reasonable factors other than age (RFOA) is an affirmative defense on which the defendant bears both the burdens of production and persuasion. *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84, 94–95 (2008). Adopting *Meacham*, the Third Court of Appeals has held that in order to establish the affirmative defense of RFOA, the employer has the burden to prove that (1) its decision was based on a factor other than age, and (2) that factor is reasonable. *City of Austin v. Chandler*, 428 S.W.3d 398, 411 (Tex. App.—Austin 2014, no pet.). The definition of a reasonable factor other than age is taken from 29 C.F.R. § 1625.7(e)(1).

For submission of a disparate impact case based on age discrimination, the Committee recommends the following question and instruction:

QUESTION _____

Did *Don Davis*'s requirement that [*describe specific employment practice*] have a disparate impact on [*name of protected group, e.g., persons age forty or over*]?

"Disparate impact" is established if the identified and challenged practice has a significantly adverse effect compared to [*name of those outside the protected group, e.g., persons under forty*].

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question _____ [*disparate impact question*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was *Don Davis*'s requirement that [*describe specific employment practice*] based on a reasonable factor other than age?

A reasonable factor other than age is a non-age factor that is objectively reasonable when viewed from the position of a prudent employer mindful of its legal responsibilities under like circumstances.

Answer "Yes" or "No."

Answer: _____

Damages. See PJC 115.30 for the question submitting actual damages and PJC 115.31 regarding exemplary damages.

After-acquired evidence of employee misconduct. If the employer has pleaded the discovery of evidence of employee misconduct acquired only after the employee's employment was terminated, see PJC 107.7 for the applicable question.

PJC 107.9 **Question and Instruction on Retaliation**

QUESTION _____

Did *Don Davis* [*fail or refuse to hire, discharge, or (describe other discriminatory or retaliatory action)*] *Paul Payne* because of *Paul Payne*'s [*opposition to a discriminatory practice; making or filing a charge of discrimination; filing a complaint; or testifying, assisting, or participating in any manner in a discrimination investigation, proceeding, or hearing under chapter 21 of the Texas Labor Code (formerly Texas Commission on Human Rights Act)*]?

Paul Payne must establish that without *his* [*opposition to a discriminatory practice; making or filing a charge of discrimination; filing a complaint; or testifying, assisting, or participating in any manner in a discrimination investigation, proceeding, or hearing under chapter 21 of the Texas Labor Code (formerly Texas Commission on Human Rights Act)*], if any, *Don Davis*'s [*failure or refusal to hire, discharge, or (describe other discriminatory or retaliatory action)*], if any, would not have occurred when it did. There may be more than one cause for an employment decision. *Paul Payne* need not establish that *his* [*opposition to a discriminatory practice; making or filing a charge of discrimination; filing a complaint; or testifying, assisting, or participating in any manner in a discrimination investigation, proceeding, or hearing under chapter 21 of the Texas Labor Code (formerly Texas Commission on Human Rights Act)*], if any, was the sole cause of *Don Davis*'s [*failure or refusal to hire, discharge, or (describe other discriminatory or retaliatory action)*], if any.

If you do not believe the reason *Don Davis* has given for [*failing or refusing to hire, discharge, or (describe other discriminatory or retaliatory action)*], you may, but are not required to, infer that *Don Davis* would not have [*failed or refused to hire, discharge, or (describe other discriminatory or retaliatory action)*] *Paul Payne* but for *his* [*opposition to a discriminatory practice; making or filing a charge of discrimination; filing a complaint; or testifying, assisting, or participating in any manner in a discrimination investigation, proceeding, or hearing under chapter 21 of the Texas Labor Code (formerly Texas Commission on Human Rights Act)*].

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 107.9 should be used for a claim that an employer retaliated or discriminated against an employee for engaging in conduct protected by Tex. Lab. Code § 21.055. *See also Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 61–64 (2006) (holding antiretaliation provision under title VII not limited to discriminatory actions that affect terms and conditions of employment).

Source of question. PJC 107.9 is derived from Tex. Lab. Code § 21.055. The substance of the permissive inference portion of the question is derived from *Ratliff v. City of Gainsville*, 256 F.3d 355, 360-62 (5th Cir. 2001) and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 US 133, 148 (2000).

Broad-form submission. PJC 107.9 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting 'whenever feasible' to mandate broad-form submission 'in any or every instance in which it is capable of being accomplished'")). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Causation standard. Tex. Lab. Code § 21.055 contains no express standard of causation in retaliation cases. Courts have adopted a "but for" causation standard. *See Pineda v. United Parcel Service, Inc.*, 360 F.3d 483, 488–89 (5th Cir. 2004) (holding that the "motivating factor" causation standard applicable to claims under Tex. Lab. Code § 21.125 does not apply to retaliation claims under section 21.055); *Herbert v. City of Forest Hill*, 189 S.W.3d 369, 377 (Tex. App.—Fort Worth 2006, no pet.) ("A plaintiff asserting a retaliation claim must establish . . . a 'but for' causal nexus between the protected activity and the employer's prohibited conduct."); *Thomann v. Lakes Regional MHMR Center*, 162 S.W.3d 788, 799 (Tex. App.—Dallas 2005, no pet.) ("To prove a causal connection between her filing the complaint and the termination of her employment, Thomann must show that 'but for' filing the complaint, her employment would not have been terminated when it was."). If there is a dispute about whether an

adverse employment action occurred or whether the plaintiff undertook a protected activity, a predicate question may be required on these fact issues.

PJC 107.11 **Instruction on Disability**

"Disability" means—

1. a mental or physical impairment that substantially limits at least one major life activity;

2. a record of such an impairment; or

3. being regarded as having such an impairment.

"Mental or physical impairment" means [*any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory (including speech organs); cardiovascular; reproductive; digestive; genitourinary; immune; circulatory; hemic; lymphatic; skin; and endocrine; or any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities*].

"Mental or physical impairment" includes an impairment that is episodic or in remission, if it would substantially limit a major life activity when active.

"Major life activity" includes [*caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, or working. The term also*

includes the operation of a major bodily function, including, but not limited to, functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions].

"Substantially limits a major life activity" means an impairment that substantially limits the ability to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a "disability."

"Record of such an impairment" means that an individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

"Regarded as having such an impairment" means being regarded as having an actual or perceived mental or physical impairment, other than an impairment that is minor and is expected to last or actually lasts less than six months, regardless of whether the impairment limits or is perceived to limit a major life activity.

Disability is not a motivating factor in an employment decision if an individual's disability impairs the individual's ability to reasonably perform the job in question, even with a reasonable accommodation.

COMMENT

When to use. PJC 107.11 is to be used with PJC 107.6 if disability (other than failure to accommodate) is alleged to be the basis of an employer's commission of an unlawful employment practice. If failure to accommodate is the claim, PJC 107.12 should be used.

The instruction includes three definitions of disability, but only the definition(s) raised by the pleadings and evidence should be submitted.

In most cases the issue of whether a given activity is a major life activity or whether a particular condition is a mental or physical impairment is not in dispute. In such cases, or if the court determines these issues as a matter of law, the list need not be submitted. Instead, the jury should be instructed that the particular activity in question is a major life activity or that a physical or mental impairment exists. If there is a factual dispute about major life activity or physical or mental impairment, only the terms in brackets that are raised by the pleadings and evidence should be submitted.

Source of instruction. PJC 107.11 is derived from the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213, as amended by the ADA Amendments Act of 2008 (ADAAA), and from amendments to the Texas Labor Code. *See* Tex. Lab. Code ch. 21. The definitions are contained in the Equal Employment Opportunity Commission (EEOC) regulations implementing the equal employment provisions of the ADAAA, 29 C.F.R. §§ 1630.1–.16. Effective September 1, 2009, the disability discrimination provisions of chapter 21 of the Texas Labor Code were amended

to conform to the amendments to the federal ADA. The implementing federal regulations relating to the federal amendments are effective May 24, 2011. *See* 29 C.F.R. §§ 1630.1–.16.

Additional instruction: substance addiction or communicable disease status. In the appropriate case, use the following instruction:

> "Disability" does not include [*a current condition of addiction to the use of alcohol, a drug, an illegal substance, or a federally controlled substance or a currently communicable disease or infection that constitutes a direct threat to the health or safety of other persons or that makes the affected person unable to perform the duties of the person's employment*].

See Tex. Lab. Code § 21.002(6).

Additional instruction—effect of mitigating measures on disability determination. Congress and the Texas legislature overturned the holding in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), that mitigating measures must be taken into account in determining whether an impairment constitutes a substantial limitation on a major life activity. 42 U.S.C. § 12102(4)(E); Tex. Lab. Code § 21.0021(b). Therefore, in circumstances where mitigating measures impact major life activities, the jury should be instructed as follows:

> In determining whether an individual has an impairment that substantially limits a major life activity, you must not consider the ameliorative effects of mitigating measures, including—

1. medication, medical supplies, medical equipment, medical appliances, prosthetic limbs and devices, hearing aids, cochlear implants and other implantable hearing devices, mobility devices, and oxygen therapy equipment;

2. devices that magnify, enhance, or otherwise augment a visual image, other than eyeglasses and contact lenses that are intended to fully correct visual acuity or eliminate refractive error;

3. the use of assistive technology;

4. reasonable accommodations and auxiliary aids or services; and

5. learned behavioral or adaptive neurological modifications.

Submission of "regarded as" cases. The amendments to chapter 21 of the Texas Labor Code broadened the coverage for individuals with respect to "regarded as" claims. Under the previous version of the statute, plaintiffs were required to prove that the perceived impairment was one that is or would be a substantial limitation of a major life activity. The amendments dispense with this requirement. The amendments are the basis for the Committee's suggested instructions. Tex. Lab. Code § 21.002(12–-a).

Transitory and minor. Neither the ADAAA nor the amendments to the Texas Labor Code cover impairments that are transitory and minor. *See* 42 U.S.C. § 12102(3)(B); Tex. Lab. Code § 21.002(12–a). Under both provisions, if the impairment lasts or is expected to last six months or less, it is "transitory." The statutory language of the Texas Labor Code differs from the ADAAA. *Compare* 42 U.S.C.

§ 12102(3)(B) *with* Tex. Lab. Code § 21.002(12–a). Under state law, the burden is on the plaintiff to prove that the disability is either not transitory or not minor. *Okpere v. National Oilwell Varco, L.P.*, 524 S.W.3d 818, 835 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). ~~If the issue of a "transitory and minor" impairment is raised by the pleadings and the evidence, it should be submitted provided that the burden of proof is properly placed. The federal regulations interpreting the ADAAA place the~~ Federal law places the burden of proving "transitory and minor" on the defendant as an affirmative defense. *See* *Willis v. Noble Environmental Power, LLC*, 143 F.Supp.3d 475, 484 (N.D. Tex. 2015) (citing 29 C.F.R. § 1630.15(f)). ~~29 C.F.R. § 1630.15(f); *Dube v. Texas Health & Human Services Commission*, No. SA-11-CV-354-XR, 2011 WL 4017959 (W.D. Tex. Sept. 8, 2011). The statutory language of the Texas Labor Code differs from the ADAAA. *Compare* 42 U.S.C. § 12102(3)(B) *with* Tex. Lab. Code § 21.002(12–a). There are no Texas cases determining whether the burden of proving "transitory and minor" should be placed on the plaintiff or defendant.~~

Qualified individual. Pursuant to Texas Labor Code section 21.105, disability-based discrimination is actionable only when such discrimination occurs because of or on the basis of a physical or mental condition that does not impair an individual's ability to reasonably perform a job. A qualified individual is an individual "who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8); *City of Houston v. Proler*, 437 S.W.3d 529, 532 (Tex. 2014) (although decided under the law

prior to the 2009 amendments to Texas Labor Code chapter 21, the definition of "qualified individual" did not change).

PJC 107.25__Question Limiting Relief for Retaliation under Texas Whistleblower Act

If you answered "Yes" to Question _____ [*107.4*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Would *Don Davis* have taken the same action inquired about in Question _____ [*107.4*] when *he* did, based solely on information, observation, or evidence that is not related to *Paul Payne's* report of a violation of law?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 107.25 should be used if an employer claims that its employment decision was made solely on information, observation, or evidence that is not related to the fact that the employee has made a report of a violation of the law protected under the Texas Whistleblower Act. Tex. Gov't. Code § 554.004(b); *see Fort Worth I.S.D. v. Palazzolo, 498 S.W.3d 674, 683-86 (Tex. App. – Fort Worth, pet. denied) (error not to submit issue as an affirmative defense instead of an inferential rebuttal).*

Source of question. PJC 107.25 is derived from Tex. Gov't Code § 554.004(b).

PJC 115.31 **Predicate Question and Instruction on Exemplary Damages for Unlawful Employment Practices**

~~PJC 115.31A **Instruction for Actions Filed before September 1, 2003**~~

~~QUESTION _____~~

~~Do you find by clear and convincing evidence that *Don Davis* engaged in the discriminatory practice that you have found in answer to Question _____ [*applicable liability question*] [*or Question _____ [applicable liability question*]] with malice or with reckless indifference to the right of *Paul Payne* to be free from such practices?~~

~~"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.~~

~~"Malice" means~~

~~1. a specific intent by *Don Davis* to cause substantial injury to *Paul Payne*; or~~

~~2. an act or omission by *Don Davis,*~~

~~a. which when viewed objectively from the standpoint of *Don Davis* at the time of its occurrence involves an extreme degree~~

~~of risk, considering the probability and magnitude of the potential harm to others; and~~

~~b. of which *Don Davis* has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.~~

~~Answer "Yes" or "No."~~

~~Answer: _____~~

~~PJC 115.31B **Instruction for Actions Filed on or after September 1, 2003**~~

Answer the following question regarding *Don Davis* only if you unanimously answered "Yes" to Question _____ [*applicable liability question*] [*or Question* _____ [*applicable liability question*]]. Otherwise, do not answer the following question.

To answer "Yes" to [*any part of*] the following question, your answer must be unanimous. You may answer "No" to [*any part of*] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [*that part of*] the following question.

QUESTION _____

Do you find by clear and convincing evidence that *Don Davis* engaged in the discriminatory practice that you have found in answer to Question _____ [*applicable liability question*] [*or Question* _____ [*applicable liability question*]] with malice or with reckless indifference to the right of *Paul Payne* to be free from such practices?

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

"Malice" means a specific intent by *Don Davis* to cause substantial injury or harm to *Paul Payne*.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 115.31 should be used for a claim for punitive damages under Texas Labor Code chapter 21 (formerly Texas Commission on Human Rights Act), when—

1. the evidence indicates that the discriminatory employment practice was motivated by malice or reckless indifference, Tex. Lab. Code § 21.2585(b); and

2. the cause of action arose on or after September 1, 1995, the effective date of Tex. Lab. Code § 21.2585.

~~Use PJC 115.31A for actions filed before September 1, 2003. For actions filed on or after September 1, 2003, use PJC 115.31B.~~

Source of question and instruction. ~~PJC 115.31A is derived from former Tex. Lab. Code § 21.2585 and former Tex. Civ. Prac. & Rem. Code § 41.001(2), (7) (Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.12 (S.B. 5), eff. Sept. 2, 1987, *amended by* Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995).~~ PJC 115.31~~B~~ is derived from Tex. Lab. Code § 21.2585 and Tex. Civ. Prac. & Rem. Code § 41.001(2), (7). Under Tex. Civ. Prac. & Rem. Code § 41.003(d) and the supreme court's March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a, unanimity is required on the exemplary damages question and the applicable liability question. PJC 115.31~~B~~ is conditioned accordingly. The unanimity instruction is adapted from the instruction in Tex. Civ. Prac. & Rem. Code § 41.003(e) and the supreme court's March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a.

Unanimity. For actions filed on or after September 1, 2003, "[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages." Tex. Civ. Prac. & Rem. Code § 41.003(d). Section 41.003(e) of the Code mandates that the jury be instructed that its answer regarding the amount of exemplary damages must be unanimous. By the supreme court's March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011,

orders under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the exemplary damages question and the applicable liability question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d). PJC 115.31~~B~~ is conditioned accordingly.

Multiple defendants. The following conditioning instruction may be substituted in a case involving claims against multiple defendants:

> Answer the following question regarding a defendant only if you unanimously answered "Yes" to Question _____ [*applicable liability question*] [*or Question* _____ [*applicable liability question*]] regarding that defendant. Otherwise, do not answer the following question regarding that defendant.

PJC 115.40 **Question and Instructions—Securing Execution of Document by Deception as a Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(11))**

Answer the following question only if you unanimously answered "Yes" to Question _____ [*115.37*]. Otherwise, do not answer the following question.

To answer "Yes" to [*any part of*] the following question, your answer must be unanimous. You may answer "No" to [*any part of*] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [*that part of*] the following question.

QUESTION _____

Did *Don Davis* secure the execution of a document by deception [*and was the value of the property affected $~~1,500~~2,500 or more*]?

"Securing the execution of a document by deception" occurs when a person causes another person to *sign* any document affecting *property*, and does so by deception, with the intent to defraud or harm any person.

A person acts with intent with respect to the nature of *his* conduct or to a result of *his* conduct when it is the conscious objective or desire to engage in the conduct or cause the result.

"Deception" means creating or confirming by words or conduct a false impression of law or fact that is likely to affect the judgment of another in the transaction, and that the actor does not believe to be true.

"Property" means: (a) real property; (b) tangible or intangible personal property, including anything severed from land; or (c) a document, including money, that represents or embodies anything of value.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 115.40 should be used in a case in which (1) exemplary damages are sought, (2) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003, and (3) the plaintiff alleges harm based on conduct described as a felony in Tex. Penal Code § 32.46. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(11). This statute applies to causes of action accruing on or after September 1, 1995. If the jury finds conduct that violates Tex. Penal Code § 32.46, and the conduct rises to the level of a felony, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c). ~~One court has held that, in order to support entry of a judgment containing an exemplary damages award in excess of the statutory limitations, the harm to the plaintiff must have resulted~~

~~from the felonious conduct found by the jury~~. ~~*Service Corp. International v. Guerra*, 348 S.W.3d 239, 252 (Tex. App.—Corpus Christi 2009), *rev'd on other grounds*, 348 S.W.3d 221 (Tex. 2011).~~

Bifurcation. If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 115.40 should be answered in the first phase of the trial.

Caveat: burden of proof. The Committee expresses no opinion on the burden of proof for the question set forth above. *See* Tex. Civ. Prac. & Rem. Code §§ 41.003(c), 41.008(c).

Alternative language for "sign." In an appropriate case, the word *execute* may be substituted for the word *sign. See* Tex. Penal Code § 32.46(a).

Alternative language for "property." In an appropriate case, the term *service* or *the pecuniary interest of any person* may be substituted for the word *property*. *See* Tex. Penal Code § 32.46(a)(1). If *service* is substituted for *property*, the following definition should be substituted:

> "Service" includes: (a) labor and professional service; (b) telecommunication, public utility, and transportation service; (c) lodging, restaurant service, and entertainment; and (d) the supply of a motor vehicle or other property for use.

Tex. Penal Code § 32.01(3).

"Deception." The definition of "deception" in PJC 115.40 is taken from Tex. Penal Code § 31.01(1) and *Goldstein v. State*, 803 S.W.2d 777, 790 (Tex. App.—Dal-las

1991, pet. ref'd). See Tex. Penal Code § 31.01(1) for alternative definitions of "deception."

"Value" and requirement that conduct be described as a felony. Tex. Civ. Prac. & Rem. Code § 41.008(c) requires that the limitation or cap on exemplary damages may be lifted only if the plaintiff's damages are based on conduct "described as a felony" in Tex. Penal Code § 32.46. The criterion for felony status is that the property or service have a value of $~~1,500~~2,500 or higher. Tex. Penal Code § 32.46(b)(4). The optional language in the basic question in PJC 115.40 establishes whether the defendant's conduct rises to the status of a felony, if there is a dispute about the value of the property in question.

Unanimity. For actions filed on or after September 1, 2003, "[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages." Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e). By the supreme court's March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the applicable liability question as well as the exemplary damages question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d). Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish "liability for and the amount

of exemplary damages"; therefore, these questions are conditioned on, and require, unanimous findings. See PJC 115.41–115.46.

Actions filed before September 1, 2003. A unanimous decision on liability for and the amount of exemplary damages is not required for actions filed before September 1, 2003. In such cases, substitute the following conditioning instruction:

> If you answered "Yes" to Question _____ [*115.37*], then answer the following question. Otherwise, do not answer the following question.

Source of instruction and definition. The question and instructions are derived from Tex. Penal Code §§ 31.01(1), 31.08, 32.01(2), (3), 32.46; Tex. Civ. Prac. & Rem. Code § 41.008.

PJC 115.43 **Question and Instructions—Theft as a Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(13))**

Answer the following question only if you unanimously answered "Yes" to Question _____ [*115.37*]. Otherwise, do not answer the following question.

To answer "Yes" to [*any part of*] the following question, your answer must be unanimous. You may answer "No" to [*any part of*] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [*that part of*] the following question.

QUESTION _____

Did *Don Davis* commit theft [*and was the value of the stolen property $~~20,000~~30,000 or greater*]?

"Theft" means that a person unlawfully appropriates *property* with the intent to deprive the owner of property. Appropriating *property* is unlawful if it is without the owner's effective consent.

A person acts with intent with respect to the nature of *his* conduct or to a result of *his* conduct when it is the conscious objective or desire to engage in the conduct or cause the result.

"Deprive" means *to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner*.

"Owner" means a person who has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than *Don Davis*.

"Property" means: (a) real property; (b) tangible or intangible personal property, including anything severed from land; or (c) a document, including money, that represents or embodies anything of value.

"Consent" means assent in fact, whether express or implied.

"Effective consent" includes *consent by a person legally authorized to act for the owner. Consent is not effective if induced by deception or coercion*.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 115.43 should be used in a case in which (1) exemplary damages are sought, (2) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code

§ 41.003, and (3) the plaintiff alleges harm based on conduct described as a third-degree felony in Tex. Penal Code § 31.03. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(13). This statute applies to causes of action accruing on or after Sep-tember 1, 1995. If the jury finds conduct that violates Tex. Penal Code ch. 31, and that conduct rises to the level of a third-degree felony, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c). ~~One court has held that, in order to support entry of a judgment containing an exemplary damages award in excess of the statutory limitations, the harm to the plaintiff must have resulted from the felonious conduct found by the jury. *Service Corp. International v. Guerra*, 348 S.W.3d 239, 252 (Tex. App. Corpus Christi 2009), *rev'd on other grounds*, 348 S.W.3d 221 (Tex. 2011).~~ See comment below, "'Value' and requirement that conduct be described as a third-degree felony," for a discussion of the requirements needed to establish that the conduct in question was felonious.

Bifurcation. If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 115.43 should be answered in the first phase of the trial.

Caveat: burden of proof. The Committee expresses no opinion on the burden of proof for the question set forth above. *See* Tex. Civ. Prac. & Rem. Code §§ 41.003(c), 41.008(c).

Alternative definition for "unlawful appropriation of property." "Unlawful appropriation of property" also occurs when the property is stolen and the actor appropriates the property knowing it was stolen by another. Tex. Penal Code § 31.03(b)(2). In an appropriate case, this definition should be substituted for the one shown above, and the Penal Code's definition of "knowing conduct," found at Tex. Penal Code § 6.03(b), should be given as well.

Alternative definitions for "deprive." In an appropriate case, one or more of the following definitions of "deprive" may be substituted for the one shown above:

> to restore property only upon payment of reward or other compensation.

or—

> to dispose of property in a manner that makes recovery of the property by the owner unlikely.

Tex. Penal Code § 31.01(2)(B), (C).

Effective consent. In an appropriate case, the language *Consent is not effective if induced by deception or coercion* may be replaced with any of the following alternatives:

> [Consent is not effective if]
>
> 1. given by a person *Don Davis* knows is not legally authorized to act for the owner;

2. given by a person who by reason of youth, mental disease or defect, or intoxication is known by *Don Davis* to be unable to make reasonable property dispositions; or

3. given solely to detect the commission of an offense.

See Tex. Penal Code § 31.01(3)(B), (C), (D). If the defendant's knowledge of a fact is in issue (as in option 1 above), the definition of "knowing conduct" found at Tex. Penal Code § 6.03(b) should be given.

Theft of services and trade secrets. Tex. Penal Code § 31.04 should be consulted if the alleged theft was of services rather than of property, and Tex. Penal Code § 31.05 should be consulted if the alleged theft was of a trade secret.

"Value" and requirement that conduct be described as a third-degree felony. Tex. Civ. Prac. & Rem. Code § 41.008(c)(13) requires that the theft be at a level of a third-degree felony or higher in order to lift the limitation or cap on exemplary damages awards. The general criterion for a third-degree felony is that the property or service have a value of $~~20,000~~30,000 or higher but less than $~~100~~150,000. Tex. Penal Code § 31.03(e)(5). The optional language in the basic question in PJC 115.43 makes this inquiry, if there is a dispute about the value of what was stolen. Tex. Penal Code § 31.08 contains additional criteria for ascertaining value to determine the level of the offense, and Tex. Penal Code § 31.03 contains additional, nonmonetary criteria for ascertaining the level of punishment.

Unanimity. For actions filed on or after September 1, 2003, "[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for

and the amount of exemplary damages." Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e). By the supreme court's March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the applicable liability question as well as the exemplary damages question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d). Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish "liability for and the amount of exemplary damages"; therefore, these questions are conditioned on, and require, unanimous findings. See PJC 115.40–115.42, 115.44–115.46.

Actions filed before September 1, 2003. A unanimous decision on liability for and the amount of exemplary damages is not required for actions filed before September 1, 2003. In such cases, substitute the following conditioning instruction:

> If you answered "Yes" to Question _____ [*115.37*], then answer the following question. Otherwise, do not answer the following question.

Source of instruction and definition. The question and instructions are derived from Tex. Penal Code §§ 1.07(a)(11), (35), 6.03, 31.01(2), (3), (4), (5), 31.03, 31.08; Tex. Civ. Prac. & Rem. Code § 41.008.

PJC 115.45 **Question and Instructions—Misapplication of Fiduciary Property as a Statutory Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(10))**

Answer the following question only if you unanimously answered "Yes" to Question _____ [*115.37*]. Otherwise, do not answer the following question.

To answer "Yes" to [*any part of*] the following question, your answer must be unanimous. You may answer "No" to [*any part of*] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [*that part of*] the following question.

QUESTION _____

Did *Don Davis* intentionally misapply [*identify property defendant held as a fiduciary, e.g., 300 shares of ABC Corporation common stock*] in a manner that involved substantial risk of loss to *Paul Payne* [*and was the value of the property $~~1~~12,500 or greater*]?

"Misapply" means a person deals with property [*or money*] contrary to *an agreement under which the person holds the property* [*or money*].

"Substantial risk of loss" means it is more likely than not that loss will occur.

A person acts with intent with respect to the nature of *his* conduct or to a result of *his* conduct when it is the conscious objective or desire to engage in the conduct or cause the result.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 115.45 should be used in a case in which (1) exemplary damages are sought, (2) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003, and (3) the plaintiff alleges harm based on conduct described in Tex. Penal Code § 32.45. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(10). This statute applies to causes of action accruing on or after September 1, 1995. If the jury finds conduct that violates Tex. Penal Code § 32.45, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c). ~~One court has held that, in order to support entry of a judgment containing an exemplary damages award in excess of the statutory limitations, the harm to the plaintiff must have resulted from the felonious conduct found by the jury. *Service Corp. International v. Guerra*, 348 S.W.3d 239, 252 (Tex. App. – Corpus Christi 2009), *rev'd on other grounds*, 348 S.W.3d 221 (Tex. 2011).~~

remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish "liability for and the amount of exemplary damages"; therefore, these questions are conditioned on, and require, unanimous findings. See PJC 115.40–115.44, 115.46.

Actions filed before September 1, 2003. A unanimous decision on liability for and the amount of exemplary damages is not required for actions filed before September 1, 2003. In such cases, substitute the following conditioning instruction:

> If you answered "Yes" to Question _____ [*115.37*], then answer the following question. Otherwise, do not answer the following question.

Source of instruction and definition. Tex. Penal Code §§ 31.08, 32.45; Tex. Civ. Prac. & Rem. Code § 41.008.