**FALL 2013 SAMPLE INSTRUCTIONS FOR REFERENCE ONLY PLEASE CONSULT THE COURT’S WEBSITE FOR THE LATEST INSTRUCTIONS.**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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| Case No. 12-cv-03024-JLK-MEH |
| DERICK FINN,Plaintiff,v.SUNCOR ENERGY a/k/a Suncor EnergyUSA, Inc.,Defendant. |
| jury instructions |

**INSTRUCTION NO. 1.1**

**OPENING INSTRUCTIONS**

 Before the trial begins, I am giving you instructions that will help you to understand what will be presented to you and how you should conduct yourself during the trial.

 During the trial you will hear me use a few terms that you may not have heard before. I will briefly explain them to you. If, during the course of the trial, there are other terms you don’t recognize, please let me know and I will explain them. The party who sues is called the plaintiff. In this case, the plaintiff is Derick Finn. The party who is being sued is called the defendant. In this case, the defendant is Suncor Energy (U.S.A.) Inc., which will often be abbreviated to Suncor.

 You will sometimes here me refer to “counsel.” “Counsel” is another way of saying “lawyer” or “attorney.”

 When I “sustain” an objection, I am excluding that evidence from this trial for a good reason. When you hear that I have “overruled” an objection, I am permitting that evidence to be admitted.

 When I say “admitted into evidence” or “received into evidence,” I mean that this particular statement or the particular exhibit may be considered by you in making the decisions you must make at the end of the case. I am not indicating in any way that you must accept it, but only that you may consider accepting or rejecting it.

 By your verdict, you will decide disputed issues of fact. I will decide all questions of law that arise during the trial. Before you begin your deliberation at the close of the case, I will instruct you one final time on the law that you must follow and apply.

 You are to consider all the evidence received in this trial and only the evidence received at trial. It will be up to you to decide what evidence to believe and how much of any witness's testimony to accept or reject.

 After you have heard all the evidence on both sides, the parties will make their final arguments. These arguments are not evidence. After these closing arguments, I will again instruct you on the rules of law you are to use in reaching your verdicts, and then you will retire to decide your verdicts.

 During the course of the trial I may ask a question of a witness. If I do, that does not mean I have any opinion about the facts in the case. I am only trying to bring out facts that you may consider. From time to time during the trial I may also direct your attention to particular instructions of law.

 Ordinarily, the attorneys will develop all the relevant evidence that will be necessary for you to reach your verdicts. However, in rare situations, a juror may believe a question is critical to reaching a decision on a necessary element of the case. In that situation, you may write out a question and provide it to the courtroom deputy at the next recess. I will then consider that question with the lawyers. If it is determined to be a proper and necessary question, I will ask it. If I do not ask it, I will tell you why and explain why such an answer cannot be considered in your deliberations.

 If you would like to take notes during the trial, you may. On the other hand, you are not required to take notes.

 If you decide to take notes, be careful not to get so involved in note taking that you become distracted, and remember that your notes will not necessarily reflect exactly what was said, so your notes should be used only as memory aids. Therefore, you should not give your notes precedence over your independent recollection of the evidence. You should also not be unduly influenced by the notes of other jurors. If you do take notes leave them in the jury room at night and do not discuss the contents of your notes until you begin deliberations.

 During the course of the trial, you may not talk with any witness, or with the parties, or with any of the lawyers at all. In addition, during the course of the trial you should not talk about the trial with anyone else. Also, you should not discuss the merits of this case among yourselves until you have gone to the jury room to make your decision at the end of the trial. It is important that you wait until all the evidence is received and you have again heard my instructions on the controlling rules of law before you deliberate among yourselves. In other words, keep an open mind and form no opinions until you can consider all the evidence and the instructions of law together.

 During the course of the trial you will receive all the evidence you legally may consider to decide the case. Gathering any information on your own that you think might be helpful is against the law and would be a violation of your oath. Do not engage in any outside reading on this case, even including dictionaries or a bible, do not attempt to visit

any places mentioned in the case, and do not in any other way try to learn about the case outside the courtroom. Ignore all case related publicity.

 It is not fair to the parties to have one or more jurors deciding this case on information that is not presented in court. This would make a mockery of our trial system. It would make irrelevant rules of evidence and the right of cross examination.

 You will be surprised to learn that, despite the repeated giving of this instruction by trial judges, there were instances in which jurors disobeyed this instruction. When this is brought to the attention of the court, it frequently results in a mistrial and a new trial, which means the first jury’s time was completely wasted.

 I can tell you this. If *I* sacrificed several days or weeks of *my* time to serve as a trial juror, and *I* followed the court’s instructions not to talk to people or do outside research on the case, and then learned that one of my fellow jurors did *not*, which caused the court to order a mistrial and new trial after we had reached a verdict, I would be FURIOUS and RESENTFUL of that juror. I trust you would feel the same way.

 The parties, attorneys, witnesses, court, and trial jurors only want to do this one time. Therefore, please confine your consideration of this case to what happens in this courtroom. When the case is over, you will be free to say or do anything you wish concerning this case. Until then, there should be no outside research or discussion.

 There will also not be any outside technology. I wish I did not have to dwell on this topic, but recent events around the United States and recent technologies require me to point out that some common practices and habits many of you enjoy are strictly forbidden in your role as jurors. You may not, under any circumstances, have your cell

phones, iPads, or the like on when court is in session. Whether you are here or away from the court during recess you may not “google, twitter, tweet, text message, blog, Instagram, SnapChat, post” or anything else with those gadgets about or concerning anything to do with this case. To do so could cause a mistrial, meaning all of our efforts would have been wasted and we would have to start all over again with a new trial before a new jury. If you were to cause a mistrial by violating these orders, you could be subject to paying all the costs of these proceedings and perhaps punished for contempt of court. What you may do is advise anyone who needs to know, such as family members, employers, employees, schools, teachers, or daycare providers that you are a juror in a case and the judge has ordered you not to discuss it until you have reached a verdict and been discharged from the case. At that point you will be free to discuss this case or investigate anything about it to your heart’s delight.

 If during the course of the trial you believe there is anything you need to know, please write down your request and give it to the courtroom deputy. She will give it to me and we will do our best to attend to it.

 Fairness to all concerned requires that all of us connected with this case deal with the same information and with nothing other than the same information. The reason for this is that your decision in this case must be made solely on the evidence presented at the trial.

 Finally, I note that the court reporter is making stenographic notes of everything that is said. This is basically to assist any appeals. You will *not* have a typewritten copy

of the testimony available for your use during deliberations. On the other hand, any exhibits admitted at trial will be available to you during your deliberations.

**INSTRUCTION NO. 1.2**

**STATEMENT OF THE CASE**

 Plaintiff Derick Finn supervised the warehouses at Defendant Suncor’s refinery in Commerce City, Colorado. He states that the termination of his employment was because of his race, Hispanic, in violation of two federal laws:

1. Title VII of the Civil Rights Act of 1964, which is often called Title VII; and,
2. Section 1981 of the Civil Rights Act of 1991, also known as Section 1981.

These laws prohibit race discrimination.

 Suncor denies discriminating against Mr. Finn. Suncor states that it terminated Mr. Finn’s employment because he did not run the warehouse properly.

 **JURY INSTRUCTION NO. 1.2.1**

**STIPULATED FACTS**

 Before the trial of this case, the Court held a conference with the lawyers for all the parties. At this conference, the parties entered into certain stipulations of facts, which means the parties agreed that the following facts can be taken as true without further proof.

 The stipulated facts are as follows:

1. Suncor operates a refinery in Commerce City, Colorado.
2. In February 2006, Mr. Finn submitted an Application for Employment to Suncor.
3. That same month, Suncor offered Mr. Finn the Warehouse Supervisor position in Commerce City, Colorado.
4. Mr. Finn accepted the Warehouse Supervisor position.
5. Mr. Finn began working for Suncor in March 2006 at its Commerce City, Colorado refinery.
6. In 2006, Mr. Finn earned $56,512 at Suncor, which included his wages.
7. In 2007, Mr. Finn earned $79,233 at Suncor, which included his wages and a bonus.
8. In 2008, Mr. Finn earned $110,816 at Suncor, which included his wages and a bonus.
9. In 2009, Mr. Finn earned $93,646 at Suncor, which included his wages and a bonus.
10. In 2010, Mr. Finn earned $82,236 at Suncor, which included his wages and a bonus.
11. In 2011, Mr. Finn earned $85,892 at Suncor, which included his wages.
12. Suncor terminated Mr. Finn’s employment on December 13, 2011.
13. After Mr. Finn’s employment at Suncor ended, Mr. Finn was hired by Mansfield Oil, Inc. as a Contracts Logistics Manager. He was employed by Mansfield Oil, Inc. from March 13, 2012 through July 13, 2012.
14. In 2012, Mr. Finn earned $38,161, which included his wages from Mansfield Oil, Inc. Mr. Finn also received a full benefits package at Mansfield Oil, Inc.
15. In 2013, Mr. Finn was employed at Mycom, Inc. as Warehouse Manager. Mr. Finn was employed at Mycom, Inc. from January 2, 2013 through April 4, 2014.
16. In 2013, Mr. Finn earned $67,865 at Mycom, Inc., which included his wages and overtime compensation. Mr. Finn also received a full benefits package at Mycom, Inc.
17. On April 7, 2014, Mr. Finn began his employment with Integrated Printing Solutions as a Materials Manager. Mr. Finn is still employed at Integrated Printing Solutions.
18. At Integrated Printing Solutions, Mr. Finn’s 2014 salary is $65,000. He has a full benefits package.

**INSTRUCTION NO. 1.3**

**ORDER OF TRIAL**

 The case will proceed as follows:

 First, the lawyers for each side may make opening statements. What is said in the opening statements is not evidence, but is simply an introduction to help you understand what each party expects the evidence to show.

 After the opening statements, Plaintiff will present evidence in support of his claims and Defendant’s lawyers may cross-examine the witnesses. At the conclusion of Plaintiff’s case, Defendant may introduce evidence and Plaintiff’s lawyers may cross-examine the witnesses. Defendant is not required to introduce any evidence or to call any witnesses. If Defendant chooses to introduce evidence, Plaintiff may then present rebuttal evidence.

 After the evidence is presented, the parties’ lawyers make closing arguments explaining what they think the evidence has shown. What is said in the closing arguments is not evidence.

 Finally, I will instruct you on the law that you are to apply in reaching your verdict. You will then decide the case.

**INSTRUCTION NO. 1.3.1**

**DUTY TO FOLLOW INSTRUCTIONS**

 You, as jurors, are the judges of the facts. But in determining what actually happened – that is, in reaching your decision as to the facts – it is your sworn duty to follow all of the rules of law as I explain them to you.

 You may not disregard or give special attention to any one instruction, or question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences. We are bound to apply the law as it is given to us by the higher courts and the legislature.

 In your deliberations you must see to it that no one else on the jury ignores the instructions or attempts to decide the case on anything other than the law and the evidence. It is always to be born in mind that our collective commitment is to equal justice under the law. Matters of race, creed, color, nationality and gender have no place in this process. To the best of your ability you are to judge others as you would want others to judge you under the law I give you. The very heart of justice is that all apply the same law to the same evidence and leave our personal desires out of it.

 You should not read into these instructions, or anything else I say or do, as a suggestion as to what your verdict should be. That is entirely up to you.

 It is also your duty to base your verdict solely upon the evidence, without bias, prejudice or sympathy. That was the promise you made and the oath you took.

**INSTRUCTION NO. 1.4**

**EVIDENCE – GENERAL**

 It will be your duty to decide from the evidence what the facts are. You, and you alone, are the judges of the facts. You will hear the evidence, decide what the facts are, and then apply those facts to the law I give you. That is how you will reach your verdict. In doing so, you must follow the law whether you agree with it or not.

 At no time during the trial will I suggest what I think your verdict should be nor do I want you to guess or speculate about my views of what verdict you should render.

 You will decide what the facts are from the evidence that the parties will present to you during the trial. That evidence will consist of the sworn testimony of witnesses on both direct and cross-examination, regardless of who called the witness; documents and other things received into evidence as exhibits; and any facts on which the lawyers agree or which I may instruct you to accept as true.

 The following things are not evidence and you must not consider them as evidence in deciding the facts of this case:

1. Statements and arguments by lawyers are not evidence. The lawyers are not witnesses. What they say in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of the facts controls.

2. Questions and objections by the lawyers are not evidence. Lawyers have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by my ruling on it.

3. The lawyers (may) have highlight(ed) certain parts of some exhibits. While an admitted exhibit is evidence, the highlights are not. It is for you to determine the significance of the highlighted parts.

4. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered by you.

5. Anything you may see or hear when the Court is not in session is not evidence, even if what you see or hear is done or said by one of the parties or by one of the witnesses.

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts that you find have been proved, such reasonable inferences as seem justified in the light of your experience. Inferences are inductions or conclusions your reason and common sense lead you to draw from the facts established by the evidence in the case. Inferences reached from facts not proved at trial, however, are impermissible.

**INSTRUCTION NO. 1.5**

**EVIDENCE - DIRECT AND CIRCUMSTANTIAL**

 Evidence can be either direct or 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, it is proof of one or more facts from which one can find that another fact exists or is true.

 As a general rule, the law makes no distinction between direct and circumstantial evidence, and you should consider both kinds of evidence in deciding this case. It is for you to decide how much weight to give to any evidence, direct or circumstantial.

**INSTRUCTION NO. 1.6**

**FILING OF LAWSUIT AND PLEADINGS**

 The fact that Mr. Finn filed this lawsuit is not evidence that Suncor did anything wrong. The fact that Mr. Finn complains he has been damaged is not evidence that he has been damaged or that Suncor violated the law. You cannot say, “Well, there must be something wrong here or the case would not be in court.” This would be improper.

**INSTRUCTION NO. 1.7**

**BURDEN OF PROOF**

 This is a civil, rather than criminal, case and therefore Plaintiff has the burden of proving his claim by what is called a preponderance of the evidence. “By a preponderance of the evidence” means that no matter who produces the evidence, when you consider the claim of Plaintiff in light of all the facts, you believe that Plaintiff’s claim is more likely true than not true. To put it differently, if you were to put all of the evidence in favor of Plaintiff and all of the evidence in favor of Defendant on opposite sides of the scale, Plaintiff would have to make the scale tip to his side. If Plaintiff fails to meet this burden, your verdict must be for Defendant.

 In defense of the claims that Defendant violated Plaintiff’s rights under the two statutes, Defendant has asserted two affirmative defenses, the same decision defense and a failure to mitigate damages defense. The substance of these defenses, including what each defense means, will be described to you more fully later on. An affirmative defense is different from a denial of the claim. You should treat an affirmative defense in the same way you treat Plaintiff’s claim. That is, Defendant, as the party asserting the affirmative defense, has the burden of proving that defense by the same standard, that is, of proving that the affirmative defense is more likely true than not true.

 In evaluating whether Plaintiff, on the one hand, and Defendant, on the other hand, have met their respective burdens on their claims and defenses, you should also know that the law does not require parties to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matter at issue at this trial. Nor does the law require parties to produce as exhibits all papers or other things mentioned in the evidence in the case.

**INSTRUCTION NO. 1.8**

**QUESTIONS BY JURORS – PERMITTED**

 Jurors normally do not ask a witness questions. However, you may ask important questions during the trial under certain conditions.

 If you feel that the answer to your question would be helpful in understanding the issues in the case, please write down your question during a break and give it to my courtroom deputy. I will make a copy of your note for the lawyers and speak privately with them to decide whether the question is proper under the law and how best to address it.

 If the question is proper, we will repeat it in open court and someone will answer it. If there is some reason why the question cannot be answered, I will tell you what that reason is.

**INSTRUCTION NO. 1.10**

**JUDGE’S QUESTIONS TO WITNESSES**

 During the trial, I may sometimes ask a witness questions. Please do not assume that I have any opinion about the subject matter of my questions. They are intended only to clarify or to repeat something I may have missed.

**INSTRUCTION NO. 1.11**

**CONFERENCES WITH COUNSEL**

It may be necessary for me to talk to the lawyers about an issue of law out of your hearing. The purpose of these conferences is to decide how certain legal matters are to be treated. We will not be discussing factual matters.

 Sometimes we will talk briefly at the bench. But some of these conferences may take more time, so I will excuse you from the courtroom. I will try to avoid such interruptions whenever possible, but please be patient even if the trial seems to be moving slowly because conferences often actually save time in the end. The lawyers and I will do what we can to limit the number and length of these conferences.

**INSTRUCTION NO. 1.12**

**INFERENCES DEFINED**

 You are to consider only the evidence in the case. However, 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 inductions or conclusions that reason and common sense lead you to draw from facts established by the evidence in the case.

**INSTRUCTION NO. 1.13**

**CREDIBILITY OF WITNESSES**

 In deciding the facts of this case, you will have to decide which witnesses to believe and which witnesses not to believe. You may believe everything a witness says, only part of it, or none of it.

 In considering the testimony of any witness, you may consider:

1. The witness’s opportunity and ability to see or hear or know the things to which the witness testified;
2. The quality of the witness’s memory;
3. The witness’s manner while taking the oath and while testifying;
4. Whether the witness had an interest in the outcome of the case or any motive, bias or prejudice;
5. Whether the witness’s testimony is contradicted by anything the witness said or did at another time, by the testimony of other witnesses, or by other evidence;
6. How reasonable the witness’s testimony was in light of all the evidence; and,
7. Any other facts that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify to that fact.

 If you believe a witness has willfully lied regarding any material fact, you have the

right to disregard all or any part of that witness’s testimony.

**INSTRUCTION NO. 1.14**

**SINGLE WITNESS**

 The testimony of a single witness that produces in your minds belief in the likelihood of truth is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary, if, after consideration of all the evidence in the case, you hold greater belief in the accuracy and reliability of the one witness.

**INSTRUCTION NO. 1.15**

**EQUALITY OF PARTIES**

 All persons are equal before the law regardless of race, national origin, citizenship, or whether the party is a corporation. I tell you that all parties are equal before the law to remind you that you must base any decision in this case on the law and facts, not outside factors such as corporate status.

**STIPULATED INSTRUCTION NO. 1.16**

**STATUS OF CORPORATION**

 All persons are equal before the law. A corporation is considered by the law to be a person. Corporations are entitled to the same faire and conscientious consideration by you as any physical person.

 Corporations can act only through their officers and employees. Any act or omission of an officer or employee while acting within the scope of his or her employment or authority is the act or omission of the corporation or government entity.

**\*[kr, use def’s 2.1 below]PLAINTIFF’S INSTRUCTION 2.1**

**RACE DISCRIMINATION**

 Congress passed a law which makes it unlawful for an employer to “discriminate against any individual . . . because of such individual’s race. . . .”

 In order to establish a claim of race discrimination, Mr. Finn must show that his race was a “motivating factor” in Suncor’s decision to terminate Mr. Finn’s employment.

**DEFENDANT’S INSTRUCTION 2.1**

**NATURE OF THE CLAIM**

**RACE DISCRIMINATION**

 It is unlawful for an employer to intentionally terminate a person’s employment because of the person’s race.

 Mr. Finn states that Suncor terminated his employment because of his race. Suncor denies that it terminated Mr. Finn’s employment because of his race. Suncor states that it terminated Mr. Finn’s employment because he did not run the warehouse properly.

 It is your responsibility to decide whether Mr. Finn has proven his claim of intentional discrimination by a preponderance of the evidence. Mr. Finn, not Suncor, carries the burden of proof on this claim.

**INSTRUCTION NO. 2.2**

**PROOF OF DISCRIMINATION BASED ON RACE**

In order for Mr. Finn to establish his claim for race discrimination, he must prove that Suncor intentionally discriminated against him. To do so, Mr. Finn has the burden of demonstrating by a preponderance of the evidence that Mr. Finn’s race was “a motivating factor” in Suncor’s decision to terminate his employment. The fact that Mr. Finn is Hispanic and was terminated is not sufficient, in and of itself, to establish Mr. Finn’s claim under the law.

 In showing that plaintiff’s race was a motivating factor, Mr. Finn is not required to prove that his race was the sole motivation or even the primary motivation for Suncor’s decision to terminate him. Rather, Mr. Finn must prove that his race was “a” factor in the decision to terminate him and the factor that made a difference.

 If you find that Mr. Finn has failed to prove by a preponderance of the evidence that his race was a motivating factor in Suncor’s decision to terminate his employment, then you must decide in favor of Suncor and you do not have to consider Mr. Finn’s discrimination claim any further.

 However, if you find that Mr. Finn has proved by a preponderance of the evidence that his race motivated Suncor’s decision to terminate his employment, then you must consider Suncor’s affirmative defenses, which are set forth in subsequent instructions.

**[kr OUT] PLAINTIFF’S INSTRUCTION NO. 2.3**

**MOTIVATING FACTORS**

 The mere fact that Mr. Finn is a Hispanic man is not sufficient in and of itself to establish plaintiff’s race discrimination claim under the law. In showing that plaintiff’s race was a motivating factor, plaintiff is not required to prove that his race was the sole motivation or even the primary motivation for defendant's decision. The plaintiff need only prove that race played a part in the defendant's decision even though other factors may have also motivated the defendant.

**Plaintiff’s Authority:** *Davey v. Lockheed Martin Corp*., 301 F.3d 1204, 1212, 1213 (10th Cir.2002). See also *Univ. of Tx. Sw. Med. Ctr. v. Nassar*, No. 12-484, 570 U.S. \_\_, 133 S. Ct. 2517, 2522-23. 2526 (June 24, 2013)

**Defendant’s Objection:**

* Plaintiff’s Instruction fails to provide the jury context on the role that the phrase “motivating factor” plays in its determination. Defendant provides this context.
* The first sentence in Plaintiff’s instruction is improper in the “motivating factor” instruction. It belongs in the Instruction 2.2.
* Plaintiff’s Instruction fails to provide clear direction on the “defendant’s decision” at issue in this litigation. Defendant’s instruction provides clarity that the decision at issue is Plaintiff’s termination.
* Plaintiff’s Instruction fails to state that Mr. Finn must prove that “race was a consideration that actually led to Suncor’s decision to terminate his employment.” [[1]](#footnote-1)

**DEFENDANT’S INSTRUCTION NO. 2.3 [OUT – incorporated inro 2.2]**

**MOTIVATING FACTOR**

In order for Mr. Finn to succeed on his discrimination claim, he must prove by a preponderance of the evidence that his race was a motivating factor in Suncor’s decision to terminate his employment.

Mr. Finn is not required to prove that his race was the sole motivation or even the primary motivation for Suncor’s decision to end his employment. Rather, to meet his burden, Mr. Finn must demonstrate that his race was a consideration that actually led to Suncor’s decision to terminate his employment.

**Defendant’s Authority:** 3 Fed. Jury Prac. & Instr. §§ 170.20, 170.23, 171.01, 171.42 (6th ed. 2013).

**Plaintiff’s Objection:** Mr. Finn need only prove that the adverse action occurred in circumstances giving rise to an inference of discrimination. See *Whitfield v. Potter,* 2008 WL 4527711 (D. Colo. 2008), citing *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 142-143,120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), and *St. Mary’s Honor Center v. Hicks,* 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

**DEFENDANT’S PROPOSED INSTRUCTION 2.4\* [No – OUT]**

**INTENT**

 In order for Mr. Finn to establish his discrimination claim, he must prove by a preponderance of the evidence that Suncor intentionally and purposefully discriminated against him because of his race. It is not enough for Mr. Finn to show that Suncor’s conduct had a negative effect on him.

**Defendant’s Authority**: 3 Fed. Jury Prac. & Instr. §§ 170.21, 171.26 (6th ed. 2013); *Owens*, 913 F. Supp. 2d at 1059; *Exum*, 389 F.3d at 1134; *Kolstad*, 527 U.S. at 535.

**Plaintiff’s Objection:** This instruction does not accurately state applicable law, pursuant to *Whitfield v. Potter,* 2008 WL 4527711 (D. Colo. 2008), citing *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 142-143,120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), and *St. Mary’s Honor Center v. Hicks,* 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Furthermore, this is a termination case, not merely a negative effect case.

This instruction does not reflect nor accurately set forth the law as established in *Univ. of Tx. Sw. Med. Ctr. v. Nassar,* No. 12-484, 570 U.S. \_\_, 133 S. Ct. 2517, 2522, 2525 (June 24, 2013), as an employee need only prove the existence of an impermissible motivating factor in order to prevail. *Id.* at 2525.

**DEFENDANT’S INSTRUCTION 2.5**

**SIMILARLY SITUATED**

 Mr. Finn claims that his supervisor, Jennifer Fowler, treated him differently than she treated another employee, Tony Murphy. Under the law, in order to consider Ms. Fowler’s treatment of Mr. Finn compared to how she treated Mr. Murphy, you must first determine that:

1. Mr. Finn and Mr. Murphy are “similarly situated”;
2. Mr. Finn and Mr. Murphy violated work rules of comparable seriousness; and,
3. Ms. Fowler treated Mr. Finn differently than she treated Mr. Murphy after each employee violated the work rules of comparable seriousness.

 To be “similarly situated,” Mr. Finn must prove by a preponderance of the evidence that he and Mr. Finn were subject to the same standards governing performance and discipline. In determining whether Mr. Finn and Mr. Murphy are similarly situated, you may compare their job responsibilities.

 If you find that Mr. Finn has proven each element set forth above by a preponderance of the evidence, then when determining whether Suncor discriminated against Mr. Finn, you may consider Ms. Fowler’s treatment of Mr. Murphy, as compared to Mr. Finn, after each employee violated the work rules of comparable seriousness.

 However, if you find that Mr. Finn has not proven each element set forth above by a preponderance of the evidence, then you may not consider Ms. Fowler’s treatment of Mr. Murphy as compared to Mr. Finn, when determining whether Suncor discriminated against Mr. Finn.

**Defendant’s Authority:**  *Sampson v. Integra Telecom Holdings, Inc.*, 461 Fed. Appx. 670, 673 (10th Cir. 2012); *Kendrick v. Penske Transp. Servs.*, 220 F.3d 1220, 1230 (10th Cir. 2000); *Igwe v. Saint Anthony’s Hosp.*, 804 F. Supp. 2d 1183, 1192 (W.D. Okla. 2011), *aff’d*, 464 F. App’x 685 (10th Cir. 2012).

**\*\*Plaintiff’s Objection:** This instruction does not accurately reflect applicable law. Mr. Finn can establish discrimination through either direct or circumstantial evidence, and proof that discrimination occurred by showing differential treatment as compared to a similarly situated employee is not the sole or exclusive means of proving discrimination. See *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2155 (2003). Mr. Finn further need only prove that the adverse action occurred in circumstances giving rise to an inference of discrimination. *Whitfield v. Potter*, 2008 WL 4527711 (D. Colo. 2008), citing *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 142-143,120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), and *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). See also *Univ. of Tx. Sw. Med. Ctr. v. Nassar*, No. 12-484, 570 U.S. \_\_, 133 S. Ct. 2517, 2522-23 (June 24, 2013),

**DEFENDANT’S INSTRUCTION 2.6**

**SUBJECTIVE BELIEFS IRRELEVANT**

 Mr. Finn cannot rely upon his own subjective belief that Suncor discriminated against him to establish his claims against Suncor. Subjective beliefs of discrimination, however genuine, are not proof of discrimination.

**Defendant’s Authority**: *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1988); *Webb v. Level 3 Comm., LLC*, 167 Fed. Appx. 725, 733 (10th Cir. 2006).

**Plaintiff’s Objection:** This instruction is not necessary, as the elements instructions and other instructions sufficiently explain the evidence that is necessary to establish a claim of discrimination.

The *Branson* case only mentions the word “subjective” in the headnote, and it is not stated in the opinion. It was however a case where the plaintiffs’ relied upon “mere conjecture that their employer's explanation is a pretext for intentional discrimination” (*Id.* at 772).

The *Webb* case involved the Plaintiff presenting no evidence to support his conspiracy theory, which was based on speculation. The Court stated:

Webb makes two final arguments regarding pretext: 1) Level 3 initially hired older employees in order to “milk” their expertise; and 2) instead of terminating Webb in June 2001, Level 3 placed him in another position which made him vulnerable to future layoffs. Webb has presented no evidence to support his conspiracy theory. Both allegations are based purely upon speculation, and speculation is insufficient to raise a genuine issue of material fact as to pretext. *See* [*Doan,* 82 F.3d at 977](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996106549&pubNum=506&fi=co_pp_sp_506_977&originationContext=document&transitionType=DocumentItem&contextData=%28sc.UserEnteredCitation%29#co_pp_sp_506_977) (“Speculation ... will not suffice for evidence.”)

The evidence in this case does not justify the instruction proposed by Suncor.

**PLAINTIFF’S PROPOSED INSTRUCTION NO. 2.7**

**BUSINESS JUDGMENT RIGHTS**

 Suncor has asserted that it terminated Mr. Finn’s employment for unsatisfactory job performance in violation of its policies. You are not to second guess the wisdom of Suncor’s policies or substitute your judgment for Suncor’s. An employer has discretion to enforce employment policies unless doing so would violate the employee’s rights under federal law.

**Plaintiff’s Authority**: Judge John L. Kane’s “Fall 2013 Sample Instructions,” including Instruction 1.18 (Business Judgment Rights).

**Defendant’s Objection:** The “Fall 2013 Sample Instructions” is not applicable to the facts of this case. Defendant is not claiming that Plaintiff violated its policies. Rather, Suncor states that Mr. Finn did not run the warehouse properly and was terminated for failing to do so. Therefore, Plaintiff’s reference to “violation of policies” in the first sentence, the instruction “not the second guess the wisdom of Suncor’s policies” in the second sentence, and notation that an “employer has discretion to enforce employment policies” in the third sentence do not provide the jury with relevant direction on the issues presented for their decision.

 In comparison, Defendant’s instruction is customized to meet the facts of the case.

**DEFENDANT’S PROPOSED INSTRUCTION NO. 2.7**

**BUSINESS JUDGMENT**

 In reaching your verdict on Mr. Finn’s race discrimination claim, you should keep in mind that the law only prohibits an employer from intentionally discriminating against someone based on race. The law does not require an employer to use good judgment, to make correct decisions, or even to treat its employees fairly. Therefore, in deciding Mr. Finn’s discrimination claim, it is not your function to second-guess Suncor’s business decisions or put yourself in the shoes of its management. In evaluating Suncor’s assertion that it terminated Mr. Finn’s employment because he did not run the warehouse properly, you cannot find that there was discrimination simply because you disagree with the business judgment of Suncor.

**Defendant’s Authority:** 3 Fed. Jury Prac. & Instr. § 171.75 (6th ed. 2013); Faculty of Federal Advocates *Ad Hoc* Committee Model Employment Law Jury Instructions (Oct. 2012) at p. 9 (citing *Romero v. City of Albuquerque*, 190 F. App’x 597, 605 (10th Cir. 2006)).

**Plaintiff’s Objection:** This instruction is overly broad, and rephrases other discrimination related instructions. This instruction should be limited in scope to the business judgment issue, and not mention nor address “intentional discrimination” nor proof of intentional discrimination.

 In the *Romero* case, in addressing the qualifications of applicants, the Tenth Circuit stated:

“Employers are given wide discretion in setting job standards and requirements and in deciding whether applicants meet those standards.” [*Hickman v. Flood & Peterson Ins., Inc.,* 766 F.2d 422, 425 (10th Cir.1985)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985131858&pubNum=350&fi=co_pp_sp_350_425&originationContext=document&transitionType=DocumentItem&contextData=%28sc.UserEnteredCitation%29#co_pp_sp_350_425). “As long as the qualifications offered by the employer are reasonable and have been consistently applied to all applicants for the position, ... there is no reason for the fact finder to supplant the employer's list of qualifications with its own.” [*York v. AT & T Co.,* 95 F.3d 948, 954 (10th Cir.1996)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996200091&pubNum=506&fi=co_pp_sp_506_954&originationContext=document&transitionType=DocumentItem&contextData=%28sc.UserEnteredCitation%29#co_pp_sp_506_954).

*Id.* at 605.

And in addressing the notion of pretext, the Tenth Circuit wrote:

“The courts may not act as a super personnel department that second guesses employers' business judgments. Accordingly, minor differences between a plaintiff's qualifications and those of a successful applicant are not sufficient to show pretext.” [*Jaramillo v. Colo. Judicial Dep't,* 427 F.3d 1303, 1308-09 (10th Cir.2005)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2007607294&pubNum=506&fi=co_pp_sp_506_1308&originationContext=document&transitionType=DocumentItem&contextData=%28sc.UserEnteredCitation%29#co_pp_sp_506_1308) (quotation and citation omitted).

*Id.* at 605.

Thus the proffered instruction should be limited in scope to the business judgment issue. **DEFENDANT’S PROPOSED INSTRUCTION NO. 2.8**

**AFFIRMATIVE DEFENSES**

 If, after considering Mr. Finn’s evidence and Suncor’s rebuttal of that evidence, you find Mr. Finn has established each and every element of his claim for discrimination, only then should you concern yourselves with the defenses offered by Suncor.

**Defendant’s Authority:** 3 Fed. Jury Prac. & Instr. § 170.50 (6th ed. 2013).

**Plaintiff’s Objection:** This instruction is repetitive of the elements instruction and is unnecessary. It further unnecessarily tells the jury in what order to consider the evidence, which unduly constrains the jury’s domain in considering all of the evidence. Instruction 1.1 sets forth all of the information that the jury needs in considering the evidence.

**DEFENDANT’S PROPOSED INSTRUCTION NO. 2.9**

**SAME DECISION**

If you determine Mr. Finn proved that his race was a motivating factor in Suncor’s decision to terminate his employment, then you must determine whether Suncor has proven, by a preponderance of the evidence, that it would have reached the same decision regardless of Mr. Finn’s race.

**Defendant’s Authority:** 3 Fed. Jury Prac. & Instr. § 170.51 (6th ed. 2013).

**Plaintiff’s Objection:** It is unnecessary for this instruction to be given, as this is better addressed in the Special Verdict Form.

**PLAINTIFF’S PROPOSED INSTRUCTION NO. 3.1**

**DAMAGES DETERMINATION**

 If you find in favor of Mr. Finn on his claim of discrimination based upon his race, then you may award damages as follows:

**Back Pay**: the amount of the pay Mr. Finn would have earned had he not been discriminated against until today’s date. You should then add to this amount the employee benefits, such as health, insurance, vacation and other benefits Mr. Finn would have received had be not been discriminated against, through today’s date. You should then subtract the amount of the pay and benefits Mr. Finn has actually earned from other employment through today’s date.

**Other Compensatory Damages**: such as emotional distress, pain, suffering, inconvenience or mental anguish, embarrassment, humiliation, out of pocket expenses, adverse effects on Mr. Finn and other such damages you find Mr Finn has proved he experienced or in the future will experience as a result of the wrongful conduct.

**Nominal Damages**: If you find Mr. Finn has failed to prove he suffered any damages, then you must award Mr. Finn the nominal amount of $1.00.

**Punitive Damages**: If you find Suncor intentionally discriminated against Mr. Finn, the law allows, but does not require, an award of punitive damages. The purpose of an award of punitive damages is to punish a wrongdoer for misconduct, and also to provide a warning to others.

You may award punitive damages if you find Suncor engaged in discrimination with malice or with reckless indifference to the right of Mr. Finn to be free from such intentional discrimination. Suncor acts with malice or indifference if Suncor knew that the decision to terminate Mr. Finn was in violation of federal law prohibiting discrimination or if Suncor acted with reckless disregard of the law while knowing there was a high probability that such acts violated the law.

 In order to find Suncor liable for punitive damages, you must find that Suncor discriminated in the face of a perceived risk that its actions would violate federal law.

 In deciding the amount of punitive damages, you may consider the following:

1. The offensiveness of the conduct;

2. The amount needed, considering Suncor’s financial condition, to prevent the conduct from being repeated; and

3. Whether the amount of punitive damages bears a reasonable relationship to the actual damages awarded.

**Plaintiff’s Authority**: *Ash v. Colo. Springs. School District 11*, 07-cv-01104, Doc. 86-2, Instruction No. 4.1, Page 42-43 of 60.

**Defendant’s Objection:**

General Objection:

* Plaintiff proposes that only one damages instruction is given. Defendant believes separate instructions should be given for compensatory and punitive damages.
* Plaintiff’s instruction does clearly delineate the different standards governing the award of punitive damages and compensatory damages. Defendant’s instructions provide this guidance.
* Plaintiff’s instruction does not account for the fact that if he does not produce sufficient evidence during trial, the Court may decide that the jury should not consider Mr. Finn’s request for punitive damages. [[2]](#footnote-2)

Objection to Compensatory Damages Section:

* Plaintiff’s instruction does not properly explain that compensatory damages are inclusive of “back pay,” “nominal damages” and “other compensatory damages.” Defendant’s instruction properly defines compensatory damages.
* Plaintiff’s definition of nominal damages does not state that the jury may award nominal damages if it finds that Mr. Finn’s damages “have no monetary value.” Defendant’s instruction properly defines nominal damages.
* Plaintiff’s instruction does not provide the jury with the guidance that it may only “award compensatory damages for injuries that Mr. Finn proved were caused by Suncor’s wrongful conduct.” Defendant’s instruction provides this guidance.
* Plaintiff’s instruction does not offer additional guidance on the analysis it must understand when contemplating an award of non-back pay compensatory damages. Defendant’s instruction provides this guidance.

Objection to Punitive Damages Section:

* Defendant’s Punitive Damages Instruction is set forth in Defendant’s Proposed Instruction 3.2.
* Plaintiff’s definition of “malice or reckless indifference” fails to instruct the jury that they must evaluate Suncor’s employees’ “mental state of mind and determine whether Mr. Finn has showed that a Suncor employee . . . had knowledge she or he may be acting in violation of federal law.” *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526 (1999). Defendant’s proposed instruction provides this guidance.
* Plaintiff’s instruction fails to include the affirmative defense offered by Defendant. Defendant’s proposed instruction provides this guidance.

**DEFENDANT’S PROPOSED INSTRUCTION 3.1**

**COMPENSATORY DAMAGES**

 If you find that Suncor intentionally discriminated against Mr. Finn on the basis of his race, then you must determine an amount that is fair compensation for Mr. Finn’s losses. You may award compensatory damages for injuries that Mr. Finn proved were caused by Suncor’s wrongful conduct. The damages that you award must be fair compensation, no more and no less.

 In calculating damages, you can consider:

1. Back Pay. These are the wages and fringe benefits you find Mr. Finn would have earned in his employment with Suncor if Mr. Finn had not been discharged on December 13, 2011. In making this calculation, you should subtract the amount of earnings and other benefits from employment that Mr. Finn has earned during his subsequent employment from his date of discharge through trial.
2. Other Damages. You may also award damages for emotional distress, pain, suffering, inconvenience or mental anguish if you determine that Mr. Finn has proved, by a preponderance of the evidence, to have suffered any or all of these types of damages. No evidence of 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 setting 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. When considering the amount of damages to which Mr. Finn may be entitled, you should consider the nature, character, and seriousness of any emotional distress and whether its consequences have continued to the present time or can reasonably be expected to continue in the future.

Remember, you must not engage in any speculation, guess or conjecture and you must not award any damages by way of punishment or through sympathy.

 If, however, you find that Mr. Finn has failed to prove that he suffered any damages or you find that his damages have no monetary value, then you must award him the nominal amount of $1.00.

**Defendant’s Authority:** 3 Fed. Jury Prac. & Instr. §§ 170.60, 170.63; Faculty of Federal Advocates *Ad Hoc* Committee Model Employment Law Jury Instructions (Oct. 2012) at pp. 60, 65.

**Plaintiff’s Objection:** The concept of fairness is unnecessary, and begs the question and is perhaps insulting. Furthermore, language about speculation or guessing or conjecture does not belong in this instruction, and is unnecessary. The jury is elsewhere instructed about the burden of proof being by a preponderance. See Instruction 1.7.

**STIPULATED INSTRUCTION 3.1.1**

**MITIGATION**

 Mr. Finn is required to make reasonable efforts to minimize his damages. In this case, Suncor claims that Mr. Finn failed to minimize damages because he failed to use reasonable efforts to find comparable employment after discharge.

 It is Suncor’s burden to prove that Mr. Finn failed to make reasonable efforts to minimize his damages. This defense is proven if you find by a preponderance of the evidence that:

1. There were or are substantially comparable positions which Mr. Finn could have discovered and for which Mr. Finn was qualified; and,
2. Mr. Finn failed to use reasonable diligence to find suitable employment. “Reasonable diligence” does not require that Mr. Finn be successful in obtaining employment, but only that he make a good faith effort at seeking employment.

If Suncor has proven the above, then you must deduct from any award of back pay the amount of pay and benefits Mr. Finn could have earned with reasonable effort.

**Authority:** 3 Fed. Jury Prac. & Instr. § 170.60; Faculty of Federal Advocates *Ad Hoc* Committee Model Employment Law Jury Instructions (Oct. 2012) at p. 60.

**DEFENDANT’S PROPOSED INSTRUCTION 3.2**

**PUNITIVE DAMAGES**

 If you find that Suncor intentionally discriminated against Mr. Finn, the law allows, but does not require, an award of punitive damages. The purpose of an award of punitive damages is to punish a wrongdoer for misconduct, and also to provide a warning to others.

 You may award punitive damages if you find that Suncor engaged in discrimination with malice or with reckless indifference to the right of Mr. Finn to be free from such intentional discrimination. The terms “malice” and “reckless indifference” require you to evaluate an individual’s mental state of mind and determine whether Mr. Finn has showed that a Suncor employee (for example, Ms. Fowler or individuals from Human Resources) had knowledge she or he may be acting in violation of federal law. That is, in order to find Suncor liable for punitive damages, you must find that Suncor discriminated against Mr. Finn in the face of a perceived risk that its actions would violate federal law.

 In deciding the amount of punitive damages, you may consider the following:

1. The offensiveness of the conduct;
2. The amount needed, considering Suncor’s financial condition, to prevent conduct from being repeated; and,
3. Whether the amount of punitive damages bears a reasonable relationship to the actual damages awarded.

Where discriminatory acts on the part of Suncor’s managerial employees, like Ms. Fowler, were contrary to Suncor’s good faith efforts to comply with the law by implementing and enforcing policies and programs designed to prevent unlawful discrimination, you shall not award punitive damages.

**Defendant’s Authority:** 3 Fed. Jury Prac. & Instr. §§ 170.60, 170.63; Faculty of Federal Advocates *Ad Hoc* Committee Model Employment Law Jury Instructions (Oct. 2012) at pp. 60, 65; *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526 (1999).[[3]](#footnote-3)

**Plaintiff’s Objection:** The Faculty of Federal Advocates Ad Hoc Committee instructions reffered to has been unnecessarily modified by references to Ms. Fowler and members of human resourcese. . Thus the modified instruction is unduly limited in scope.

 The Defendant incorrectly imposes upon Mr. Finn the requirement that he prove to the jury that **each individual** had knowledge she or he may be acting in violation of federal law. This instruction will lead to jury confusion, and implies that if less than all of the persons involved had such knowledge, then Mr. Finn cannot prevail. For example, if Ms. Fowler had such knowledge and orchestrated Mr. Finn’s termination in violation of the law, however the human resources representatives did not have such motive, the jury would have to find for Suncor. This instruction is thus contrary to the law, as the jury is to consider the conduct of Suncor, and its employees collectively.

These modifications are too limiting and not appropriate, and would unduly restrict the focus and consideration of the jury. This instruction further improperly sets forth the requirement that the jury inquire into and determine the “state of mind” of Ms. Fowler, and of others, and determine that each one of them possessed “knowledge she or he may be acting in violation of federal law”, which is an unreasonable requirement to impose on the jury. Ignorance of the law is not to be so lightly excused.

**STIPULATED INSTRUCTION NO. 4.1**

**GENERAL INTRODUCTION**

 Now that you have heard the evidence and the argument, it is my duty to instruct you about the applicable law. It is your duty to follow the law as I will state it and to apply it to the facts as you find them from the evidence in the case. Do not single out one instruction as stating the law, but consider the instructions as a whole. You are not to be concerned about the wisdom of any rule of law stated by me. You must follow and apply the law.

 Each of you has a copy of the instructions to consult whenever you wish. The lawyers may properly refer to some of the governing rules of law in their arguments. If there is any difference between the law stated by the lawyers and as stated in these instructions, you are governed by my instructions.

 Nothing I say in these instructions indicates that I have any opinion about the facts. You, not I, have the duty to determine the facts.

 You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be controlled by sympathy, prejudice, or public opinion. All parties expect that you will carefully and impartially consider all the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

**STIPULATED INSTRUCTION NO. 4.2**

**JURY DELIBERATION – GENERAL INSTRUCTIONS**

 It is your duty to find the facts from all the evidence in the case. To those facts, you must apply and follow the laws contained in these instructions whether you agree with them or not. Your decision is called a verdict and is reached by applying those laws to the facts as you find them. You have taken an oath promising to do just so.

 You must follow all of these instructions and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything I may say or do any suggestions as to what verdict you should return. Your verdict is a matter entirely for you to decide.

**STIPULATED INSTRUCTION NO. 4.3**

**JURY – DELIBERATIONS**

 When you go to the jury room to begin your deliberations, you must elect one of you to serve as your Presiding Juror. He or she will preside over your deliberations and speak for you here in court.

 You will then discuss the case with your fellow jurors to reach agreements if you can do so. Your verdict must be unanimous.

 Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it with your fellow jurors, and listened to the views of your fellow jurors. I offer some suggestions on how you might do this in the

next jury instruction, entitled “Jury – The Deliberations Process.”

 Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

 It is important that you attempt to reach a unanimous verdict, but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight of the evidence simply to reach a verdict.

**STIPULATED INSTRUCTION NO. 4.4**

**JURY – THE DELIBERATION PROCESS**

 Once you have elected your Presiding Juror as directed by the previous instruction, you are free to proceed as you agree is appropriate. Therefore, I am not directing you how to proceed, but I offer the following suggestions that other juries have found helpful so that you can proceed in an orderly fashion, allowing full participation by each juror, and arrive at a verdict that is satisfactory to each of you.

 First, it is the responsibility of the Presiding Juror to encourage good communication and participation by all jurors and to maintain fairness and order. Your Presiding Juror should be willing and able to facilitate productive discussions even when disagreements and controversy arise.

 Second, the Presiding Juror should let each of you speak and be heard before expressing his or her own views.

 Third, the Presiding Juror should never attempt to promote nor permit anyone else to promote his or her personal opinions by coercion or intimidation or bullying of others.

 Fourth, the Presiding Juror should make certain that the deliberations are not rushed to reach a conclusion.

 If the Presiding Juror you select does not meet these standards, he or she should voluntarily step down or be replaced by a majority vote.

 After you select a Presiding Juror you should consider electing a secretary who will tally the votes, help keep track of who has or hasn’t spoken on the various issues, make certain that all of you are present whenever deliberations are under way and otherwise assist the Presiding Juror.

 Some juries are tempted to start by holding a preliminary vote on the case to “see where we stand.” It is most advisable, however, that no vote be taken before a full discussion is had on the issue to be voted on, otherwise you might lock yourself into a certain view before considering alternative and possibly more reasonable interpretations of the evidence. Experience has also shown that such early votes frequently lead to disruptive, unnecessarily lengthy, inefficient debate and ineffective decision-making.

 Instead, I suggest the Presiding Juror begin your deliberations by directing the discussion to establishing informal ground rules for how you will proceed. These rules should assure that you will focus upon, analyze and evaluate the evidence fairly and efficiently and that the viewpoints of each of you is heard and considered before any decisions are made. No one should be ignored. You may agree to discuss the case in the order of the questions presented in the special verdict form or in chronological order or according to the testimony of each witness. Whatever order you select, however, it is advisable to be consistent and not jump from one topic to another.

 To move the process of deliberation along in the event you reach a controversial issue, it is wise to pass it temporarily and move on to the less controversial ones and then come back to it. You should then continue through each issue in the order you have agreed upon unless a majority of you agrees to change the order.

 It is very helpful, but certainly not required of you, that all votes be taken by secret ballot. This will help you focus on the issues and not be overly influenced by personalities. Each of you should also consider any disagreement you have with another

juror or jurors as an opportunity for improving the quality of your decision and therefore should treat each other with respect. Any differences in your views should be discussed

 calmly and, if a break is needed for that purpose, it should be taken. As I mentioned at

the beginning of this trial, each of you is responsible for making sure that no juror bases a decision on matters that are not evidence.

 Each of you should listen attentively and openly to one another before making any judgment. This is sometimes called “active listening” and it means that you should not listen with only one ear while thinking about a response. Only after you have heard and understood what the other person is saying should you think about a response.

 Obviously, this means that, unlike TV talk shows, you should try very hard not to interrupt. If one of your number is going on and on, it is the Presiding Juror who should suggest that the point has been made and it is time to hear from someone else.

 You each have a right to your individual opinion, but you should be open to persuasion. When you focus your attention and best listening skills, others will feel respected and, even while they may disagree, they will respect you. It helps if you are open to the possibility that you might be wrong or at least that you might change your mind about some issues after listening to other views.

 Misunderstanding can undermine your efforts. Seek clarification if you do not understand or if you think others are not talking about the same thing. From time to time the Presiding Juror should set out the items on which you agree and those on which you have not yet reached agreement.

 In spite of all your efforts, it is indeed possible that serious disagreements may arise. In that event, recognize and accept that “getting stuck” is often part of the decision making process. It is easy to fall into the trap of believing that there is something wrong with someone who is not ready to move toward what may be an emerging decision. Such a belief is not helpful. It can lead to focusing on personalities rather than the issues. It is best to be patient with one another. At such times slower is usually faster. There is a tendency to set deadlines and seek to force decisions. Providing a break or more time and space, however, often helps to shorten the overall process.

 You may wish from time to time to express your mutual respect and repeat your resolve to work through any differences. With such a commitment and mutual respect,

you will most likely render a verdict that leaves each of you satisfied that you have indeed rendered justice.

**STIPULATED INSTRUCTION NO. 4.5**

**COMMUNICATIONS WITH JUDGE**

 If it becomes necessary during your deliberations to communicate with me, you may send a folded note through the court security officer, signed by one of you. Do not disclose the content of your note to the court security officer. No member of the jury should hereafter attempt to communicate with me except by signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or orally here in open court. You are not to tell anyone – including me – how the jury stands, numerically or otherwise, until you have reached a unanimous verdict and I have discharged you.

 If you send a note to me containing a question or request for further direction, please bear in mind that responses take considerable time and effort. Before giving an answer or direction I must first notify the attorneys and bring them back to the court. I must confer with them, listen to arguments, research the legal authorities, if necessary, and reduce the answer or direction to writing.

 There may be some question that, under the law, I am not permitted to answer. If it is improper for me to answer the questions, I will tell you that. Please do not speculate about what the answer to your question might be or why I am not able to answer a particular question.

 In some instances jurors request that certain testimony be read to them. This cannot be done as it is inappropriate for the court to single out testimony. In those circumstances you must rely upon your own recollection.

**STIPULATED INSTRUCTION NO. 4.6**

**UNANIMOUS AGREEMENT AND JURY VERDICT FORM**

You each have copies of a document called a Jury Verdict Form. You should answer the questions in the Jury Verdict Form as directed. You must reach unanimous agreement on the answers to each of the questions you are directed in the form to answer. Upon arriving at an agreement, your Presiding Juror will insert each answer on the Jury Verdict Form. After all of the questions have been answered as directed by the Jury Verdict Form, your Presiding Juror will date the Jury Verdict Form, sign it, and then ask all of the other jurors to sign it.

After you have filled out the Jury Verdict Form in this manner, your Presiding Juror should advise the court security officer stationed outside the jury room that you have reached a verdict.

**PLAINTIFF’S PROPOSED SPECIAL VERDICT FORM**

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO** Judge John L. Kane

Case No. 12-cv-3024-JLK-MEH DERICK FINN,

Plaintiff,

v.

SUNCOR ENERGY a/k/a Suncor Energy USA, Inc.,

Defendant.

**RACE DISCRIMINATION – (PLAINTIFF’S) SPECIAL VERDICT FORM**

**WE THE JURY,** in the above-captioned action, render our verdict in response to the following interrogatories:

1. Has Mr. Finn proved by a preponderance of the evidence that Mr. Finn’s

race was a reason for Suncor’s decision to terminate his employment?

Yes: \_\_\_\_\_\_\_\_\_\_\_\_ No: \_\_\_\_\_\_\_\_\_\_\_\_

IF YOUR ANSWER TO QUESTION 1 IS YES, PROCEED TO QUESTION 2. IF

YOUR ANSWER TO QUESTION 1 IS NO, THEN DO NOT ANSWER ANY

FURTHER QUESTIONS ON THIS SPECIAL VERDICT FORM.

2. Has Suncor proved by a preponderance of the evidence, that it

would have made the same decision regardless of Mr. Finn’s race?

Yes: \_\_\_\_\_\_\_\_\_\_\_\_ No: \_\_\_\_\_\_\_\_\_\_\_\_

IF YOUR ANSWER TO QUESTION 2 IS NO, PROCEED TO QUESTION 3. IF YOUR

ANSWER TO QUESTION 2 IS YES, THEN DO NOT ANSWER ANY FURTHER

QUESTIONS.

3. Has Mr. Finn proved, by a preponderance of the evidence, that he has

damages, injuries or losses as a result of the conduct of Suncor?

Yes: \_\_\_\_\_\_\_\_\_\_\_\_ No: \_\_\_\_\_\_\_\_\_\_\_\_

4. State below the amount of the compensatory damages, injuries or losses caused by the conduct of Suncor:

**Compensatory Damages - Back Pay**: the amount of the pay Mr. Finn would have earned had he not been discriminated against until today’s date. You should then add to this amount the employee benefits, such as health, insurance, vacation and other benefits Mr. Finn would have received had be not been discriminated against, through today’s date. You should then subtract the amount of the pay and benefits Mr. Finn has actually earned from other employment through today’s date:

$ \_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Compensatory Damages – Other**: such as emotional distress, pain, suffering,

inconvenience or mental anguish, embarrassment, humiliation, out of pocket expenses,

adverse effects of Mr. Finn and other such damages that you find the Mr. Finn has proved

that he experienced or in the future will experience as a result of the wrongful conduct:

$ \_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Nominal Damages**: If you find Mr. Finn has failed to prove that he suffered any

damages, then you must award Mr. Finn the nominal amount of $1.00.

 $ \_\_

**Punitive Damages**: If you find Suncor intentionally discriminated

against Mr. Finn, the law allows, but does not require, an award of punitive damages. The

purpose of an award of punitive damages is to punish a wrongdoer for misconduct, and

also to provide a warning to others.

You may award punitive damages if you find Suncor engaged in

discrimination with malice or with reckless indifference to the right of Mr. Finn to be free

from such intentional discrimination. In order to find Suncor liable for punitive damages, you must find Suncor discriminated in the face of a perceived risk that its actions would violate federal law.

In deciding the amount of punitive damages, you may consider the following:

 (1) The offensiveness of the conduct;

(2) The amount needed, considering Suncor’s financial

condition, to prevent the conduct from being repeated; and

(3) Whether the amount of punitive damages bears a reasonable

relationship to the actual damages awarded.

 $ \_\_\_\_\_\_\_\_\_\_\_\_\_\_

**5. Mitigation of Damages.**

**Mitigation:** Did Mr. Finn fail to mitigate his damages?

Yes: \_\_\_\_\_\_\_\_\_\_\_\_ No: \_\_\_\_\_\_\_\_\_\_\_\_

IF YOUR ANSWER TO QUESTION 5 IS YES, PROCEED TO QUESTION 6. IF THE

ANSWER TO QUESTION 5 IS NO, THEN DO NOT ANSWER ANY FURTHER

QUESTIONS.

6. State below the amount by which Mr. Finn’s damages must be reduced by

his failure to mitigate.

**Mitigation**: Mr. Finn is obligated to take reasonable steps to mitigate or diminish

the damages suffered. It is, however, Suncor’s burden to prove, by a preponderance of the evidence, that Mr. Finn failed to take reasonable steps to diminish the extent of the injuries suffered. If Suncor so proves, you should reduce your award by the amount of damages that would not have been suffered if Mr. Finn had taken reasonable steps to mitigate his damages.

$ \_\_\_\_\_\_\_\_\_\_\_\_\_\_

**PART THREE. CERTIFICATION**

**Proceed to sign the Certification section on the next page.**

**CERTIFICATION**

**If your answers to the foregoing questions constitute your true verdict in this case, sign and date the following section. Once you have done so, inform the Court by note that you are ready to return to the courtroom for announcement of your verdict.**

By our signatures and our answers to these questions, we hereby certify that the answers on this form represent the unanimous verdict of the jury.

Dated: July \_\_\_\_\_\_\_\_\_, 2014.

Based in part Upon: *Ash v. Colo. Springs. School District 11*, 07-cv-01104, Doc. 86-2, Verdict Form, Page 56. Also considered: *Univ. of Tx. Sw. Med. Ctr. v. Nassar*, No. 12-484, 570 U.S. \_\_, 133 S. Ct. 2517, 2522-23, 2526 (June 24, 2013); 42 U.S.C. Section 1981a(b)(1); *Skinner v. Total Petroleum, Inc.,* 859 F. 2d 1439, 1444 (10th Cir. 1988); [*Price Waterhouse v. Hopkins,* 490 U.S. 228, 246, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989)](http://web2.westlaw.com/find/default.wl?vc=0&ordoc=2011789921&rp=%2ffind%2fdefault.wl&DB=708&SerialNum=1989063356&FindType=Y&AP=&fn=_top&rs=WLW10.06&pbc=5C49F38C&ifm=NotSet&mt=10&vr=2.0&sv=Split);

**DEFENDANT’S PROPOSED SPECIAL VERDICT FORM**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

|  |
| --- |
| Case No. 12-cv-03024-WJM-MEH |
| DERICK FINN,Plaintiff,v.SUNCOR ENERGY a/k/a Suncor EnergyUSA, Inc.,Defendant. |
| (Defendant’s) special JURY VERDICT FORM  |

 **WE THE JURY**, in the above-captioned action, present our answers to questions submitted by the Court, to which we have unanimously agreed:

1. Race Discrimination Claim

 **Question No. 1**: Did Plaintiff Derick Finn prove, by a preponderance of the evidence, that his race motivated Defendant Suncor to terminate his employment?

 \_\_\_\_\_ Yes \_\_\_\_\_ No

***If your answer to Question No. 1 is “no” then you have completed your deliberations. Please skip the remaining questions, and please sign and date the Certification at the end of this Verdict Form. Otherwise, please proceed to question No. 2.***

1. “same decision” defense

 **Question No. 2**: Did Defendant Suncor prove, by a preponderance of the evidence, that it would have reached the same decision to terminate Mr. Finn’s employment regardless of his race?

\_\_\_\_\_ Yes \_\_\_\_\_ No

***If you answered “yes” to Question No. 2, then you have completed your deliberations. Please skip the remaining questions, and please sign and date the Certification at the end of this Verdict Form. Otherwise, please proceed to question No. 3.***

1. Damages

 **Question No. 3**: Did Plaintiff Derick Finn prove, by a preponderance of the evidence, that he suffered compensatory damages as a result of Defendant Suncor’s discrimination?

\_\_\_\_\_ Yes \_\_\_\_\_ No

***If your answer to Question No. 3 is “yes”, please proceed to Question No. 4.***

 ***If your answer to Question No. 3 is “no,” then Mr. Finn will be awarded the nominal amount of $1.00 as compensatory damages. Please enter this amount on the line below and then proceed to Question No. 7.***

$\_\_\_\_\_\_\_

 **Question No. 4**: What is the amount of compensatory damages Plaintiff Derick Finn has proved he suffered as a result of Defendant Suncor’s discrimination?

 $\_\_\_\_\_\_\_

 **Question No. 5**: Did Defendant Suncor Energy (U.S.A.) Inc. prove, by a preponderance of the evidence, that Plaintiff Derick Finn failed to use reasonable efforts to find comparable employment after his discharge?

 \_\_\_\_\_ Yes \_\_\_\_\_ No

 ***If your answer to Question No. 5 is “yes,” please proceed to Question No. 6.***

 ***If your answer to Question No. 5 is “no,” please proceed to Question No. 7.***

**Question No. 6**: What is the amount of pay and benefits Plaintiff Derick Finn could have earned if he had used reasonable efforts to find comparable employment?

 $\_\_\_\_\_\_\_

**Question No. 7**: Did Plaintiff Derick Finn prove, by a preponderance of the evidence, that Defendant Suncor intentionally discriminated against him with malice or with reckless indifference to Mr. Finn’s right to be free from intentional discrimination?

 \_\_\_\_\_ Yes \_\_\_\_\_ No

 ***If your answer to Question No. 7 is “yes,” please proceed to Question No. 8.***

***If your answer to Question No. 7 is “no,” you have concluded deliberations. Please skip the remaining questions and please sign and date the Certification at the end of this Verdict Form.***

**Question No. 8**: Did Defendant Suncor prove, by a preponderance of the evidence, that it made good faith efforts to comply with the law by implementing and enforcing policies and programs designed to prevent unlawful discrimination?

 \_\_\_\_\_ Yes \_\_\_\_\_ No

***If your answer to Question No. 8 is “yes,” you have concluded deliberations. Please skip the remaining questions and please sign and date the Certification at the end of this Verdict Form.***

***If your answer to Question No. 8 is “no,” please proceed to Question No. 9.***

**Question No. 9**: Please identify the amount of punitive damages to be awarded against Defendant Suncor to punish it for intentionally discriminating against Mr. Finn with malice or with reckless indifference to Mr. Finn’s right to be free from intentional discrimination

 $\_\_\_\_\_\_\_

 ***You have now concluded deliberations in this case. Please sign and date the Verdict Form on the lines provided on the Certification.***

1. CERTIFICATION

**If your answers to the foregoing questions constitute your true verdict in this case, sign and date the following section. Once you have done so, inform the Court by note that you are ready to return to the courtroom for announcement of your verdict.**

By our signatures and our answers to these questions, we hereby certify that the answers on this form represent the unanimous verdict of the jury.

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Dated: July \_\_, 2014

Respectfully submitted this 3rd day of July, 2014.

 s*/*Andrew T. Brake\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Andrew T. Brake

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 ATTORNEY FOR PLAINTIFF

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|   | *s/Darren E. Nadel Hogan*\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Darren E. NadelAlyson A. Smith LITTLER MENDELSON, P.C.1900 Sixteenth StreetSuite 800Denver, CO 80202Telephone: 303.629.6200Fax: 303.629.0200E-mail: dnadel@littler.com aasmith@littler.comATTORNEYS FOR DEFENDANT  |

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1. *Elmore v. Capstan, Inc.*, 58 F.3d 525, 530 (10th Cir. 1995) (stating that “the employee must prove only that a discriminatory factor was ‘also a reason for the employer’s decision’ and that it was ‘the factor that made a difference’”) (quoting *James v. Sears, Roebuck & Co., Inc.*, 21 F.3d 989, 992 (10th Cir. 1994)) (emphasis added). [↑](#footnote-ref-1)
2. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 533, 539 (2009) (granting certiorari to determine “circumstances under which a jury may consider a request for punitive damages under §1981a(b)(1)” and determining that such consideration is proper where an plaintiff demonstrates “the requisite malice or … reckless indifference on the part of certain individuals”). [↑](#footnote-ref-2)
3. *Id.* at 526-27 (stating that the “terms ‘malice’ or ‘reckless indifference’ pertain to the employer’s knowledge that it may be acting in violation of federal law”), 535 (“The terms ‘malice’ and ‘reckless’ ultimately focus on the actor’s state of mind.”), 539 (holding that a jury may consider a request for punitive damages where the plaintiff demonstrates “the requisite ‘malice or reckless indifference’ on the part of certain individuals”), 546 (“We leave for remand the question whether petitioner can identify facts sufficient to support an inference that the requisite mental state can be imputed to respondent. … [I]t remains to be seen whether petitioner can make a sufficient showing that Allen[, the alleged bad actor,] acted with malice or reckless indifference to petitioner’s Title VII Rights.”). [↑](#footnote-ref-3)