

**2.21 THE NEW JERSEY LAW AGAINST DISCRIMINATION
("NJLAD") (N.J.S.A. 10:5-1 et seq.)**

INTRODUCTORY NOTE TO THE COURT (Approved 5/03)

The model employment discrimination charges that follow comprise a suggested framework for the fashioning of jury instructions. They are intended as a guide because discrimination claims can arise in a rich variety of contexts. Moreover, the law is in a state of continuing development. You should develop a charge that best fits the particular facts of a case. Moreover, you should be aware that the charge provided below was developed for use in those cases alleging "disparate treatment" under the NJLAD where the plaintiff's proofs of discrimination are largely circumstantial. It was not designed for handicap discrimination cases alleging failure to provide reasonable accommodations. It was not designed for discrimination cases where the plaintiff produces "direct evidence" of discrimination (so called "mixed-motive" cases), *see Bergen Commercial Bank v. Sisler*, 157 N.J. 188, 208-209 (1999) (discussing parties' burdens of proof where the plaintiff is able to establish direct evidence of discrimination); and it was not designed for "disparate impact" cases. Also, it was not designed for sexual harassment cases. *See* Charge 2.22G.

These charges have been revised to incorporate the holdings of several recent cases. Specifically, in *Mogull v. CB Commercial Real Estate Group, Inc.*, 162 N.J. 449 (2000), the Supreme Court of New Jersey suggested that charging the jury in terms of the *prima facie* case and burden-shifting as in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973), is confusing to the jury. 162 N.J. at 471-73. In addition, a recent opinion of the United States Supreme Court, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000), and the recent decisions in *Viscik v. Fowler Equip. Co. Inc.*, 173 N.J. 1 (2002) and *Matiello v. The Grand Union Co.*, 333 N.J. Super. 12 (App. Div.), *certif. denied*, 165 N.J. 677 (2000), give clarification on what evidence is sufficient to support a finding of intentional discrimination.

Under the previous model charge, the court instructed the jury to consider the issue of discrimination under the three-part *McDonnell Douglas* framework, which was followed in *Peper v. Princeton University* 77 N.J. 55, 83 (1978). First, the jury was instructed to determine whether the plaintiff had established a *prima facie* case - that is, specific elements of circumstantial evidence, which, if fully credited, would give rise to an inference of intentional discrimination. Second, the jury was instructed that, if the plaintiff met this initial burden, the burden shifted to the defendant to articulate a legitimate, non-discriminatory reason for the adverse employment decision. Third, the jury was instructed that if the defendant met this burden, then the burden shifted back to the plaintiff to prove that the reason proffered by the employer was a “pretext” and that the true reason for the adverse employment decision was unlawful discrimination. The jury was also instructed that at all stages of this test, the burden of proof remained on the plaintiff.

The *McDonnell Douglas* test was devised by the United States Supreme Court in the context of summary judgment practice, and was adopted as a means to determine whether a plaintiff had sufficient circumstantial evidence to raise a triable issue of fact on the issue of discrimination to withstand a motion for summary judgment. As the New Jersey Supreme Court observed in *Mogull*, however, this framework has “confuse[d] lawyers and judges, much less juries who do not have the benefit of extensive study of the law on the subject.” *Mogull*, 162 N.J. at 471. Accordingly, the New Jersey Supreme Court recommended that the first two stages of the *McDonnell Douglas* test be decided by the court, and not the jury. *Id.* at 473.

This revised charge is intended to implement this recommendation and remove from the jury’s consideration the issues of whether the plaintiff and the defendant have met the first and second stages, respectively, of the *McDonnell Douglas* test. Thus, whether the plaintiff has made out a *prima facie* case should be handled, if necessary, in the context of a motion for judgment pursuant to R. 4:40-1 at the end of the plaintiff’s case, and should not be an issue decided by the jury. Similarly, under *Mogull*, the court should also decide whether the defendant has offered evidence from which a jury could, if it believed the defendant, find that the adverse employment

decision was made for a legitimate, non-discriminatory reason. Again, this is merely a showing that the defendant has evidence sufficient to raise a defense to the discrimination claim requiring submission of the issue to a jury for determination, and should be handled, if contested, on a motion for judgment pursuant to R. 4:40-1.

If the court determines that the plaintiff has offered evidence sufficient to establish a *prima facie* case, and that the defendant has articulated a legitimate, non-discriminatory reason for its action, the defendant may still move for judgment under R. 4:40-1 on the ground that the plaintiff has not offered sufficient evidence on the third stage of the *McDonnell Douglas* test, *i.e.*, that the reason proffered by the employer was a “pretext” and that the true reason for the adverse employment decision was unlawful discrimination. If the court denies the motion (or the motion is not made), then the issue of whether the defendant engaged in unlawful discrimination is sufficiently disputed so as to require determination by the jury.

The jury is instructed to consider all of the evidence presented by the parties to reach the ultimate conclusion of whether the defendant intentionally discriminated against the plaintiff. In particular, the jury is instructed that it may, but is not required, to find intentional discrimination if it believes that the defendant’s stated reason for its actions was not the true reason for its actions. This instruction is in accord with the recent holdings in *Reeves*, *Viscik* and *Matiello*.

As noted above, the jury is no longer charged that it must make a finding as to whether the plaintiff has established a *prima facie* case of discrimination, since that is a finding the court must make. However, in cases where an element of the *prima facie* case is in dispute (*e.g.*, qualifications in a case where the employer claims a job applicant was not qualified for the job, whether there was an adverse job action in a constructive discharge case, or whether the employee was handicapped in certain handicap discrimination cases), the court must charge the jury on such issues based on the specific facts of the case. For further guidance on this issue, see the Note to the Court in the body of the charge.

A. General Charges (Determinative Factor; Mixed Motive Charge)
(Approved 5/03)

The plaintiff claims that the defendant unlawfully discriminated against him/her by *[insert alleged adverse action, such as: terminating his/her employment, failing to promote him/her, et cetera]* because of his/her *[choose an applicable category: age, sex, race, handicap, et cetera¹]*. The defendant denies these allegations and instead maintains that it *[insert the alleged adverse action]* the plaintiff because of the plaintiff's *[insert the defendant's explanation, such as the plaintiff's poor work performance, et cetera]*. If the defendant did, in fact, *[insert the alleged adverse action]* the plaintiff because of the plaintiff's *[insert the protected category]*, that would be unlawful under the New Jersey Law Against Discrimination.

NOTE TO JUDGE

In cases where an element of the *prima facie* case is in dispute (e.g., qualifications in a case where the employer claims a job applicant was not qualified for the job, whether there was an adverse job action in a constructive discharge case, or whether the employee was handicapped in certain handicap discrimination cases), the court must charge the jury on such issues based on the specific facts of the case. To assist the court in identifying the *prima facie* elements that may be in dispute, a list of the *prima facie* elements of the typical discrimination claims appears in Section B of this Charge. However,

¹See N.J.S.A. 10:5-12 for prohibited categories of discrimination. Although this provision of the statute does not expressly indicate that handicapped individuals are members of a protected class, this is made clear in N.J.S.A. 10:5-4.1. See *Anderson v. Exxon*, 89 N.J. 483, 492 (1982).

the court is cautioned that the formulation of the specific *prima facie* case elements is under constant revision by the courts, and thus, the court should consult the most recent formulation of the elements. Moreover, the court may need to develop its own list of *prima facie* elements to fit certain cases and may not be able to follow one of the models that have been provided. *See e.g., Viscik v. Fowler Equip. Co. Inc.*, 173 N.J. 1 (2002) (holding that “[t]he precise elements of a *prima facie* case must be tailored to the particular circumstances”); *Williams v. Pemberton Twp. Public Schools*, 323 N.J. Super., 490, 502 (App. Div. 1999) (holding that “[i]n light of the various contexts in which employment discrimination claims arise, we consider it unwise to require a plaintiff to establish unfailingly as part of the *prima facie* case that plaintiff was replaced by an individual outside the plaintiff’s protected class[; t]he appropriate fourth element of a plaintiff’s *prima facie* case requires a showing that the challenged employment decision (*i.e.*, failure to hire, failure to promote, wrongful discharge) took place under circumstances that give rise to an inference of unlawful discrimination[; t]hat formulation permits a plaintiff to satisfy the fourth element in a variety of ways”).

If it is necessary to charge one or more *prima facie* elements in a particular case, the following framework can be used to fashion the charge:

It is the plaintiff’s burden to prove that *[fill in the disputed prima facie element, such as “she was qualified for the position for which she applied.”]* If the plaintiff fails to prove this by a preponderance of the evidence, then you should return a verdict for the defendant. If, on the other hand, you find that *[fill in disputed prima facie element]*, then you must consider whether the defendant engaged in intentional discrimination because of the plaintiff’s *[insert the protected category]*.

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Then, having charged the jury on this element of the plaintiff's *prima facie* case, you would resume charging the jury with the following:

It is the plaintiff's burden to prove that it is more likely than not that the defendant engaged in intentional discrimination because of the plaintiff's *[insert the protected category]*. That is the ultimate issue you must decide: did the defendant *[insert alleged adverse action]* because of the plaintiff's *[insert the protected category]*. The plaintiff may do this directly, by proving that a discriminatory reason more likely than not motivated the defendant's action, or indirectly, by proving that the employer's stated reason for its action is not the real reason for its action.

You may find that the defendant had more than one reason or motivation for its actions. For example, you may find that the defendant was motivated both by the plaintiff's *[insert the protected category]* and by other, nondiscriminatory factors, such as the plaintiffs' job performance. To prevail, the plaintiff is not required to prove that his/her *[insert the protected category]* was the only reason or motivation for defendant's actions. Rather, the plaintiff must only prove that his/her *[insert the protected category]* played a role in the decision and that it made an actual difference in the defendant's decision. If you find that the plaintiff's *[insert the protected category]* did make an actual difference in the defendant's decision, then you must enter judgment for the plaintiff. If, however, you find that

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the defendant would have made the same decision regardless of the plaintiff's *[insert the protected category]*, then you must enter judgment for the defendant.²

Because direct proof of intentional discrimination is often not available, the plaintiff is allowed to prove discrimination by circumstantial evidence. In that regard you are to evaluate all of the indirect evidence of discrimination that you find was presented during the trial. *[The judge may refer to specific types of indirect evidence presented during the trial, such as comparative evidence, statistical evidence, prior conduct and/or comments of the parties, et cetera.]*

In particular, you should consider whether the explanation given by the defendant for his/her/its actions was the real reason for its actions. If you don't believe the reason given by the defendant is the real reason the defendant *[insert alleged adverse action]* the plaintiff, you may, but are not required to find that the plaintiff has proven his/her case of discrimination. You are permitted to do so because, if you find the employer has not told the truth about why it acted, you may conclude that it is hiding the discrimination. However, while you are permitted to find discrimination based upon your disbelief of the employer's stated reasons, you are not required to do so. This is because you may conclude that the

²*Bergen Commercial Bank v. Sisler*, 157 N.J. 188, 207 (1999); *Greenberg v. Camden County Vo-Tech Schools*, 310 N.J. Super. 189, 198 (App. Div. 1998); *Slohoda v. United Parcel Service, Inc.*, 207 N.J. Super. 145, 155 (App. Div. 1986). This charge incorporates the concept of, but does not use the phrase "determinative factor," because it is not as understandable to a jury. See *Gehring v. Case Corp.*, 43 F.3d 340, 343-344 (7th Cir. 1994).

employer's stated reason is not the real reason, but that the real reason is something other than illegal discrimination.

Let me give you an example of what I am talking about. Assume that an employee claims she was discharged because of her age and the employer claims she was discharged because of excessive absenteeism. If you were to conclude that the employer's explanation is false and that it did not really discharge the employee because of excessive absenteeism, you would be permitted to find that the real reason was because of the employee's age. However, you would not be required to find that the real reason was because of the employee's age, because you might find that the real reason had nothing to do with illegal discrimination. For example, you might find that the real reason was because the employer simply did not like the employee.

The plaintiff at all times bears the ultimate burden of convincing you that it is more likely than not that defendant engaged in intentional discrimination. To decide whether the plaintiff has proved intentional discrimination, you should consider all of the evidence presented by the parties, using the guidelines I gave you in the beginning of my instructions regarding evaluating evidence generally, such as weighing the credibility of witnesses. *[The judge should refer to any other general instructions where appropriate.]* Keep in mind that in reaching your determination of whether the defendant engaged in intentional discrimination, you

are instructed that the defendant's actions and business practices need not be fair, wise, reasonable, moral or even right, so long as the plaintiff's *[insert the protected category]* was not a motivating factor for the *[insert alleged adverse action]*.³

I remind you that the ultimate issue you must decide is whether the defendant engaged in illegal *[insert the protected category]* discrimination by *[insert alleged adverse action]* the plaintiff, and that the plaintiff has the burden to prove that discrimination occurred.

**B. *Prima Facie* Elements to be Included in Charge if Disputed
in a Particular Case (6/10)**

NOTE TO JUDGE

When it comes to determining what should be required, if anything, to constitute the fourth element of the plaintiff's *prima facie* case, the court needs to exercise a great amount of discretion and judgment to make sure that, in requiring a showing of this fourth element, the presence of such an element is absolutely necessary for a plaintiff to make out a case of discrimination. Thus, for example, the courts have generally held that, in a discriminatory discharge case, it is not necessary that the plaintiff establish, as part of his/her *prima facie* case, that he/she was replaced by someone outside the protected class. See, e.g., *Viscik v. Fowler Equip. Co. Inc.*, 173 N.J. 1 (2002) (holding that “[t]he precise elements of a *prima facie* case must be tailored to

³*Viscik v. Fowler Equip. Co. Inc.*, 173 N.J. 1 (2002) (noting that “[t]he employer’s subjective decision making may be sustained even if unfair”); *Maiorino v. Schering Plough Corp.*, 302 N.J. Super. 323, 345 (App. Div. 1997) (noting that “[t]here is no principle of law that requires that a business’ decision be popular with employees; [a]s long as the decision is not based on unlawful...discrimination, ‘the courts have no business telling [companies]...how to make personnel decisions’”), *certif. denied*, 152 N.J. 189 (1997); *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994).

the particular circumstances”); *Williams v. Pemberton Twp. Public Schools*, 323 N.J. Super., 490, 502 (App. Div. 1999) (holding that “[i]n light of the various contexts in which employment discrimination claims arise, we consider it unwise to require a plaintiff to establish unflinchingly as part of the *prima facie* case that plaintiff was replaced by an individual outside the plaintiff’s protected class[; t]he appropriate fourth element of a plaintiff’s *prima facie* case requires a showing that the challenged employment decision (*i.e.*, failure to hire, failure to promote, wrongful discharge) took place under circumstances that give rise to an inference of unlawful discrimination[; t]hat formulation permits a plaintiff to satisfy the fourth element in a variety of ways.”

1. Discriminatory Failure to Hire

- a. The plaintiff belongs to a protected class;
- b. The plaintiff applied for a position for which defendant was seeking applicants;
- c. The plaintiff was rejected despite adequate qualifications; and
- d. After the rejection, the position remained open and the defendant continued to seek applications from persons of plaintiff’s qualifications.

or

- d. The employer stopped seeking applications after receiving notice of plaintiff’s legal claim.

or

- d. The plaintiff was not hired under circumstances that would give rise to an inference of discrimination.

2. Failure to Hire Based on Age

- a. The plaintiff was 70 years of age or younger;
- b. The plaintiff applied and was qualified for a position for which defendant was seeking applicants;
- c. The plaintiff was rejected despite having adequate qualifications; and
- d. Defendant hired a person who was sufficiently younger/older to raise a question as to age discrimination.

or

- d. The position remained open and defendant continued to seek applicants with qualifications similar to plaintiff's.

or

- d. The plaintiff was not hired under circumstances that would give rise to an inference of discrimination.

3. Failure to Hire or Promote Based on Handicap

- a. The plaintiff was handicapped within the meaning of the statute;
- b. The plaintiff applied for and was qualified for a position for which defendant was seeking applicants; and
- c. The plaintiff was denied the job/promotion despite adequate qualifications; and
- d. The position remained open and defendant continued to seek applicants with qualifications similar to plaintiff's.

or

- d. The position was filled by someone with the same or lesser qualifications who was not handicapped.

or

- d. The plaintiff was not hired/promoted under circumstances that would give rise to an inference of discrimination.

4. Discriminatory Treatment in Compensation, Terms, Conditions or Privileges of Employment

- a. The plaintiff is a member of a protected class; and
- b. The plaintiff was treated less favorably with respect to *[insert description of compensation, terms, conditions or other privilege that is basis for discrimination claim]* than workers who were similarly situated but who were not *[insert the protected category]*.

5. Discriminatory Discharge or Demotion

- a. The plaintiff is a member of a protected class;
- b. The plaintiff must merely prove that he or she “was actually performing the job prior to the termination.”⁴
- c. The plaintiff was nevertheless fired or demoted; and
- d. The plaintiff was replaced by a worker not in the protected class.

or

- d. Non-protected workers with comparable work records were retained when the plaintiff was fired or demoted.

or

- d. The plaintiff was terminated or demoted under circumstances that would give rise to an inference of discrimination.

⁴ *Zive v. Stanley Roberts, Inc.*, 182 N.J. 436, 454 (2005).

C. Sample Jury Interrogatories

NOTE TO JUDGE

The following sample should be tailored to the particular facts and issues of the case. In particular, where multiple adverse actions or protected categories are in issue, a separate interrogatory should be given for each action or the protected category.

Also, if an element or elements of plaintiff's *prima facie* case is disputed and has been charged to the jury, an interrogatory should be fashioned for the jury to decide whether plaintiff has proven that element(s). The jury should be directed to consider the remaining questions only as to those claims where it finds that plaintiff has proven all disputed *prima facie* elements:]

1. Do you find that plaintiff has proved that it is more likely than not that defendant engaged in intentional discrimination by *[insert alleged adverse action]* plaintiff because of plaintiff's *[insert the protected category]*?

Yes _____ No _____

If the answer to [any of] the prior question[s] is “yes”, you are to proceed to the issue of damages. If the answer to [each of] the prior question[s] is “no”, you need not proceed further, and should enter a verdict for defendant.