

SOME BASIC RULES OF FEDERAL COURT PRACTICE

- 1. Respect the Judge's staff**
- 2. Respect other lawyers**
- 3. Respect the Judge**
 - A. Respect the Judge's Time**
 - B. Stand When Addressing the Court**
 - C. Don't try to intimidate or bully the Court**
- 4. Respect (and be familiar with) the Rules and the Court's Practice Standards**
- 5. Motions in Limine - file them; but only if the admissibility of the evidence is truly controverted**
- 6. Don't delegate your jury instructions and verdict form to a junior attorney**
- 7. Take seriously the Judge's request that you submit additional voir dire questions**
- 8. Do not ignore the Jurors and do not patronize the jurors**
- 9. Take advantage of the electronic capability in the Courtroom**

Remember that the most valuable asset any lawyer possesses is his/her REPUTATION, which is directly related to his/her conduct both inside and outside the courtroom!

So follow the Golden Rule: Do unto others as you would have them do unto you, i.e., always be polite and respectful to everyone.

SAMPLE OF WHAT IS NOT HELPFUL TO JURY

VERTICT FORM

We, the Jury, being duly empaneled and sworn to try the above-entitled case, unanimously find the following answers to questions submitted by the Court:

1. Do you find that Defendant retaliated against Plaintiff for exercising his constitutional right to file grievances? (Yes or No)

YES _____ NO _____

If your answer to Question No. 1 is "Yes," then answer Question No. 2.
If your answer to Question No. 1 is "No," then skip Question No. 2.

2. State the amount of compensatory damages or nominal damages (in the sum of \$1.00) and the amount of punitive damages, if any, to which Plaintiff is entitled as a result of the actions of Defendant:

Compensatory Damages: _____

OR Nominal Damages (in the sum of \$1.00): _____

AND Punitive Damages (if any): _____

YOUR FOREPERSON SHOULD DATE THIS VERDICT FORM, AND EACH JUROR SHOULD SIGN THE VERDICT FORM

Dated this _____ day of _____, 2009.

Jury Foreperson

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

MODEL FORM

**VERDICT FORM
AND SPECIAL INTERROGATORIES**

A. TITLE VII RETALIATION

Regarding Plaintiff ____'s claim of Title VII retaliation against Defendant _____:

A.1. Did Plaintiff prove, by a preponderance of the evidence, that Plaintiff engaged in the protected activity of protesting illegal racial, religious, or sexual discrimination on _____(insert date(s))?

____ Yes ____ No

A.2. Did Plaintiff prove, by a preponderance of the evidence, that Defendant fired (or insert other action taken) Plaintiff?

____ Yes ____ No

A.3. Did Plaintiff prove, by a preponderance of the evidence, that there was a causal connection between Plaintiff's protest of illegal racial, religious, or sexual discrimination on _____ and Plaintiff getting fired?

____ Yes ____ No

IF YOU ANSWERED "NO" TO ANY OF THE QUESTIONS A.1 – A.3 ABOVE, THEN DO NOT PROCEED FURTHER ON PART A. PLEASE GO TO PART B BELOW.

ON THE OTHER HAND, IF YOU ANSWERED "YES" TO ALL OF THE QUESTIONS A.1, A.2 AND A.3 ABOVE, THEN CONTINUE TO QUESTION A.4 BELOW:

A.4. What amount of damages, if any, do you award in favor of Plaintiff and against Defendant? You should answer "0" if you determine there were none.

\$ _____
Back Pay Damages

\$ _____
Non-Economic Damages

A.5. Did Defendant prove, by a preponderance of the evidence, that Plaintiff failed to make reasonable efforts to reduce Plaintiff's own damages for loss of compensation by seeking alternative employment?

____ Yes ____ No

A.6. If your answer to A.5 is “Yes,” by what amount do you reduce Plaintiff’s economic damages?

\$ _____

A.7. Did Plaintiff prove, by a preponderance of the evidence, that a higher management official of Defendant acted with malice or reckless indifference to Plaintiff’s federally protected rights?

____ Yes ____ No

A.8. Did Plaintiff prove, by a preponderance of the evidence, that Defendant had not acted in a good faith attempt to comply with the law by adopting policies and procedures designed to prohibit such discrimination in the workplace?

____ Yes ____ No

A.9. If your answers to A.7 and A.8 are both “Yes,” what amount of punitive damages, if any, should be assessed against Defendant? You should answer “0” if you determine there should be none.

\$ _____

Punitive Damages

Please sign this verdict form and special interrogatories on the signature line provided below.

Date

Foreperson

MOTION IN LIMINE

1. Plaintiff and Plaintiff's witnesses should be barred from testifying about any issues that relate solely to the state law claim that has been dismissed.

XYZ was granted summary judgment by another division of this District Court on Plaintiff's state law wage claim and his FLSA wage claim. On appeal, the Tenth Circuit issued an Order and Judgment that upheld the dismissal of the state law claim, and reversed the trial court as to the FLSA claim. The dismissed state law claim alleged that XYZ failed to pay Mr. M all or a part of a bonus that he had been awarded. Because a bonus is considered a "wage or compensation" under Colorado law, C.R.S. § 8-4-101(8)(II), Mr. M's state law claim included the allegation XYZ failed to pay him certain wages he was owed. Because that claim has been dismissed, and those issues are not relevant to the FLSA overtime pay dispute at issue here, Plaintiff's witnesses and counsel should be prohibited from mentioning, referring to, or otherwise basing any answer, statement or argument on the allegation that XYZ did not pay Mr. M a bonus. Witnesses should also be prohibited from stating that XYZ refused to pay Mr. M wages or compensation if that testimony is based the allegation that XYZ did not pay Mr. M a bonus and admonished to avoid inadvertent reference in their testimony. In accord with the foregoing, XYZ hereby moves this Court for an order prohibiting Plaintiff, his counsel or Plaintiff's witnesses from testifying about, stating or arguing or referring to, allegations that solely relate to the state law bonus claim that has been dismissed.

2. It is anticipated that Plaintiff will introduce testimony that concerns a conversation with expletives that should be excluded from trial because its prejudicial impact outweigh its relevance. F.R.E. 403.

Deposition testimony included a 2000 or 2001 discussion that Mr. M's trial testimony is expected to recount. It was Mr. M's testimony that the owner of XYZ, Neal House, said to Mr. M "what the fuck did [you] do, give [your]self a raise?" This Court should enter an Order prohibiting testimony as to this alleged conversation as it does not demonstrate that XYZ knew or should have known that Mr. M was not reporting overtime in 2002 through 2005 that he now seeks in this action. This type of testimony has previously been discussed by the Tenth Circuit and held not relevant to claims such as Mr. M's. *Whitaker v. Pacific Enter. Oil Co.*, No. 91-5093, 1992 U.S. App. WL 44729, at *2 (10th Cir. March 9, 1992) (attached hereto as Exhibit A). That court held that the "unelaborated comments attributed to [defendant] merely suggest that [the defendant] may have discouraged overtime work, which does not constitute a violation of the FLSA." *Id.* Such comments do not demonstrate actual or constructive knowledge of unreported overtime work. *Id.* at *4. While this is an unpublished opinion, the facts of *Whitaker* are strikingly familiar to this case, and the rationale of that court may be helpful as to this matter. Because such comments do not demonstrate any actual or constructive knowledge of the unreported overtime work in this case, XYZ hereby moves this Court to enter an order prohibiting such testimony due to its otherwise prejudicial nature. F.R.E. 401, 403. The undersigned also thinks it is important for the

Court to be aware of this anticipated testimony so that, in its discretion, if the testimony is allowed at all, the Court can decide how it will be handled in the presence of the Court and Jury given the expletive within. Pages 45 through 46, 76 and 95 of Mr. M's deposition are submitted herewith as Exhibit B.

3. Testimony of former XYZ employees should be limited to knowledge of Mr. M's wage claim, and not include those former employees rationale as to why their XYZ employment came to an end.

Plaintiff's "will call" witnesses include Ms. S, Ms. F, and Mr. C, who are all former employees of XYZ. To the extent that Plaintiff hopes to inquire as to why those employees left XYZ that testimony should be excluded. F.R.E. 401. As proponents of these witnesses for his case in chief, Plaintiff cannot elicit rationale for why they themselves left the employ of XYZ. Instead, their testimony should be limited to the facts relevant to the elements of Mr. M's FLSA claim, and whether XYZ knew or should have known of Mr. M's unreported overtime hours. Any other testimony from these witnesses as to their own employment experience at XYZ is improper impeachment testimony in direct examination, prejudicial, and not relevant to the claim asserted by Mr. M. Accordingly that testimony should be excluded at this time. F.R.E. 401.

EXAMPLE OF OBJECTIONS TO EXHIBITS THAT ARE NOT HELPFUL

1. Exhibit 1: irrelevant, hearsay, prejudicial.
2. Exhibit 2: irrelevant per F.R.E. 401, 403.
3. Exhibit 3: irrelevant per F.R.E. 401, 403.

EXAMPLE OF USEFUL OBJECTION TO EXHIBITS

Defendant _____, by and through its counsel, _____, hereby object to the following exhibits:

1. Exhibit 1: "6/13/04 e-mail to _____":

This document is has no relevance to whether XYZ failed to pay Mr. XYZ for the unreported overtime at issue. This document has no relevance to whether ABC knew or should have known that Mr. XYZ did not report the overtime he seeks in this action. Instead, this document is an e-mail that concerns the departure of witness ____ from her employment at ABC. As set forth in Section 3 of Defendant's Motions In Limine (incorporated herein by this reference), testimony from former employees as to why they themselves left the employ of ABC is not relevant to this trial. This document purports to be evidence of a dispute between ABC and Mrs. _____ which has no bearing on Mr. XYZ's FLSA claim. Accordingly, and for the reasons set forth in section 3 of Defendant's Motions in Limine, this exhibit should not be introduced at trial, alluded to in questioning or testimony, or otherwise acknowledged. F.R.E. 401, 403.

2. Exhibit 2: "Letter from ____ of the Department of Labor to ABC, dated September 15, 2005 with attachments"
Exhibit 10: "ABC Bonus Recipients form dated December 3, 2004 to Mr. XYZ"

Both of these exhibits concern a state wage claim that alleged that ABC failed to pay Mr. XYZ a bonus. That state wage claim has been dismissed by another division of this District Court. That dismissal was upheld by the 10th Circuit. Documentary evidence as to whether Mr. XYZ was paid a bonus is not relevant to this FLSA claim for overtime. For the reasons set forth at Section 1 of Defendant's Motions In Limine (incorporated herein by this reference) these documents should not be introduced at trial, alluded to in questioning or testimony, or otherwise acknowledged. F.R.E. 401, 403.

PARTIES' FACT STIPULATIONS

The Parties have agreed to the following factual stipulations. The Parties respectfully suggest that the Court should read the first stipulation before Plaintiff calls his first witness, and that the remaining stipulations should be read at the close of the evidence.

1. During the trial you will hear a number of witnesses use the word "goodwill." Goodwill is an accounting term that is used to assign a value to a company's intangible assets. Intangible assets generally have no physical existence but nonetheless provide value to a company. Some examples of intangible assets include such things as a strong brand name, a good reputation, or high employee morale. In contrast, a tangible asset is an asset that has a physical existence, such as cash, equipment or real estate. In a transaction when one company purchases another company, goodwill appears on the balance sheet of the purchasing company and is valued as the difference between the purchase price and the value of the acquired company's tangible assets.
2. Jurisdiction and venue over Defendant _____ are proper in this Court.
3. Defendant _____ is a corporation that develops and sells specialized chemicals, and at all relevant times was a publicly-held corporation whose shares were traded on the New York Stock Exchange.
4. On September 6, 2002, Defendant hired Mr. M as its Director of Internal Audit.
5. In August 2004, Defendant promoted Mr. M to the position of Controller. Mr. M held that position until his discharge on August 3, 2006.
6. At all relevant times, Mr. M reported to Mr. B, the Company's Senior Vice President For Finance and the Company's highest-ranking finance officer.
7. During his employment as Corporate Controller, Mr. M was Defendant's highest ranking Certified Public Accountant, or CPA.
8. As Corporate Controller, Mr. M was responsible for high-level accounting and finance functions at Defendant, including reviewing the Company's accounting consolidation processes and the consolidated financial statements, compiling the Company's quarterly and annual filings with the Securities and Exchange Commission, and interfacing with Defendant's external auditors.
9. In April 2006, during a review of Defendant's financials in preparation for the Company's first quarter 2006 audit, Grant Thornton, Defendant's independent outside auditors, discovered that the Company had been incorrectly accounting for certain of its "goodwill" assets.