

11.2 Age Discrimination—Hostile Work Environment

Comment

At least one Ninth Circuit case suggests that a viable hostile work environment claim can be stated under the ADEA. *Sischo-Nownejad v. Merced Cmty. Coll. Dist.*, 934 F.2d 1104, 1109 (9th Cir. 1991), superseded on other grounds as recognized by *Dominguez-Curry v. Nev. Transp. Dep’t*, 424 F.3d 1027, 1041 (9th Cir. 2015) (“A plaintiff may show violations of [the ADEA] by . . . proving the existence of a hostile work environment.”). This is consistent with the general practice that, absent reasons to the contrary, intentional discrimination under the ADEA should be treated in the same fashion as Title VII. See generally *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1295 (9th Cir. 2000) (“The analysis [of disparate treatment claims] under Title VII is the same as that under ADEA.”); *Mustafa v. Clark Cnty. Sch. Dist.*, 157 F.3d 1169, 1180 n.11 (9th Cir. 1998) (“This Court applies the same standards to disparate treatment claims pursuant to Title VII [and] the Age Discrimination in Employment Act . . .”).

As with Title VII, the ADEA defines “employer” to include the employer’s agents. 29 U.S.C. § 630(b). Thus, the liability framework for Title VII harassment addressed in the Supreme Court’s decisions in *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), should also apply to cases brought under the ADEA.

As applicable, the parallel Title VII instructions concerning hostile work environment claims (Instructions 10.4 (Civil Rights—Title VII—Hostile Work Environment—Harassment (Comment only)), 10.5 (Civil Rights—Title VII—Hostile Work Environment—Definition), 10.6 (Civil Rights—Title VII—Hostile Work Environment—Harassment Because of Protected Characteristics—Elements), 10.7 (Civil Rights—Title VII—Hostile Work Environment Caused by Supervisor—Claim Based upon Vicarious Liability—Tangible Employment Action—Affirmative Defense), and 10.8 (Civil Rights—Title VII—Hostile Work Environment Caused by Non-Immediate Supervisor or by Co-Worker—Claim Based on Negligence)) should be given, in a form modified to take into account that age is the protected characteristic by adding the element that the plaintiff was 40 years of age or older at the time of the harassment. See 29 U.S.C. § 631(a).