2.25 HOSTILE WORK ENVIRONMENT CLAIMS UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION (SEXUAL AND OTHER HARASSMENT) (Approved 05/2015; Revised 10/2022)

NOTE TO JUDGE

The following charge is based on the Supreme Court's decision in *Lehmann v. Toys 'R' Us Inc.*, 132 *N.J.* 587 (1993) regarding the definition of hostile work environment under the New Jersey Law Against Discrimination ("LAD") and the standard for employer liability for supervisory harassment, and the decisions in *Blakey v. Continental Airlines, Inc.*, 164 *N.J.* 38 (2000), and *Cerdeira v. Martindale-Hubbell*, 402 *N.J. Super.* 486 (App. Div. 2008), regarding employer liability for co-worker harassment. Not all hostile environment cases will require that this charge be given in its entirety. Portions not applicable to a given case should be omitted.

This charge may be used in cases of both supervisory harassment (*i.e.*, when the alleged harasser is a supervisor) and non-supervisory harassment (*i.e.*, when the alleged harasser is a co-worker). However, as explained below, some modifications will be required depending upon whether the alleged harasser is a supervisory or non-supervisory employee.

In cases of both supervisory and non-supervisory harassment, the standards for determining whether the conduct constitutes unlawful harassment are the same. Accordingly, no modifications to Section 3 ("Does the Conduct Constitute Unlawful Harassment?") will be required.

However, the standards for imposing liability on the employer for the harassment vary depending upon whether the alleged harasser is a supervisor or a non-supervisor. Thus, Section 4 ("Should Defendant Employer be Held Responsible for the Unlawful Harassment?") will need to be tailored appropriately depending upon the identity of the harasser as indicated in bracketed comments to the court in that section.

In addition, the court should note that although this charge does address the issue of employer liability under the LAD for acts of sexual harassment, it does not address the issue of individual liability, *e.g.*, the individual liability of the alleged harasser and/or other employees who failed to adequately respond to the alleged harassment. Individual liability under the LAD is addressed in Model Civil Jury Charge 2.22A.

1. Overview of Issues to Be Decided

Plaintiff claims that plaintiff was subjected to harassment on the basis of plaintiff's *[insert legally protected characteristic]*. Such harassment is a form of discrimination based on *[insert legally protected characteristic]* and is prohibited by the New Jersey Law Against Discrimination. To resolve plaintiff's harassment claim, you must decide three issues:

First, you must decide whether the complained-of conduct actually occurred.

Second, if you decide that the complained-of conduct did occur, you must then decide whether that conduct constitutes harassment on the basis of *[insert legally protected characteristic]*.

Third, if you decide that the conduct does constitute harassment on the basis of *[insert legally protected characteristic]*, you must then decide whether defendant *[employer's name]* should be held responsible for that conduct.

I will now explain each of these three issues to you in more detail.

2. Did the Conduct Occur?

The first issue you must decide is whether any of the complained-of conduct actually occurred. If you find that plaintiff has not proved by a preponderance of the evidence that any of the alleged conduct occurred, then you must return a verdict for defendant(s) on the claim of harassment on the basis of *[insert legally protected characteristic]*.

If, on the other hand, you find by a preponderance of the evidence that some or all of the complained-of conduct did occur, then you must move on to the second issue.

3. Does the Conduct Constitute Unlawful Harassment?

The second issue you must decide is whether the conduct that you find has occurred constitutes harassment on the basis of the plaintiff's *[insert legally protected characteristic]*. To prove that the conduct constitutes harassment on the basis of *[insert legally protected characteristic]*, plaintiff must prove two elements by a preponderance of the evidence:

First, plaintiff must prove that the conduct occurred because of plaintiff's [*insert legally protected characteristic]*.

Second, plaintiff must prove that the conduct was severe or pervasive enough to make a reasonable *[person of the same legally protected class]*[1] believe that the conditions of employment were altered and that the working environment was intimidating, hostile or abusive.

I will explain each of these two elements in more detail.

a. Did the Conduct Occur "Because Of" Plaintiff's *[Insert Legally Protected Characteristic]*?

First, plaintiff must prove that the conduct occurred because of plaintiff's *[insert legally protected characteristic]*. Stated differently, plaintiff must prove that the conduct would not have occurred if plaintiff's *[insert legally protected characteristic]* had been different.

When the harassing conduct directly refers to the plaintiff's *[insert legally protected characteristic]*, the "because of" element is automatically satisfied. Thus, for example, if plaintiff alleges that plaintiff has been subjected to harassing comments about the lesser abilities of members of plaintiff's *[insert legally*

[1] The standard is whether a person of the same legally protected class would find the work environment to be hostile. *See*, *e.g.*, *Lehmann v. Toys 'R' Us, Inc.*, 132 *N.J.* 587, 603-04 (1993) (holding that when plaintiff in sexual harassment case is female, reasonable woman standard must be used); *Cutler v. Dorn*, 196 *N.J.* 419, 430 (2008) (holding that "[a]lthough *Lehmann* involved sexual harassment in the workplace, *Lehmann*'s test applies generally to hostile work environment claims" and that "where, as here, a hostile work environment claim involves allegations of harassment based on religious faith or ancestry, the inquiry is whether a reasonable person of plaintiff's religion or ancestry would consider the workplace acts and comments ... sufficiently severe or pervasive to alter the conditions of employment and create a hostile working environment").

protected characteristic], plaintiff has established that the harassment occurred "because of" plaintiff's *[insert legally protected characteristic]*.

Even conduct that does not directly refer to the plaintiff's *[insert legally protected characteristic]* can constitute harassment on the basis of *[insert legally protected characteristic]*. However, when the conduct does not directly refer to the plaintiff's *[insert legally protected characteristic]*, the plaintiff must produce some evidence to show that the conduct occurred "because of" plaintiff's *[insert legally protected characteristic]*. For example, the plaintiff might show that only employees of the same *[insert legally protected characteristic]* suffered the harassment. All that is required is a showing that it is more likely than not that the harassment occurred because of the plaintiff's *[insert legally protected characteristic]*.[2]

The plaintiff does not have to prove that the employer or the alleged harasser intended to harass plaintiff or intended to create a hostile working environment. The employer's or alleged harasser's intent is not at issue. The issue is simply whether the conduct occurred because of plaintiff's *[insert legally protected characteristic]*.

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[2] When the plaintiff is not a member of a historically disadvantaged group, the plaintiff "must make the additional showing that the defendant employer is the rare employer who discriminates against the historically-privileged group." *Lehmann*, *supra*, 132 *N.J.* at 605-06. Thus, in such cases, the jury should be charged that the plaintiff must prove the defendant is the rare employer who discriminates against the historically privileged group to which the plaintiff belongs.

If you find that the conduct would have occurred regardless of plaintiff's *[insert legally protected characteristic]*, then there has been no unlawful harassment. In other words, if the alleged harasser treats all employees equally poorly, regardless of their *[insert legally protected characteristic]*, you must return a verdict for defendants on the plaintiff's claim of harassment on the basis of *[insert legally protected characteristic]*. If, on the other hand, you find that the conduct did occur because of plaintiff's *[insert legally protected characteristic]*, then you must decide the second element.

b. Was the Conduct Sufficiently Severe or Pervasive?

The second element plaintiff must prove to establish that the conduct constituted unlawful harassment is that the conduct was severe or pervasive enough to make a reasonable *[insert legally protected class to which plaintiff belongs, such as "woman," "African-American," or "older person"]* believe that the working conditions were altered and that the working environment was intimidating, hostile or abusive. When deciding whether plaintiff has proved this element, you should consider the following:

(1) The law does not require that the workplace be free of all vulgarity or sexually-laced speech or conduct. Occasional, isolated and/or trivial remarks or conduct are generally insufficient to constitute unlawful harassment. Rather, only

speech or conduct that is sufficiently severe or pervasive to create a hostile or intimidating working environment can constitute unlawful harassment.

(2) In determining whether the conduct was severe or pervasive, keep in mind that the conduct does not have to be both severe and pervasive; the conduct need only be severe or pervasive. The conduct can consist of a single severe incident or an accumulation of incidents, although it will be a rare and extreme case in which a single incident will be so severe that it would make the working environment hostile.[3] When the conduct consists of multiple incidents, you should not consider each incident individually, but should consider the totality of the incidents. Numerous incidents that would not be sufficient if considered individually may be sufficient when considered together.

(3) The severity of conduct can be exacerbated when committed by a supervisor. Supervisors have an important role in shaping the work environment. They should prevent, not create, a hostile atmosphere. For that reason, a supervisor's actions can have a greater impact than misconduct by fellow employees.[4]

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[3] *See Lehmann, supra*, 132 *N.J.* at 606-607 (holding that "[a]lthough it will be a rare and extreme case in which a single incident will be so severe that it would, from the perspective of a reasonable woman, make the working environment hostile, such a case is certainly possible"); *Taylor v. Metzger,* 152 *N.J.* 490, 500 (1998) (reiterating that it will be a rare and extreme case in which a single incident is sufficient to be actionable, but finding that single racial remark at issue could be sufficiently severe to be actionable); *Rios v. Meda Pharmaceutial, Inc.*, 247 *N.J.* 1, 11-12 (2021).

[4] *Rios*, *supra*, 247 *N.J.* at 11-12.

(4) The plaintiff need not personally have been the target of each or any instance of offensive or harassing conduct for you to find that the working environment was hostile. You may consider evidence of offensive or harassing conduct directed toward other workers if plaintiff personally witnessed that conduct.

(5) In deciding whether the conduct in this case is sufficiently severe or pervasive to create a hostile working environment, you must view the conduct from the perspective of a reasonable *[insert legally protected class to which plaintiff belongs, such as "woman," "African-American," or "older person"]*, not from plaintiff's own subjective perspective. In other words, the issue you must decide is not whether plaintiff personally believed that plaintiff's working environment was hostile. The issue you must decide is whether a reasonable *[insert legally protected class to which plaintiff belongs, such as "woman," "African-American," or "older person"]* would find the working environment hostile. Thus, if only an overly-sensitive *[insert legally protected class to which plaintiff belongs, such as "woman," "African-American," or "older person"]* would view the conduct as sufficiently severe or pervasive to create a hostile working environment, but a reasonable *[insert legally protected class to which plaintiff belongs, such as "woman," "African-American," or "older person"]* would not, it is not harassing conduct for which the plaintiff can recover. By the same token, even if plaintiff personally did not find the alleged conduct to be severe or pervasive, but a reasonable *[insert legally protected*

class to which plaintiff belongs, such as "woman," "African-American," or "older person"] would, it is harassing conduct for which the plaintiff can recover. You must use your own judgment in deciding whether a reasonable *[insert legally protected class to which plaintiff belongs, such as "woman," "African-American," or "older person"]* would consider the working environment hostile.

Finally, it is not necessary that the plaintiff show that plaintiff has actually been psychologically harmed by the conduct, or that the plaintiff has suffered any economic loss as a consequence of the conduct. Those issues may be relevant to the damages plaintiff can recover, but they are not relevant to the issue of whether the conduct constitutes unlawful harassment.[5]

If, after applying these guidelines, you find that plaintiff has not proved by a preponderance of the evidence that the alleged conduct constitutes harassment on

[5] More or less detailed instructions regarding the "severe or pervasive" requirement are possible, depending upon the facts of each case. In *Baliko v. Int'l Union of Operating Engineers,* 322 *N.J. Super.* 261, 275 (App. Div. 1999), the court stated: "[i]n determining whether comments or gestures are severe or pervasive, the trial judge must instruct the jury to consider: (1) the total physical environment of the plaintiffs' work area; (2) the degree and type of obscenity that filled the environment of the workplace, both before and after the plaintiffs were assigned to the specific workplace; (3) the nature of the unwelcome sexual words or sexual gestures; (4) the frequency of the offensive encounters; (5) the severity of the offensive encounters; (6) whether the unwelcome comments or gestures were physically threatening; (7) whether the offensive encounters unreasonably interfered with any plaintiff's work performance, but subject to the admonition that each plaintiff is not obliged to prove that the unwelcome comments or gestures actually did interfere with each plaintiff's work performance; and (8) whether the offensive encounters had an effect on any plaintiff's psychological well-being, but also subject to an admonition that each plaintiff need not demonstrate specific psychological harm."

the basis of *[insert legally protected characteristic]*, then you must return a verdict for the defendants on plaintiff's claim of unlawful harassment.

If, on the other hand, you find that plaintiff has proved that the conduct constitutes harassment on the basis of *[insert legally protected characteristic]*, then you must decide the third issue.

4. Should Defendant Employer be Held Responsible for the Unlawful Harassment?

The third issue you must decide is whether defendant *[employer's name]* should be held responsible for the harassing conduct of *[name(s) of alleged harasser(s)]*.[6] In other words, you must decide whether *[employer's name]* should

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[6] As set forth in the Note to the Judge at the beginning of the charge, the standards for imposing liability on the employer vary depending upon whether the alleged harasser is a supervisory or non-supervisory employee. This footnote will elaborate on the different standards.

In *Lehmann*, the Court addressed in detail the circumstances under which an employer can be held liable for sexual harassment by a supervisor. In all cases of supervisory sexual harassment, an employer is strictly liable for equitable damages, such as back pay and front pay. 132 *N.J.* at 619. Employer liability for compensatory damages, such as emotional distress, is determined under common-law agency principles. *Id*. at 619-620. Moreover, different common-law agency principles apply depending upon whether the supervisor was acting within or without the scope of the supervisor's employment. If the supervisor acts within the scope of the supervisor's employment, the employer is strictly liable for compensatory damages. *Ibid*. If the supervisor acts outside the scope of the supervisor's employment (described by *Lehmann* as "the more common situation"), employer liability is determined according to the agency principles set forth in Section 219(2) of the Restatement (Second) of Agency. This charge assumes that the supervisor was acting outside the scope of the supervisor's employment, and thus, incorporates the Section 219(2) principles.

Lehmann did not address the issue of employer liability for acts of sexual harassment by a non-supervisor. However, other decisions since *Lehmann* have held that an employer can be held liable for co-worker harassment when the employer knew or should have known about the alleged harassment and failed to take prompt and adequate remedial action and where the employer's

have to pay damages because of the harassing conduct of *[name(s) of alleged harasser(s)]*. Although *[alleged harasser's name]* is an employee of [*employer's name*], the law provides that an employer is not automatically liable for all damages caused by an employee who engages in unlawful harassment. More specifically, although an employer will always be liable for economic damages, such as wage loss, an employer is not automatically liable for emotional distress damages caused by an employee who engages in unlawful harassment.

To impose liability on defendant [*employer's name*] for any emotional distress plaintiff has suffered, plaintiff must prove at least one of the following theories for employer liability by a preponderance of the evidence:

NOTE TO JUDGE

The following sentence should be charged in all cases, regardless of whether the alleged harasser is a supervisor or a co-worker.

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failure to take effective preventive measures caused the harassment to occur. See, e.g., *Blakey v. Continental Airlines, Inc.*, 164 *N.J.* 38, 62 (2000) (holding that "employers do have a duty to take effective measures to stop co-employee harassment when the employer knows or has reason to know that such harassment is ... taking place"); *Cerdeira v. Martindale-Hubbell*, 402 *N.J. Super.* 486, 493-94 (App. Div. 2008) (holding that employer can be held liable for co-worker harassment if employer did not have effective anti-harassment policy and complaint mechanism and failure to have effective policy and complaint mechanism caused harm to plaintiff).

Thus, only the "Failure to Take Remedial Action" and "Negligence" portion of this charge below (Sections 4a and 4c) should be charged in cases involving employer liability for co-worker harassment.

First, plaintiff must prove that the employer knew or should have known of the harassment and failed to take effective remedial measures to stop it.

NOTE TO JUDGE

The following sentence should be charged only in cases where the alleged harasser is a supervisor.

Or second, plaintiff must prove that defendant *[employer's name]* delegated to *[name(s) of alleged harassing supervisor(s)]* the authority to control the working environment and *[name(s) of alleged harassing supervisor(s)]* abused that authority to create a hostile work environment.

NOTE TO JUDGE

The following sentence should be charged in all cases, regardless of whether the alleged harasser is a supervisor or a co-worker.

Or third, plaintiff must prove that defendant *[employer's name]* was negligent by failing to take reasonable steps to prevent the harassment from occurring.

I will now explain each of these theories in more detail.

NOTE TO JUDGE

The following section should be charged in all cases, regardless of whether the alleged harasser is a supervisor or a co-worker.

a. Failure to Take Remedial Action

As I said, one way defendant *[employer's name]* may be liable for the harassment is if the employer knew or should have known about the harassment and failed to take prompt and effective remedial action to stop it. Effective remedial actions are those reasonably calculated to end the harassment. The reasonableness of an employer's response must be judged by its ability to stop harassment by the person who engaged in the harassment.

Thus, in this case, if you find by a preponderance of the evidence that defendant *[employer's name]* knew or should have known about the alleged harassment and failed to take prompt and effective measures reasonably designed to stop that harassment, then defendant *[employer's name]* is liable for the harassment.

NOTE TO JUDGE

The following section should be charged only in cases where the alleged harasser is a supervisor.

b. Delegation of Authority

A second way defendant *[employer's name]* may be liable is if it delegated to *[name(s) of alleged harassing supervisor(s)]* the authority to (1) undertake tangible employment decisions affecting plaintiff; or (2) direct plaintiff's daily work

activities[7] and *[name(s) of alleged harassing supervisor(s)]* abused that authority to create a hostile work environment.

To prove that defendant *[employer's name]* is liable to plaintiff based on its delegation of authority to *[name(s) of alleged harassing supervisor(s)]*, plaintiff must prove each of the following elements by a preponderance of the evidence:

(1) That defendant *[employer's name]* delegated authority to *[name(s) of alleged harassing supervisor(s)]* to control the situation of which plaintiff complains; and

(2) *[name(s) of alleged harassing supervisor(s)]* exercised that authority; and

(3) *[name(s) of alleged harassing supervisor(s)]* exercise of authority resulted in unlawful harassment; and

(4) the authority delegated by defendant *[employer's name]* to *[name(s) of alleged harassing supervisor(s)]* aided *[name(s) of alleged harassing supervisor(s)]* in injuring the plaintiff.

If you find that the plaintiff has proved each of these elements, then defendant *[employer's name]* is liable for the alleged unlawful harassment. If any one of these elements is not proved, then defendant *[employer's name]* cannot be held liable based on its delegation of authority.

NOTE TO JUDGE

The following section should be charged in all cases, regardless of whether the alleged harasser is a supervisor or a co-worker.

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[7] *Aguas v. State*, 220 *N.J.* 494, 528 (2015).

c. Negligence

The third possible way defendant *[employer's name]* may be liable is if plaintiff can prove by a preponderance of the evidence that defendant *[employer's name]* was negligent by failing to take reasonable measures to prevent the harassment from occurring [, and if so, the absence of such measures was the proximate cause of the harm plaintiff claims plaintiff suffered].

NOTE TO JUDGE

> It is unclear whether proximate causation should be charged in hostile work environment cases. In *Baliko v. International Union of Operating Engineers*, 322 *N.J. Super.* 261, 277-78 (App. Div. 1999), the Appellate Division held that it is reversible error to charge proximate causation to a jury in a hostile work environment case. However, in *Cerdeira v. Martindale-Hubbell*, 402 *N.J. Super.* 486, 493 (App. Div. 2008) and *Wallace v. Mercer Cty. Youth Detention Ctr.*, 2011 WL 4808258, *7 (App. Div. Oct. 12, 2011), other Appellate Division panels held that proximate causation is a proper jury question in hostile work environment cases without citing or distinguishing the prior holding in *Baliko*. Thus, trial judges must decide whether to charge proximate causation in hostile work environment cases in light of these conflicting precedents.

This is because an employer has a duty to take reasonable steps to prevent unlawful harassment from occurring in the workplace.

To determine whether defendant *[employer's name]* was negligent, you may consider the following:

- Whether it had in place well-publicized and enforced anti-harassment policies;
- Whether it had effective formal and informal complaint structures;
- Whether it had in place anti-harassment training programs; and
- Whether it had in place harassment monitoring mechanisms.

You may consider the existence of such measures as evidence of due care by the employer, and the lack of such measures as evidence of a lack of due care by the employer. However, the absence of such measures does not automatically constitute negligence, nor does the existence of such measures automatically demonstrate the absence of negligence.

If you find that plaintiff has proved by a preponderance of the evidence any one of these theories that I have just explained, then you should hold *[employer's name]* responsible for any alleged emotional distress damages plaintiff suffered. In that case, you will need to determine the amount, if any, of damages to award plaintiff for plaintiff's alleged emotional distress. However, I will not at this time give you specific instructions on the issue of damages, but rather, will do so later.

If, on the other hand, you find that plaintiff has not proved any one of these theories by a preponderance of the evidence, then you may not hold *[employer's name]* responsible for any alleged emotional distress damages plaintiff suffered.

NOTE TO JUDGE

The following should be charged in all cases in which plaintiff alleges employer vicarious liability based on delegation of authority under *Restatement* § 210(2)(d) and plaintiff has not experienced a tangible adverse employment action. Such "tangible employment action" includes "discharge, demotion or undesirable reassignment." *Aguas v. State*, 220 *N.J.* 494, 537 (2015) (citing *Burlington Industries v. Ellerth*, 524 *U.S.* 742, 765, 118 *S.Ct.* 2257, 2270, 141 *L.Ed.2d* 633, 655 (1998) and *Faragher v. City of Boca Raton*, 524 *U.S.* 775, 808, 118 *S.Ct.* 2275, 2293, 141 *L.Ed.2d* 662, 689 (1998)).

d. [Defendant Employer's] Affirmative Defense To Liability and Damages

If you find that the elements have been proven regarding plaintiff's allegations of employer vicarious liability based on delegation of authority, then you must consider *[employer's name]* affirmative defense that it publicized and enforced an effective anti-harassment policy. I will instruct you now on the elements of that affirmative defense. To prove its affirmative defense, defendant must prove both of the following elements by a preponderance of the evidence:

First: that defendant exercised reasonable care to prevent harassment in the workplace on the basis of *[protected status]* and promptly correct any harassing behavior that occurred.

Second: that plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by defendant.[8]

To determine whether defendant *[employer's name]* exercised reasonable care to prevent harassment in the workplace and promptly correct any harassing behavior, you may consider the following:

- Whether defendant had in place well-publicized and enforced anti-harassment policies;
- Whether defendant had effective formal and informal complaint structures;
- Whether defendant had in place anti-harassment training programs;
- Whether defendant had in place harassment monitoring mechanisms; and
- Whether reasonable steps were taken to correct the alleged problem, if known to defendant [*employer's name*] management.[9]

You may consider the existence of such measures as evidence of reasonable care by the employer, and the lack of such measures as evidence of a lack of reasonable care by the employer. However, the absence of such measures does not automatically demonstrate a lack of reasonable care, nor does the existence of such measures automatically demonstrate reasonable care.

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[8] *Aguas*, 220 *N.J.* at 524-25.

[9] *Aguas,* 220 *N.J.* at 513 (citing *Gaines v. Bellino*, 173 *N.J.* 301, 313 (2002)).

You must then determine whether plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by defendant.

You may consider:[10]

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[10] The court should list factors, if any, that relate to the determination of whether plaintiff acted reasonably or unreasonably in a particular case based on the facts adduced at trial (such as whether plaintiff did or did not follow defendant's complaint procedure or did or did not make (or attempt to make) a formal complaint of harassment). *See, e.g.,* Aguas, 220 *N.J.* at 516. The court also should permit plaintiff to rebut the elements of the affirmative defense. *Id*. at 524.

In most cases, the issue will be whether the plaintiff followed defendant's formal complaint procedure. In such cases, the following language should be given consideration for inclusion into the body of the charge as is applicable to the evidence presented or omitted at trial:

> To determine whether plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by defendant, you may consider whether plaintiff followed defendant's formal complaint procedure, if such a procedure existed. You may consider evidence that plaintiff made or attempted to make a formal complaint of harassment as evidence that plaintiff acted reasonably. You may consider evidence that plaintiff did not make or attempt to make a formal complaint as evidence that plaintiff acted unreasonably. However, the absence of a formal complaint does not automatically demonstrate that plaintiff acted unreasonably.

See Gaines, 173 *N.J.* at 318.

Similarly, in the event the evidence at trial, or lack thereof, demonstrates that a formal complaint was not filed by plaintiff, you should consider for inclusion above a description of the following along with any other factors which may be considered by the jury in evaluating the significance of plaintiff's failure to make or attempt to make a formal complaint.

> Any failure to file a formal complaint must be considered in the context of (a) whether the defendant *[employer's name]* exercised reasonable care to prevent harassment by (i) implementing an effective anti-harassment policy and (ii)

If you find that defendant has proven both of the elements of the affirmative defense by a preponderance of the evidence, then you must find that defendant is not vicariously liable for any emotional distress damages plaintiff may have experienced. If you find that defendant has not proven both of the elements of the affirmative defense by a preponderance of the evidence, then you must find that defendant is vicariously liable for emotional distress damages, if any, plaintiff may have experienced.

e. Summary of Unlawful Harassment Elements

I will now summarize all of this for you. To decide plaintiff's claim of harassment on the basis of *[insert legally protected characteristic]*, you must decide three issues:

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consistently enforcing the policy; and, (b) whether the defendant was aware of the harassment from plaintiff's informal complaint(s) of harassment, if any, or by other means.

See Gaines, 173 *N.J.* at 316-318.

An employer whose policy is ineffective or which exists in name only is not entitled to an affirmative defense. *Aguas,* 220 *N.J.* at 522-523.

First, you must determine whether plaintiff has proven by a preponderance of the evidence that the alleged conduct actually occurred.

Second, if you find that some or all of the alleged conduct occurred, you must decide whether plaintiff has proven by a preponderance of the evidence that the conduct constitutes harassment on the basis of *[insert legally protected characteristic]*. This requires that you decide (1) whether the conduct occurred because of plaintiff's *[insert legally protected characteristic]*, and if so, (2) whether the conduct was severe or pervasive enough to make a reasonable *[insert legally protected class to which plaintiff belongs, such as "woman," "African-American," or "older person"]* believe that the conditions of employment were altered and the working environment was intimidating, hostile or abusive.

And third, if you find that unlawful harassment occurred, you must decide whether plaintiff has proven by a preponderance of the evidence that defendant *[employer's name]* should be held liable for any alleged emotional distress damages plaintiff may have suffered. This requires that you consider the theories I just explained:

(1) whether the employer knew or should have known about the harassment and failed to take prompt and adequate remedial action; or

NOTE TO JUDGE

The following clause (No. 2) should only be charged in cases in which the alleged harasser is a supervisor.

(2) whether the supervisor abused authority delegated to the supervisor by the employer; or

(3) whether the employer was negligent by failing to prevent the harassment.

The employer may be held responsible under any one of these tests.

NOTE TO JUDGE

The following should be charged in all cases in which the defendant has asserted the affirmative defense under subsection d. above.

Finally, you must decide whether the defendant *[employer's name]* has proven, by a preponderance of the evidence, that it exercised reasonable care to prevent and promptly correct the harassing behavior; and that plaintiff unreasonably failed to take advantage of preventive or corrective opportunities provided by defendant *[employer's name]* or to otherwise avoid harm.[11]

[11] *Aguas*, 220 *N.J.* at 525.