

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC16-323

IN RE: STANDARD JURY INSTRUCTIONS
IN CIVIL CASES—REPORT NO. 16-01

Comment on Proposed Jury Instructions “416 Unlawful Discrimination”

The Florida Chapter of the National Employment Lawyers Association (Florida NELA), by and through their undersigned counsel, hereby submits the following changes to the proposed pattern jury instructions for civil cases (416 Unlawful Discrimination, for proposed Instruction No. 416.16, and proposed Instructions Nos. 416.4, 416.5 and 416.7):

1. The Florida Chapter of the National Employment Lawyers Association (Florida NELA) is a non-profit organization dedicated to the advancement of workers' rights. Its membership is restricted to attorneys who primarily represent employees when handling employment-related legal matters. Florida NELA's current membership includes more than 160 attorneys, who are located throughout the state of Florida.

2. The Committee on Standard Jury Instructions in Civil Cases has submitted to the Florida Supreme Court a report proposing new jury instructions

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for discrimination cases in Section 416 Unlawful Discrimination (including instructions 416.1 through 416.12).

2. Florida NELA proposes the following changes, highlighted in red, to proposed instruction No. 416.16, and proposed instructions Nos. 416.4, 416.5 and 416.7.

3. Proposed instruction No. 416.16 Legal Cause — Damages:

The [discharge] [failure to hire] [describe discriminatory treatment alleged] is the legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes **substantially** to producing such damage, so that it can reasonably be said that, but for the [discharge] [failure to hire] [(describe discriminatory treatment)], the [loss] [injury] [or] [damage] would not have occurred.

Comment: Florida NELA proposes the removal of the word “substantially.”

The Note on Use for 416.6 indicates that the instruction is based upon § 760.10(1). However, nothing in the language of that section indicates that the legal cause of damages is established only when the adverse action contributes “substantially” to producing damage. The phrase “substantially” also is not otherwise defined, and does not appear in the federal pattern instructions for discrimination cases issued by the Eleventh Circuit Court of Appeals. See, e.g., Eleventh Circuit Pattern Jury Instructions for Civil Cases, § 4.5 (2013).

4. Proposed instruction Nos. 416.4, 416.5 and 416.7:

416.4 Discrimination — Disparate Treatment. To “discriminate” means to treat an [employee] [applicant] differently with regard to compensation, terms, conditions, or privileges of employment because of the [employee’s] [applicant’s] [race] [color] [religion] [sex] [pregnancy] [national origin] [age] [handicap] [marital status], **or to be motivated in the treatment by the [employee’s] [applicant’s] [race] [color] [religion] [sex] [pregnancy] [national origin] [age] [handicap] [marital status].**

416.5 Legal Cause – Discrimination. (Claimant’s) [race] [color] [religion] [sex] [pregnancy] [national origin] [age] [handicap] [marital status] is the legal cause of (defendant’s) decision to [discharge] [fail to hire] [(describe discriminatory treatment)] (claimant) if (defendant) made the decision because of claimant’s) [race] [color] [religion] [sex] [pregnancy] [national origin] [age] [handicap] [marital status] **or was motivated by it.**

416.7 Issues on Plaintiff’s Claim. The issues you must decide on the claim of (claimant) against (defendant) are whether (defendant) discriminated against (claimant) by [discharging] [failing to hire] [describe discriminatory treatment alleged] (claimant) because of (claimant’s) [race] [color] [religion] [sex] [pregnancy] [national origin] [age] [handicap] [marital status] **or was motivated by it,** and, if so, whether the [discharge] [failure to hire] [(describe discriminatory treatment)] was a legal cause of [loss] [injury] or [damage] to (claimant).

Comment: Florida NELA proposes the addition of language indicating that disparate treatment also may be shown if the defendant’s action is motivated by the claimant’s protected status. The additional language is consistent with the Eleventh Circuit Pattern Jury instructions for Title VII cases (referring to “a motivating” factor) on which the Florida Civil Rights Act is patterned. The

“because of” language suggests a higher burden of proof for discrimination cases that federal cases have recognized do not apply to Title VII cases.

Respectfully submitted,

JENNIFER DALEY
Florida Bar Number 856436
Jen.Daley@Comcast.net
JDaley@TheAmlongFirm.com
500 N.E. 4th St., Second Floor
Fort Lauderdale, FL 33301
(954) 462-1983 Telephone
(954) 523-3192 Facsimile

*Florida NELA Southern District
Representative, on behalf of
Florida NELA*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed with the Court this 2nd day of May, 2016, and thereby electronically transmitted to counsel of record noted below on the Service List.

s/ Jennifer Daley _____
JENNIFER DALEY

SERVICE LIST

JENNIFER DALEY

Florida Bar Number 856436

Jen.Daley@Comcast.net

JDaley@TheAmlongFirm.com

500 N.E. 4th St., Second Floor

Fort Lauderdale, FL 33301

(954) 462-1983 Telephone

(954) 523-3192 Facsimile

Florida NELA Southern District

Representative, on behalf of Florida

NELA

REBECCA MERCIER VARGAS

Committee Chair

Law Office of Kreuzler-Walsh,

Compiani & Vargas, P.A.

501 South Flagler Drive, Suite 503

West Palm Beach 33401

rvargas@kwcvpa.com,

HEATHER TELFER

Bar staff liaison to the committee

651 E. Jefferson Street

Tallahassee 32399-2300

htelfer@flabar.org