JUDICIAL COUNCIL
OF
THE UNITED STATES ELEVENTH JUDICIAL CIRCUIT

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On 29 May 2013, the Judicial Council approved the Eleventh Circuit Pattern Jury Instructions, Civil Cases (2013 revision). Since that date, the Council has approved revisions on 19 July 2017 and 2 January 2018, which are listed at the bottom of this memorandum.

On 24 January 2019, the Council also approved the following revised instructions for the Pattern Jury Instructions, Civil Cases:

ADVERSE EMPLOYMENT ACTION CLAIMS INSTRUCTIONS

4.1 Public Employee – First Amendment Claim – Discharge or Failure to Promote – Free Speech on Matter of Public Concern

4.2 Public Employee – First Amendment Claim – Discharge or Failure to Promote – Political Disloyalty or Key Employee

4.6 Title VII – Civil Rights Act – Workplace Harassment by Supervisor – No Tangible Employment Action Taken (with Affirmative Defense by Employer)

4.7 Title VII – Civil Rights Act – Workplace Harassment by Co-worker or Third Party – No Tangible Employment Action Taken

All other instructions in the 2013 Pattern Jury Instructions for Civil Cases and previous revisions remain in effect, including the following revisions:

- On 19 July 2017, the Judicial Council approved, and announced in a memorandum on 28 August 2017, revisions to instructions 9.1, 9.3, 9.4, 9.5, 9.7, 9.8, 9.9, 9.10, 9.11, 9.12, 9.14, 9.15, 9.16, 9.18, 9.19, 9.20,

9.21, 9.22, 9.23, 9.24, 9.25, 9.26, 9.27, 9.28, 9.29, 9.30, 9.31, 9.32, 9.33, 10.1, 10.2, 10.3, 10.4, 10.5, 10.6, 10.7, 10.8, 11.1, 11.2, 11.3, 11.4, and 11.5.

- On 2 January 2018, the Council approved, and announced in a memorandum on 9 January 2018, revisions to instructions 5.2, 5.3, 5.6, 5.8, 5.9, 5.10, 5.11, 5.12, as well as new instructions 5.1, 5.4, 5.5, 5.7, and 5.13.

The May 2013 resolution of the Judicial Council of the Eleventh Circuit applies limitations and conditions upon the use and approval of the 2013 pattern jury instructions. Those limitations and conditions also apply to all of the instructions listed above.

The Pattern Jury Instruction Builder found on the public website for the Eleventh Circuit Court of Appeals at http://pji.ca11.uscourts.gov has been updated to reflect these changes.

FOR THE JUDICIAL COUNCIL:

James P. Gerstenlauer
Secretary to the Judicial Council

4.1 Public Employee – First Amendment Claim – Discharge or Failure to Promote – Free Speech on Matter of Public Concern

In this case, [name of plaintiff] claims that [name of defendant], while acting "under color" of state law, intentionally deprived [name of plaintiff] of [his/her] constitutional right to free speech by [discharging [him/her] from employment/ denying [him/her] a promotion] because [he/she] [[describe protected speech or conduct]] / [[name of defendant] mistakenly believed that [name of plaintiff] [describe protected speech or conduct]].

[Name of defendant] denies [name of plaintiff]'s claims and asserts that [describe the defendant's defense].

Under the First Amendment to the Constitution of the United States, a public employee has a right to freedom of speech on matters of public concern. It is unlawful for a public employer to take action against a public employee because the employee exercises [his/her] First Amendment rights by speaking on a matter of public concern or because the employer mistakenly believes that the employee did so.

To succeed on [his/her] claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of defendant]'s actions were "under color" of state law;

Second: [[Name of plaintiff] [describe protected speech or conduct]] / [[name of defendant] mistakenly believed that [name of plaintiff] [describe protected speech or conduct]];

Third: [Name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion];

Fourth: [[Name of plaintiff]'s [describe protected speech or conduct]] / [[name of defendant]'s [describe mistaken belief]] was a motivating factor in [name of defendant]'s decision [to discharge [name of plaintiff]/not to promote [name of plaintiff]]; and

Fifth: [Name of plaintiff] suffered damages because of [name of defendant]'s actions.

[In the verdict form that I will explain in a moment, you will be asked to answer questions about these factual issues.]

[**To be used when the parties stipulate that the defendants acted "under color" of state law:** The parties have agreed that [name of defendant] acted "under color" of state law so you should accept that as a true and proven fact.]

[To be used when the parties dispute whether the defendants acted "under color" of state law: For the first element, you must decide whether [name of defendant] acted "under color" of state law. A government official acts "under color" of law when [he/she] acts within the limits of lawful authority. A government official also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

For the second element, if you find that [name of plaintiff] [describe protected speech or conduct], then you have found that [he/she] engaged in "protected speech."

[To be used when it is alleged that the public employer mistakenly believed that employee engaged in protected activity: For the second element, if you find that [name of defendant] mistakenly believed that [name of employee] engaged in [describe protected speech or activity], then you have found the second element to be met, whether or not [name of plaintiff] actually engaged in such [speech/conduct].]

For the third element, you must decide whether [name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion].

For the fourth element, you must decide whether [name of plaintiff]'s protected speech / [name of defendant]'s mistaken belief was a "motivating factor" in [name of defendant]'s decision. To prove that [[name of plaintiff]'s protected speech] / [[name of defendant]'s mistaken belief] was a motivating factor in [name of defendant]'s decision, [name of plaintiff] does not have to prove that [[his/her] protected speech] / [[name of defendant]'s mistaken belief] was the only reason for [name of defendant]'s actions. It is enough if [[name of plaintiff] proves that [his/her] protected speech] / [[name of defendant]'s mistaken belief] influenced

[name of defendant]'s decision. If [[name of plaintiff]'s protected speech] / [[name of defendant]'s mistaken belief] made a difference in [name of defendant]'s decision, you may find that it was a motivating factor in the decision.

[Name of defendant] claims that [[name of plaintiff]'s protected speech] / [[name of defendant]'s mistaken belief] was not a motivating factor in [name of defendant]'s decision and that [he/she/it] [discharged/did not promote] [name of plaintiff] for [another reason/other reasons]. A public employer may not take action against a public employee because the employee exercised protected First Amendment rights or because the public employer believed that the employee did so. But a public employer may [discharge/decline to promote] a public employee for any other reason, good or bad, fair or unfair. If you believe [name of defendant]'s reason[s] for [his/her/its] decision [to discharge/not to promote] [name of plaintiff], and you find that [his/her/its] decision was not motivated by [[name of plaintiff]'s protected speech] / [[name of defendant]'s mistaken belief], you must not second guess [his/her/its] decision and you must not substitute your own judgment for [name of defendant]'s judgment – even if you do not agree with it.

[**Pretext (optional, see annotations):** As I have explained, [name of plaintiff] has the burden to prove that [[his/her] protected speech] / [[name of defendant]'s mistaken belief that [name of plaintiff] engaged in protected speech]

was a motivating factor in [name of defendant]'s decision [to discharge/not to promote] [name of plaintiff]. I have explained to you that evidence can be direct or circumstantial. To decide whether [[name of plaintiff]'s protected speech] / [[name of defendant]'s mistaken belief] was a motivating factor in [name of defendant]'s decision [to discharge/not to promote] [name of plaintiff], you may consider the circumstances of [name of defendant]'s decision. For example, you may consider whether you believe the reason[s] [name of defendant] gave for the decision. If you do not believe the reason[s] [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true unconstitutional reasons for the decision.]

If you find that [[name of plaintiff] [describe protected speech or conduct]] / [[name of defendant] mistakenly believed that [named of plaintiff] [describe protected speech or conduct]] and that this [protected speech] / belief was a "motivating" factor in [name of defendant]'s decision to [discharge [name of plaintiff] from employment/deny [name of plaintiff] a promotion], you must decide whether [name of plaintiff] suffered damages as a result. If the damages would not have existed except for the [discharge/denied promotion], then you may find that [name of plaintiff] suffered those damages because of the [discharge/denied promotion].

[**Including Affirmative Defense (if applicable, see annotations):** If you find in [name of plaintiff]'s favor for each fact [he/she] must prove, you must decide whether [name of defendant] has shown by a preponderance of the evidence that [he/she/it] would have made the same decision even if [he/she/it] had not taken [[name of plaintiff]'s protected activity] / [[his/her/its] mistaken belief that [named of plaintiff] [describe protected speech or conduct]] into account. If you find that [name of plaintiff] would [have been dismissed/not have been promoted] for reasons other than [[his/her] protected speech] / [[name of defendant]'s mistaken belief that [named of plaintiff] [describe protected speech or conduct]], your verdict should be for [name of defendant].

If you find for [name of plaintiff] and against [name of defendant] on this defense, you must consider [name of plaintiff]'s compensatory damages.]

[**Without Affirmative Defense:** If you find in [name of plaintiff]'s favor for each fact [he/she] must prove, you must consider [name of plaintiff]'s compensatory damages.]

When considering the issue of [name of plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]'s damages as a result of the [discharge/denied promotion], no more and no less. Compensatory damages are not allowed as a punishment and

must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [name of plaintiff] has proved them by a preponderance of the evidence, and no others:

(a) Net lost wages and benefits from the date of the [discharge] [denied promotion] to the date of your verdict; and

(b) Emotional pain and mental anguish.

To determine the amount of [name of plaintiff]'s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

To determine whether and how much [name of plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury – tangible and intangible. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like mental anguish. You will determine what amount fairly compensates [him/her] for [his/her] claim. There is no exact standard to apply, but the award should be fair in light of the evidence.

[**Mitigation of Damages:** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to

mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]'s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[**Punitive Damages:** To be used only for individual-capacity claims against individual defendants: [Name of plaintiff] also claims that [name of individual defendant]'s acts were done with malice or reckless indifference to [name of plaintiff]'s federally protected rights, which would entitle [him/her] to punitive damages in addition to compensatory damages. [Name of plaintiff] must prove by a preponderance of the evidence that [he/she] is entitled to punitive damages. You

will only reach the issue of punitive damages if you find that [name of plaintiff] has proved the elements of [his/her] claim against [name of individual defendant], and you award [name of plaintiff] compensatory damages. You may not assess punitive damages against [public employer].

If you find for [name of plaintiff] and find that [name of defendant] acted with malice or reckless indifference to [name of plaintiff]'s federally protected rights, the law allows you, in your discretion, to award [name of plaintiff] punitive damages as a punishment for [name of defendant] and as a deterrent to others.

A person acts with malice if the person's conduct is motivated by evil intent or motive. A person acts with reckless indifference to the protected federal rights of another person when the person engages in conduct with a callous disregard for whether the conduct violates those protected federal rights.

If you find that punitive damages should be assessed, you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of such damages. [You also may assess punitive damages against one or more of the individual defendants, and not others, or against more than one individual defendant in different amounts.]]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant]'s actions were "under color" of state law?

Answer Yes or No ______________

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That [[name of plaintiff] [describe protected speech or conduct]] / [[name of defendant] mistakenly believed that [named of plaintiff] [describe protected speech or conduct]]?

Answer Yes or No ______________

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

3. That [name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion]?

Answer Yes or No ______________

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

4. That [[name of plaintiff] [describe protected speech or conduct]] / [[name of defendant]'s mistaken belief that [named of plaintiff] [describe protected speech or conduct]] was a motivating factor in [name of

defendant]'s decision [to discharge [name of plaintiff] from employment/not to promote [name of defendant]]?

Answer Yes or No ______________

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

5. That [name of defendant] would have [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion] even if [name of defendant] had not taken [[name of plaintiff]'s protected activity] / [[name of defendant]'s mistaken belief that [named of plaintiff] [describe protected speech or conduct]] into account?

Answer Yes or No ______________

If your answer is "Yes," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "No," go to the next question.]

6. That [name of plaintiff] suffered damages because of [name of defendant]'s acts?

Answer Yes or No ______________

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

7. That [name of plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No ____________

If your answer is “Yes,”
in what amount? $____________

8. That [name of plaintiff] should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No ____________

If your answer is “Yes,”
in what amount? $____________

If you did not award damages in response to either Question No. 7 or Question No. 8, this will end your deliberations, and your foreperson should go to the end of this verdict form to sign and date it. If you awarded damages in response to Question No. 7 or Question No. 8 (or both), go to the next question.

9. That punitive damages should be assessed against [name of individual defendant]?

Answer Yes or No ____________

If your answer is "Yes,"
in what amount? $____________

SO SAY WE ALL.

____
Foreperson's Signature

DATE: ____________________

ANNOTATIONS AND COMMENTS

I. Causes of Action

This pattern charge contemplates cases in which a public employee sues members of a governing body who have the legal authority to take the adverse employment action about which the employee complains (e.g., school boards, city councils, county commissions). If the action is brought against a municipality or other government entity that is capable of being sued, then the pattern charge should be modified to reflect that the employee who took the adverse employment action on behalf of the government entity did so under color of state law and was authorized to do so either as the final decisionmaker or pursuant to the governing body's policy and/or practice.

Pattern Instruction 4.1 provides instructions for discharge and failure to promote claims, but it is also intended to be used for any other case in which the plaintiff alleges a discriminatory adverse employment action, including demotion, pay cut, transfer to a less desirable job, or other adverse employment action.

II. Elements and Defenses

A."Under Color of State Law"

To prevail on a First Amendment claim, the plaintiff must prove that the defendant or the defendant's representative acted under color of state law. This issue is usually undisputed and need not be charged. For cases in which the "under color of" issue is disputed, Pattern Instruction 4.1 contains an optional "under color" of element and instruction.

B. Whether Employee's Speech is Protected

A threshold issue in most public employee freedom of speech cases is whether the employee engaged in protected speech. Under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), an employee's speech is not protected unless the plaintiff spoke as a citizen and

not as part of his official duties. *Garcetti*, 547 U.S. at 421. To date, the Eleventh Circuit cases on this issue have decided the "citizen-employee" issue as a matter of law, and the cases generally say that the issue is a question of law, not a question of fact. *See, e.g., Battle v. Bd. of Regents*, 468 F.3d 755, 757, 761-62 (11th Cir. 2006) (per curiam) (affirming grant of summary judgment where there was no genuine dispute that speech was part of employee's official duties); *accord Abdur-Rahman v. Walker*, 567 F.3d 1278, 1283-84 (11th Cir. 2009) (affirming judgment on the pleadings where there was no genuine fact dispute that employees made statements pursuant to official duties); *Boyce v. Andrew*, 510 F.3d 1333, 1343-47 (11th Cir. 2007) (per curiam) (reversing denial of qualified immunity based on "official duties" issue). Nonetheless, there could be a genuine fact dispute on the question. *See D'Angelo v. Sch. Bd. of Polk Cnty.*, 497 F.3d 1203, 1211 (11th Cir. 2007) (affirming judgment as a matter of law based on "official duties" issue where there was no genuine fact dispute, but noting that such a case may arise). In cases where there is a dispute as to whether the plaintiff was speaking on a matter of public concern and not as part of his official employment duties, the instruction and verdict form should be adapted to cover this issue.

An employee may challenge an employer's action as unlawful even if the employer makes a factual mistake about the employee's behavior or activities. *Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412 (2016).

C. Adverse Employment Action

To prevail on a First Amendment retaliation claim, the plaintiff must prove that the employer subjected the plaintiff to an "adverse employment action." Pattern Instruction 4.1 does not define "adverse employment action." In most cases, the question whether an employer's decision amounts to an "adverse employment action" will not be disputed because the decision is clearly an adverse employment action, such as termination, failure to promote, or demotion with pay cut. If there is a fact dispute as to whether an employment action amounts to an "adverse employment action," the instruction and verdict form should be adapted accordingly. Pattern Instruction 4.21, *infra*, contains an adverse employment action charge that may be used. An "adverse employment action" "must involve an important condition of employment" and exists "when the alleged employment action would likely chill the exercise of constitutionally protected speech." *Akins v. Fulton Cnty., Ga.*, 420 F.3d 1293, 1300-01 (11th Cir 2005) (internal quotation marks omitted) (listing examples of "adverse employment actions," including constructive discharge, transfer to a less desirable position, and actions that negatively impact "an employee's salary, title, position, or job duties").

D. Causation

Pattern Instruction 4.1 charges that the protected speech must be a "motivating factor" in the employer's decision. This instruction is based on *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), in which the Supreme Court held that a plaintiff must show that protected First Amendment "conduct was a 'substantial factor' or to put it in other words, that it was a 'motivating factor'" in the defendant's challenged action. *Id.* at 287; *see also Vila v. Padron*, 484 F.3d 1334, 1339 (11th Cir. 2007) (requiring that protected speech play "a substantial or motivating role in the adverse employment action"). To eliminate potential confusion that the terms "substantial" and "motivating" have different meanings, Pattern Instruction 4.1 charges that the protected speech must be a "motivating factor" in the defendant's decision.

The model instruction includes in brackets an optional charge discussing the inference of pretext. The basis for this charge is explained in further detail in the annotations following Pattern Instruction 4.5, *infra*.

III. Individual Liability

An "official decisionmaker" is individually liable under § 1983 for taking an adverse employment action in violation of the plaintiff's First Amendment rights. *See Quinn v. Monroe Cnty.*, 330 F.3d 1320, 1326 (11th Cir. 2003) ("The 'decisionmaker' inquiry addresses who has the power to make official decisions and, thus, be held individually liable." (emphasis omitted)). The model instruction presumes that the defendant's status as an official decisionmaker is undisputed or has been resolved by the court.

In a case where a genuine fact dispute exists as to the defendant's status as an official decisionmaker, the instruction and verdict form should be adapted accordingly. The following principles of law may be helpful in fashioning a jury charge. The official decisionmaker may be identified by a rule, handbook, or organizational chart, or "by examining the statutory authority of the official alleged to have made the decision." *Id*. at 1328. In the termination context, a defendant is an official decisionmaker if he or she has the power to effectuate termination, even if the termination decision is subject to further review. *Id*. On the other hand, a supervisor who merely has the power to recommend a termination is not an official decisionmaker, even if the recommendation is "rubber stamp[ed]" by the actual decisionmaker. *Id*. at 1327; *accord Kamensky v. Dean*, 148 F. App'x 878, 879-80 (11th Cir. 2005) (per curiam) (declining to extend a "rubber stamp" exception to the decisionmaker inquiry for individual liability). Although other circuits have taken a different approach to this issue, *e.g., Tejada-Batista v. Morales*, 424 F.3d 97, 102 (1st Cir. 2005) (holding that where a supervisor's biased adverse recommendation to the official decisionmaker was a but-for cause of the official decisionmaker's decision to take adverse employment action, the biased subordinate may be individually liable even if the official decisionmaker's own motive was pure), at

the date of this publication, the Eleventh Circuit has not reconsidered its holding in *Quinn*.

IV. Governmental Liability

A government entity cannot be held liable for the actions of its employees under 42 U.S.C. § 1983 based on a theory of *respondeat superior*. *Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1307 (11th Cir. 2001) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 663 n.7 (1978)). "Rather only deprivations undertaken pursuant to governmental 'custom' or 'policy' may lead to the imposition of governmental liability." *Id*.

Pattern Instruction 4.1 does not contain a "policy or custom" charge. In cases where there is a jury question as to whether the decision was made pursuant to a policy or custom, then the instruction should be adapted accordingly. Pattern Instruction 4.3, *infra*, contains language that is intended to guide the jury through the "policy or custom" issue, and that language may be used. Please refer to Pattern Instruction 4.3, *infra*, and the accompanying annotations.

V. Special Questions

The First Amendment protects independent contractors from being terminated from at-will government contracts in retaliation for the exercise of protected free speech. *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 684-85 (1996). Accordingly, the model instruction applies in such cases. The Eleventh Circuit has yet to decide whether to extend this protection to First Amendment claims brought by independent contractors without pre-existing relationships (i.e., "disappointed bidders"). *See Webster v. Fulton Cnty., Ga.*, 283 F.3d 1254, 1257 (11th Cir. 2002).

VI. Remedies

Damages under § 1983 are determined by common law compensation principles. *Wright v. Sheppard*, 919 F.2d 665, 669 (11th Cir. 1990). "In addition to damages based on monetary loss or physical pain and suffering… a § 1983 plaintiff also may be awarded compensatory damages based on demonstrated mental and emotional distress, impairment of reputation, and personal humiliation." *Slicker v. Jackson*, 215 F.3d 1225, 1231 (11th Cir. 2000).

The court, in its discretion, may award front pay as an alternative to reinstatement, *E.g., Haskins v. City of Boaz*, 822 F.2d 1014, 1015 (11th Cir. 1987). Front pay is a question for the court and not the jury, so it is not included as a remedy in Pattern Instruction 4.1.

A plaintiff cannot recover punitive damages in a § 1983 action against a government entity. *See Young Apartments, Inc. v. Town of Jupiter, Fla.*, 529 F.3d 1027,

1047 (11th Cir. 2008) ("In a § 1983 action, punitive damages are only available from government officials when they are sued in their individual capacities." (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981))). Therefore, if the case involves claims against a government entity only, then the punitive damages instruction should not be given; if the case involves claims against a government entity *and* government officials sued in their individual capacities, then the instruction and verdict form should be adapted to clarify that the jury may only consider the issue of punitive damages with regard to the individual defendants.

Few awards exceeding a single digit ratio between punitive and compensatory damages will "comport with due process." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

A plaintiff is not automatically entitled to a nominal damages instruction for constitutional violations. *See Oliver v. Falla*, 258 F.3d 1277, 1282 (11th Cir. 2001) (finding that because the plaintiff failed to request a nominal damages instruction, he waived "any entitlement to such damages"). A plaintiff is entitled to nominal damages, however, if a nominal damages instruction is requested and a violation of a fundamental constitutional right is established. *See Hughes v. Lott*, 350 F.3d 1157, 1162 (11th Cir. 2003) (citing *Carey v. Piphus*, 435 U.S. 247, 255 (1978)); *see also Kelly v. Curtis*, 21 F.3d 1544, 1557 (11th Cir. 1994) ("When constitutional rights are violated, a plaintiff may recover nominal damages even though he suffers no compensable injury." (emphasis omitted)).

4.2 Public Employee – First Amendment Claim – Discharge or Failure to Promote – Political Disloyalty or Key Employee

In this case, [name of plaintiff] claims that [name of defendant], while acting "under color" of state law, intentionally deprived [name of plaintiff] of [his/her] constitutional right to free speech by [discharging [him/her] from employment/ denying [him/her] a promotion] because [[he/she] [describe protected speech or conduct]] / [[name of defendant] mistakenly believed that [named of plaintiff] [describe protected speech or conduct]].

[Name of defendant] denies [name of plaintiff]'s claims and asserts that [describe the defendants' defense].

Under the First Amendment to the Constitution of the United States, every citizen has a right to "freedom of speech," which includes the right to engage in "political activity" without governmental interference or penalty. It is unlawful for a public employer to take action against a public employee [– except for certain "key" employees, as I will explain in a moment –] because the employee engaged in political activity, such as holding meetings and hearing the views of political candidates, running for office, or supporting political candidates, or because the employer mistakenly believed that the employee did so.

To succeed on [his/her] claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of defendant]'s actions were "under color" of state law;

Second: [[Name of plaintiff] engaged in constitutionally protected political activity, a form of free speech, by [describe protected activity]] / [[name of defendant] mistakenly believed that [name of plaintiff] [describe protected speech or conduct]];

Third: [Name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion];

Fourth: [[Name of plaintiff]'s [describe protected activity]] / [[name of defendant]'s [describe mistaken belief]] was a motivating factor in [name of defendant]'s decision [to discharge [name of plaintiff]/not to promote [name of plaintiff]]; and

Fifth: [Name of plaintiff] suffered damages because of [name of defendant]'s acts.

[In the verdict form that I will explain in a moment, you will be asked to answer questions about these factual issues.]

[To be used when the parties stipulate that defendants acted "under color" of state law: The parties have agreed that [name of defendant] acted "under color" of state law so you should accept that as a proven fact.]

[To be used when the parties dispute whether the defendants acted "under color" of state law: For the first element, you must decide whether [name of defendant] acted "under color" of state law. A government official acts "under color" of law when [he/she] acts within the limits of lawful authority. A government official also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful

authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

For the second element, if you find that [name of plaintiff] [describe protected activity], then you have found that [he/she] engaged in "protected activity."

[To be used when it is alleged that the public employer mistakenly believed that employee engaged in protected activity: For the second element, if you find that [name of defendant] mistakenly believed that [name of employee] engaged in [describe protected speech or activity], then you have found the second element to be met, whether or not [name of plaintiff] actually engaged in such [speech / conduct].]

For the third element, you must decide whether [name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion].

For the fourth element, you must decide whether [[name of plaintiff]'s protected activity] / [[name of defendant]'s mistaken belief that [name of plaintiff] [describe protected speech or conduct]] was a "motivating factor" in [name of defendant]'s decision. To prove that [[name of plaintiff]'s protected activity] / [[name of defendant]'s mistaken belief] was a motivating factor in [name of defendant]'s decision, [name of plaintiff] does not have to prove that [[his/her]

protected activity] / [[name of defendant]'s mistaken belief] was the only reason for [name of defendant]'s actions. It is enough if [name of plaintiff] proves that [[his/her] protected activity] / [[name of defendant]'s mistaken belief] influenced [name of defendant]'s decision. If [[name of plaintiff]'s protected activity] / [[name of defendant]'s mistaken belief] made a difference in [name of defendant]'s decision, you may find that it was a motivating factor in the decision.

[Name of defendant] claims that [[name of plaintiff]'s protected activity] / [[name of defendant]'s mistaken belief] was not a motivating factor in [his/her/its] decision and that [he/she/it] [discharged/did not promote] [name of plaintiff] for [another reason/other reasons]. A public employer may not take action against a public employee because the employee exercised [his/her] protected First Amendment rights or because the employer believed that the employee exercised [his/her] protected First Amendment rights. But a public employer may [discharge/decline to promote] a public employee for any other reason, good or bad, fair or unfair. If you believe [name of defendant]'s reason[s] for [his/her/its] decision [to discharge/not to promote] [name of plaintiff], and you find that [his/her/its] decision was not motivated by [name of plaintiff]'s protected activity or a mistaken belief that the employee engaged in protected activity, you must not second guess [his/her/its] decision and you must not substitute your own judgment for [name of defendant]'s judgment – even if you do not agree with it.

[**Pretext (optional, see annotations):** As I have explained, [name of plaintiff] has the burden to prove that [[his/her] protected activity] / [the employer's mistaken belief that the employee engaged in protected activity] was a motivating factor in [name of defendant]'s decision [to discharge/not to promote] [name of plaintiff]. I have explained to you that evidence can be direct or circumstantial. To decide whether [[name of plaintiff]'s protected activity] / [the employer's mistaken belief that the employee engaged in protected activity] was a motivating factor in [name of defendant]'s decision [to discharge/not to promote] [name of plaintiff], you may consider the circumstances of [name of defendant]'s decision. For example, you may consider whether you believe the reason[s] [name of defendant] gave for the decision. If you do not believe the reason[s] [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true unconstitutional reasons for the decision.]

If you find that [[name of plaintiff] [describe protected activity]] / [[name of defendant] mistakenly believed that [name of plaintiff] [describe protected speech or conduct]] and that this [protected activity / belief] was a motivating factor in [name of defendant]'s decision to [discharge [name of plaintiff] from employment/deny [name of plaintiff] a promotion], you must decide whether [name of plaintiff] suffered damages as a result. If the damages would not have

existed except for the [discharge/denied promotion], then you may find that [name of plaintiff] suffered those damages because of the [discharge/denied promotion].

[Including "Same Decision" Defense (if applicable, see annotations): If you find in [name of plaintiff]'s favor for each fact [he/she] must prove, you must decide whether [name of defendant] has shown by a preponderance of the evidence that [he/she/it] would have made the same decision even if [he/she/it] had not taken [[name of plaintiff]'s protected activity] / [[name of defendant]'s mistaken belief that [name of plaintiff] engaged in protected activity] into account. If you find that [name of plaintiff] would [have been dismissed/not have been promoted] for reasons other than [[his/her] protected activity] / [[name of defendant]'s mistaken belief], your verdict should be for [name of defendant].]

If you find for [name of plaintiff] and against [name of defendant] on this defense, you must [consider [name of plaintiff]'s compensatory damages/decide the issue of [name of defendant]'s "key-employee" defense.]]

[Including "Key Employee" Defense: If you find by a preponderance of the evidence that [name of plaintiff] suffered damages as a result of [name of defendant]'s acts [and that [name of plaintiff] would not have been [discharged] [denied a promotion] for reasons unrelated to [[his/her] protected activity]] / [[name of defendant]'s mistaken belief that [name of plaintiff] engaged in protected activity], then you must decide whether [name of defendant] has proved

by a preponderance of the evidence that [name of plaintiff] was a "key" employee whose job duties and responsibilities were such that [name of defendant] had a right to expect and demand political loyalty from [name of plaintiff] as a condition of employment.

An elected official such as [name of defendant] must stand for election and is politically responsible or accountable for the acts of certain key employees. Therefore, elected officials have a right to expect and demand political loyalty from key employees. If a key employee engages or is believed to have engaged in politically disloyal activity, that employee may be [terminated] [denied a promotion] even though the politically disloyal activity would otherwise be a form of free speech or free association protected by the First Amendment. On the other hand, non-key employees continue to enjoy full First Amendment protection and cannot be [terminated] [denied a promotion] simply because they engaged in politically disloyal activity or are believed to have done so.

[Name of defendant] claims that [name of plaintiff] was a "key" employee. [Name of defendant] has the burden to prove by a preponderance of the evidence that [name of plaintiff] was a "key employee." A key employee is one who holds a position that implicates political concerns in its effective functioning, so politically disloyal activity may interfere with the key employee's performance of public duties. To decide whether [name of plaintiff] was a key employee by virtue of

[name of plaintiff]'s position as [describe plaintiff's job], you should consider factors such as:

(a) Whether [name of plaintiff] acted as an advisor or formulated plans or policies for the implementation of broad goals concerning the operation of the [describe the office or department in which [name of plaintiff] worked];

(b) Whether the [name of plaintiff] exercised independent judgment in carrying out [his] [her] responsibilities;

(c) Whether [name of plaintiff] had regular contact with or worked closely with [name of defendant];

(d) Whether [name of plaintiff] frequently interacted with the public as [name of defendant]'s representative or alter ego; and

(e) Whether [name of plaintiff] had access to confidential information not generally available to [name of defendant]'s other employees.

No one of these factors is more important than any of the others, and a job can be a "key" position even if one or some of these factors do not apply. You must weigh these factors and then decide whether the [name of plaintiff] was, or was not, a "key" employee.]

If you find that [name of plaintiff] was a key employee, then you will indicate that on the verdict form, and your foreperson should sign and date the verdict form. If you find that [name of plaintiff] was not a key employee, you must then decide the issue of [name of plaintiff]'s compensatory damages.]

[Without Affirmative Defense: If you find by a preponderance of the evidence that [name of plaintiff] suffered damages because of [name of

defendant]'s acts, you must then decide the issue of [name of plaintiff]'s compensatory damages].

When considering the issue of [name of plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]'s damages as a result of the [discharge/denied promotion], no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [name of plaintiff] has proved them by a preponderance of the evidence, and no others:

(a) Net lost wages and benefits from the date of the [discharge] [denied promotion] to the date of your verdict; and

(b) Emotional pain and mental anguish.

To determine the amount of [name of plaintiff]'s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

To determine whether and how much [name of plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury – tangible and intangible. [Name of plaintiff] does not have to

introduce evidence of a monetary value for intangible things like mental anguish. You will determine what amount fairly compensates [him/her] for [his/her] claims. There is no exact standard to apply, but the award should be fair in light of the evidence.]

[Mitigation of Damages: You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]'s damages by the amount that could have

been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[**Punitive Damages:** To be used only for individual-capacity claims against individual defendants: [Name of plaintiff] also claims that [name of individual defendant]'s acts were done with malice or reckless indifference to [name of plaintiff]'s federally protected rights, which would entitle [him/her] to punitive damages in addition to compensatory damages. [Name of plaintiff] must prove by a preponderance of the evidence that [he/she] is entitled to punitive damages. You will only reach the issue of punitive damages if you find that [name of plaintiff] has proved the elements of [his/her] claim against [name of individual defendant] and you award [name of plaintiff] compensatory damages. You may not assess punitive damages against [public employer].

If you find for [name of plaintiff] and find that [name of defendant] acted with malice or reckless indifference to [name of plaintiff]'s federally protected rights, the law allows you, in your discretion, to award [name of plaintiff] punitive damages as a punishment for [name of defendant] and as a deterrent to others.

A person acts with malice if the person's conduct is motivated by evil intent or motive. A person acts with reckless indifference to the protected federal rights of another person when the person engages in conduct with a callous disregard for whether the conduct violates those protected federal rights.

If you find that punitive damages should be assessed, you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of such damages. [You also may assess punitive damages against one or more of the individual defendants, and not others, or against more than one individual defendant in different amounts.]]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant]'s actions were "under color" state law?

Answer Yes or No ______________

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That [name of plaintiff] engaged in constitutionally protected political activity, a form of free speech, by [describe protected activity] / That [name of defendant] mistakenly believed that [named of plaintiff] [describe protected speech or conduct]?

Answer Yes or No ______________

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

3. That [name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion]?

Answer Yes or No ______________

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

4. That [[name of plaintiff]'s [describe protected speech or conduct]] / [[name of defendant]'s mistaken belief that [named of plaintiff] [describe protected speech or conduct]] was a motivating factor in [name of defendant]'s decision [to discharge [name of plaintiff] from employment/not to promote [name of plaintiff]]?

Answer Yes or No ______________

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[5. That [name of defendant] would have [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion] even if [he/she/it] had not taken [[name of plaintiff]'s protected activity] / [[name of defendant]'s mistaken belief that [named of plaintiff] [describe protected speech or conduct]] into account?

Answer Yes or No _____________

If your answer is "Yes," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "No," go to the next question.]

[6. That [name of plaintiff] was a "key employee?"

Answer Yes or No _____________

If your answer is "Yes," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "No," go to the next question.]

7. That [name of plaintiff] suffered damages because of [name of defendant]'s acts?

Answer Yes or No _____________

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

8. That [name of plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No _____________

If your answer is "Yes,"
in what amount? $_____________

9. That [name of plaintiff] should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____________

If your answer is "Yes,"
in what amount? $_____________

If you did not award damages in response to either Question No. 8 or Question No. 9, this will end your deliberations, and your foreperson should go to the end of this verdict form to sign and date it. If you awarded damages in response to Question No. 8 or Question No. 9 (or both), go to the next question.

10. That punitive damages should be assessed against [name of individual defendant]?

Answer Yes or No _____________

If your answer is "Yes,"
in what amount? $_____________

SO SAY WE ALL.

____
Foreperson's Signature

DATE: ____________________

ANNOTATIONS AND COMMENTS

I. Causes of Action

Generally, an employer may not take an adverse employment action against an employee who exercises rights under the First Amendment, including the right to engage in political activity. Pattern Instruction 4.2 provides instructions for discharge

and failure to promote claims, but it is also intended to be used for any other case in which the plaintiff alleges a discriminatory adverse employment action, including demotion, pay cut, transfer to a less desirable job, or other adverse employment action.

II. Elements and Defenses

A. Adverse Employment Action

To prevail on a First Amendment retaliation claim, the plaintiff must prove that the employer subjected the plaintiff to an "adverse employment action." Pattern Instruction 4.2 does not define "adverse employment action." In most cases, the question whether an employer's decision amounts to an "adverse employment action" will not be disputed because the decision is clearly an adverse employment action, such as termination, failure to promote, or demotion with pay cut. If there is a fact dispute as to whether an employment action amounts to an "adverse employment action," the instruction and verdict form should be adapted accordingly. Pattern Instruction 4.21, *infra*, contains an adverse employment action charge that may be used. An "adverse employment action" "must involve an important condition of employment" and exists "when the alleged employment action would likely chill the exercise of constitutionally protected speech." *Akins v. Fulton Cnty., Ga.*, 420 F.3d 1293, 1301-02 (11th Cir. 2005) (internal quotation marks omitted) (listing examples of adverse employment actions, including constructive discharge, transfer to a less desirable position, and actions that negatively impact an employee's salary, title, position, or job duties).

An employee may challenge an employer's action as unlawful even if the employer makes a factual mistake about the employee's behavior or activities. *Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412 (2016).

B. Causation

Pattern Instruction 4.2 charges that the protected political activity must be a "motivating factor" in the employer's decision. This instruction is based on *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), in which the Supreme Court held that a plaintiff must show that protected First Amendment "conduct was a 'substantial factor' or to put it in other words, that it was a 'motivating factor'" in the defendant's challenged action. *Id*. at 287; *see also Vila v. Padron*, 484 F.3d 1334, 1339 (11th Cir. 2007) (requiring that protected speech play "a substantial or motivating role in the adverse employment action"). To eliminate potential confusion that the terms "substantial" and "motivating" have different meanings, Pattern Instruction 4.2 charges that the protected speech must be a "motivating factor" in the defendant's decision.

The model instruction includes in brackets an optional charge discussing the inference of pretext. The basis for this charge is explained in further detail in the annotations following Pattern Instruction 4.5, *infra*.

C. "Key Employee" Defense

Pattern Instruction 4.2 contains an instruction regarding the "key employee" defense. This instruction is based on *Branti v. Finkel*, 445 U.S. 507 (1980), in which the Supreme Court held that governmental employers cannot condition employment upon an employee's political affiliation, which is protected by the First Amendment, unless the "hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id*. at 518; *see also Rutan v. Republican Party of Ill.*, 497 U.S. 62, 73-74 (1990) (holding that employment decisions such as promotions, transfers, and recalls after layoffs, cannot be based upon political affiliation or other protected political activity unless the patronage practice is narrowly tailored to advance vital governmental interests); *Cutcliffe v. Cochran*, 117 F.3d 1353, 1357 (11th Cir. 1997) (explaining that the question whether a particular deputy sheriff is a "key employee" may depend on the deputy's individual job functions).

D. Candidacy Defense

A defense related to the "key employee" defense is the "candidacy defense," which the Eleventh Circuit recognized in *Underwood v. Harkins*, 698 F.3d 1335 (11th Cir. 2012). The "candidacy defense" applies in cases where an elected official dismisses an employee because that employee opposed the elected official in an election. The Eleventh Circuit held that "an elected official may dismiss an immediate subordinate for opposing her in an election without violating the First Amendment if the subordinate, under state or local law, has the same duties and powers as the elected official." *Id*. at 1343. Pattern Instruction 4.2 does not contain a "candidacy defense" instruction but should be modified to include this defense when relevant.

III. Remedies

For annotations and comments regarding remedies, including remedies available against a government entity, please see the Annotations and Comments following Pattern Instruction 4.1, *supra*.

4.6 Title VII – Civil Rights Act – Workplace Harassment by Supervisor – No Tangible Employment Action Taken (with Affirmative Defense by Employer)

In this case, [name of plaintiff] claims that [name of defendant] violated Federal Civil Rights statutes that prohibit employers from discriminating against employees in the terms or conditions of employment because of their [race/religion/sex/national origin]. These statutes prohibit the creation of a hostile work environment caused by harassment because of an employee's [race/religion/sex/national origin].

Specifically, [name of plaintiff] claims that [his/her] supervisor harassed [him/her] because of [his/her] [race/religion/sex/national origin] and that the harassment created a hostile work environment.

[Name of defendant] denies [name of plaintiff]'s claims and asserts that [describe the defendant's defense].

To succeed on [his/her] claim against [name of defendant], [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of plaintiff]'s supervisor harassed [him/her] because of [his/her] [race/religion/sex/national origin];

Second: The harassment created a hostile work environment for [name of plaintiff]; and

Third: [Name of plaintiff] suffered damages because of the hostile work environment.

[In the verdict form that I will explain in a moment, you will be asked to answer questions about these factual issues.]

A "hostile work environment" created by harassment because of [race/religion/sex/national origin] exists if:

(a) [name of plaintiff] was subjected to offensive acts or statements about [race/religion/sex/national origin] – even if they were not specifically directed at [him/her];

(b)[name of plaintiff] did not welcome the offensive acts or statements, which means that [name of plaintiff] did not directly or indirectly invite or solicit them by [his/her] own acts or statements;

(c) the offensive acts or statements were so severe or pervasive that they materially altered the terms or conditions of [name of plaintiff]'s employment;

(d) a reasonable person – not someone who is overly sensitive – would have found that the offensive acts or statements materially altered the terms or conditions of the person's employment; and

(e) [name of plaintiff] believed that the offensive acts or statements materially altered the terms or conditions of [his/her] employment.

To determine whether the conduct in this case was "so severe or pervasive" that it materially altered the terms or conditions of [name of plaintiff]'s employment, you should consider all the circumstances, including:

(a) how often the discriminatory conduct occurred;

(b) its severity;

(c) whether it was physically or psychologically threatening or humiliating; and

(d) whether it unreasonably interfered with [name of plaintiff]'s work performance.

A “material alteration” is a significant change in conditions. Conduct that amounts only to ordinary socializing in the workplace does not create a hostile work environment. A hostile work environment will not result from occasional horseplay, [sexual flirtation,] offhand comments, simple teasing, sporadic use of offensive language, or occasional jokes related to [race/religion/sex/national origin]. But discriminatory intimidation, ridicule, insults, or other verbal or physical conduct may be so extreme that it materially alters the terms or conditions of employment.

If you find that [name of plaintiff]’s supervisor harassed [him/her] because of [his/her] [race/religion/sex/national origin], and that the harassment created a hostile work environment, then you must decide whether [he/she] suffered damages as a result. If the damages would not have existed except for the hostile work environment, then you may find that [name of plaintiff] suffered those damages because of the hostile work environment.

[**Without Affirmative Defense:** If you find that [name of plaintiff] suffered damages because of the hostile work environment, you must decide the issue of [his/her] compensatory damages.]

[**Including Affirmative Defense:** If you find that [name of plaintiff] suffered damages because of the hostile work environment, you must decide whether [name of defendant] has established [his/her/its] affirmative defense.

To succeed on its affirmative defense, [name of defendant] must prove each of the following facts by a preponderance of the evidence:

First: [Name of defendant] exercised reasonable care to prevent and promptly correct any harassing behavior because of [race/religion/sex/national origin] in the workplace; and

Second: [Name of plaintiff] [unreasonably failed to take advantage of preventive or corrective opportunities [name of defendant] provided to avoid or correct the harm.] [took advantage of [name of defendant]'s preventative or corrective opportunities and [name of defendant] responded by taking reasonable and prompt corrective action.]

To determine whether [name of defendant] exercised reasonable care, you may consider whether:

(a) [name of defendant] created an explicit policy against harassment because of [race/religion/sex/national origin] in the workplace;

(b)[name of defendant] communicated the policy to [his/her/its] employees; and

(c) the policy provided a reasonable process for [name of plaintiff] to complain to higher management.

[To determine whether [name of plaintiff] unreasonably failed to take advantage of a preventive or corrective opportunity [name of defendant] provided, you may consider, for example, whether [name of plaintiff] unreasonably failed to follow a complaint procedure [name of defendant] provided.]

If you find that [name of defendant] established [his/her/its] affirmative defense, you must indicate that on the verdict form, and you will not decide the issue of [name of plaintiff]'s damages. If you find that [name of defendant] did not

establish [his/her/its] affirmative defense, you must decide the issue of [name of plaintiff]'s compensatory damages.]

When considering the issue of [name of plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]'s damages as a result of the hostile work environment, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [name of plaintiff] has proved them by a preponderance of the evidence, and no others:

(a) net lost wages and benefits to the date of your verdict; and

(b) emotional pain and mental anguish.

To determine the amount of [name of plaintiff]'s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

To determine whether and how much [name of plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury – tangible and intangible. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like mental anguish.

You must determine what amount will fairly compensate [him/her] for those claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

[**Mitigation of Damages:** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]'s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[**Punitive Damages:** [Name of plaintiff] also asks you to award punitive damages. The purpose of punitive damages is not to compensate [name of plaintiff] but, instead, to punish [name of defendant] for wrongful conduct and to deter similar wrongful conduct. You will only reach the issue of punitive damages if you find for [name of plaintiff] and award [him] [her] compensatory damages.

To be entitled to an award of punitive damages [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] acted with either malice or with reckless indifference toward [name of plaintiff]'s federally protected rights. Specifically, [name of plaintiff] must show that an employee of [name of defendant], acting in a managerial capacity, either acted with malice or with reckless indifference to [name of plaintiff]'s federally protected rights.

There is no bright-line rule about which employees act in a managerial capacity. You must determine whether an employee acted in a "managerial capacity" based upon the type of authority [name of defendant] gave the employee and the amount of discretion that the employee has in what is done and how it is accomplished.

To show that [name of defendant] acted with malice, [name of plaintiff] must show that an employee acting in a managerial capacity knew that federal law prohibits discrimination and discriminated against [name of plaintiff] anyway. To show that [name of defendant] acted with reckless indifference to [name of

plaintiff]'s federally protected rights, [name of plaintiff] must show that an employee acting in a managerial capacity acted with serious disregard for whether the conduct violated federal law. Either malice or reckless indifference is sufficient to entitle [name of plaintiff] to an award of punitive damages; [name of plaintiff] need not prove both.

An employer may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where the managerial employees' acts are contrary to the employer's good faith efforts to comply with the law by implementing policies and programs designed to prevent unlawful discrimination in the workplace. However, the mere existence of policies prohibiting discrimination does not preclude punitive damages if the policies are ineffective.

There is no single factor that determines whether [name of defendant] acted with malice or with reckless indifference to [name of plaintiff]'s federally protected rights. In determining whether to award punitive damages, you may consider factors such as: [(1) whether [name of defendant] engaged in a pattern of discrimination toward its employees]; [(2) whether [name of defendant] acted spitefully or malevolently]; [(3) whether [name of defendant] showed a blatant disregard for civil legal obligations]; [(4) whether [name of defendant] failed to investigate reports of discrimination]; [(5) whether [name of defendant] failed to

take corrective action concerning discriminatory acts or comments by its employees]; and [(6) whether the person accused of discrimination was included in the employer's decision making process concerning [name of plaintiff]'s [discharge] [denied promotion].]

If you find that punitive damages should be assessed against [name of defendant], you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of such damages.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of plaintiff]'s supervisor harassed [name of plaintiff] because of [his/her] [race/religion/sex/national origin]?

Answer Yes or No ______________

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That the harassment created a hostile work environment for [name of plaintiff]?

Answer Yes or No ______________

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[3. That [name of defendant] exercised reasonable care to prevent and promptly correct any harassing behavior in the workplace because of [race/religion/sex/national origin]?

Answer Yes or No ______________

If your answer is "Yes," go to the next question. If your answer is "No," go to Question No. 5.

4. [That [name of plaintiff] unreasonably failed to take advantage of the preventive or corrective opportunities [name of defendant] provided to avoid or correct the harm.] [That [name of plaintiff] took advantage of the preventive or corrective opportunities provided by [name of defendant] and [name of defendant] responded by taking reasonable and prompt corrective action].

Answer Yes or No ______________

If your answer is "Yes," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "No," go to the next question.]

5. That [name of plaintiff] suffered damages because of the hostile work environment

Answer Yes or No _____________

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

6. That [name of plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No _____________

If your answer is "Yes,"
in what amount? $_____________

7. That [name of plaintiff] should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____________

If your answer is "Yes,"
in what amount? $_____________

[If you did not award damages in response to either Question Nos. 6 or 7, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If you awarded damages in response to Question Nos. 6 or 7 (or both), go to the next question.]

[8. That punitive damages should be assessed against [name of defendant]?

Answer Yes or No _____________

If your answer is "Yes,"
in what amount? $_____________]

SO SAY WE ALL.

____
Foreperson's Signature

DATE: ____________________

ANNOTATIONS AND COMMENTS

I. Cause of Action

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Such disparate treatment can take the form of a "hostile work environment that changes the terms and conditions of employment, even though the employee is not discharged, demoted, or reassigned." *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 807 (11th Cir. 2010) (en banc) (internal quotation marks omitted).

Pattern Instruction 4.6 provides instructions for Title VII workplace harassment by a supervisor. Pattern Instruction 4.7 provides instructions for Title VII workplace harassment by a co-worker and may also be used where the alleged harasser is a third party, such as a customer.

A. Not For Tangible Employment Action Cases

Pattern Instruction 4.6 is intended to be used for any Title VII hostile work environment claim where there is no contention that the hostile work environment culminated in a "tangible employment action." For those claims, Pattern Instruction 4.5, *supra*, or Pattern Instruction 4.8, *infra*, may be used. Pattern Instruction 4.5 is a general disparate treatment charge, and Pattern Instruction 4.8 applies to a subset of "tangible employment action" claims where the disparate treatment is alleged to be based on the refusal of unwelcome sexual advances.

In a case where there is a fact dispute whether the hostile work environment culminated in a tangible employment action, it may be necessary to combine the

instructions and to instruct the jury on the definition of "tangible employment action." "'A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227, 1231 (11th Cir. 2006) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)). In such a case, if the jury finds a tangible employment action, it will not need to consider the affirmative defense available in hostile work environment cases based on a supervisor's harassment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998) ("No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.").

In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 140 (2004), the Supreme Court concluded that constructive discharge due to a "supervisor's official act" is a "tangible employment action," so the affirmative defense established in *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998) does not apply. In contrast, constructive discharge due to continuing harassment by a supervisor is not a "tangible employment action," so the *Faragher* defense is available. *Suders*, 542 U.S. at 140. Please see "Affirmative Defense" section below for more information on the *Faragher* defense. The elements of a constructive discharge claim are addressed in Pattern Instruction 4.23, *infra*.

B. Retaliatory Hostile Work Environment Cases

The Eleventh Circuit recognized a cause of action for retaliatory hostile work environment under Title VII. *Gowski v. Peake*, 682 F.3d 1299, 1312 (11th Cir. 2012). The Eleventh Circuit in *Gowski* applied the "severe or pervasive" requirement for a hostile work environment claim that is described in Pattern Instruction 4.6 (and not the "materially adverse action" standard applied to retaliation claims under *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006)), so Pattern Instruction 4.6 may be modified for use in a retaliatory hostile work environment case – the main difference would be that the questions regarding whether protected *status* motivated the hostile work environment would need to ask whether protected *activity* motivated the hostile work environment. If there is a fact dispute regarding whether the plaintiff engaged in protected activity, then instructions and interrogatories from Pattern Instruction 4.21, *infra*, should be inserted into Pattern Instruction 4.6.

II. Elements and Defenses

The definition of a hostile work environment is adapted from *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-23 (1993). *Reeves v. C.H. Robinson Worldwide, Inc.*, 594

F.3d 798, 808-09 (11th Cir. 2010) (en banc); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245-46 (11th Cir. 1999) (en banc).

A. Supervisor

Pattern Instruction 4.6 assumes that there is no genuine fact dispute as to whether the harasser is a "supervisor." If there is a fact dispute on this issue, the instruction should be modified accordingly. "[A]n employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim." *Vance v. Ball State Univ.*, No. 11-556, 2013 WL 3155228 (U.S. June 24, 2013).

B. "Because of" the Protected Trait

The plaintiff must prove that the hostile work environment was *because of* the protected trait. *See Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 809 (11th Cir. 2010) (en banc) ("Although gender-specific language that imposes a change in the terms or conditions of employment based on sex will violate Title VII, general vulgarity or references to sex that are indiscriminate in nature will not, standing alone, generally be actionable. Title VII is not a general civility code.") (internal quotation marks omitted). "Evidence that co-workers aimed their insults at a protected group may give rise to the inference of an intent to discriminate on the basis of sex, even when those insults are not directed at the individual employee." *Id*. at 811. Pattern Instruction 4.6 does not elaborate on the "because of" requirement.

C. Affirmative Defense

The Supreme Court recognized an affirmative defense to hostile work environment claims in *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998). Under this defense, an employer may be vicariously liable "for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence." *Id*. at 807. "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id*. If the employer exercises reasonable care to prevent and correct harassing behavior and the employee takes advantage of the preventive or corrective opportunities, the employer is still entitled to the affirmative defense if it establishes that it responded to the employee's complaint with reasonable and prompt corrective action. *Nurse "BE" v. Columbia Palms W. Hosp.*

Ltd. P'ship, 490 F.3d 1302, 1311-12 (11th Cir. 2007). Pattern Instruction 4.6 contains an instruction on the *Faragher* defense.

III. Remedies

Please refer to the annotations and comments for Pattern Instruction 4.5, *supra*.

4.7 Title VII – Civil Rights Act – Workplace Harassment by Co-Worker or Third Party – No Tangible Employment Action Taken

In this case, [name of plaintiff] claims that [name of defendant] violated Federal Civil Rights statutes that prohibit employers from discriminating against employees in the terms or conditions of employment because of their [race/religion/sex/national origin]. These statutes prohibit the creation of a hostile work environment caused by harassment because of an employee's [race/religion/sex/national origin].

Specifically, [name of plaintiff] claims that [name of harasser] harassed [him/her] because of [his/her] [race/religion/sex/national origin], that the harassment created a hostile work environment for [him/her], and that [name of defendant] knew, or in the exercise of reasonable care should have known about, the harassment, but did not take prompt remedial action.

[Name of defendant] denies [name of plaintiff]'s claims and asserts that [describe the Defendant's defense].

To succeed on [his/her] claim against [name of defendant], [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of harasser] harassed [name of plaintiff] because of [his/her] [race/religion/sex/national origin];

Second: The harassment created a hostile work environment for [name of plaintiff];

Third: [Name of plaintiff]'s supervisor knew, or in the exercise of reasonable care should have known, about the hostile work environment;

Fourth: [Name of plaintiff]'s supervisor failed to take prompt remedial action to eliminate the hostile work environment; and

Fifth: [Name of plaintiff] suffered damages because of the hostile work environment

[In the verdict form that I will explain in a moment, you will be asked to answer questions about these factual issues.]

A "hostile work environment" created by harassment because of [race/religion/sex/national origin] exists if:

(a) [name of plaintiff] was subjected to offensive acts or statements about [race/religion/sex/national origin] – even if they were not specifically directed at [him/her];

(b)[name of plaintiff] did not welcome the offensive acts or statements, which means that [name of plaintiff] did not directly or indirectly invite or solicit them by [his/her] own acts or statements;

(c) the offensive acts or statements were so severe or pervasive that they materially altered the terms or conditions of [name of plaintiff]'s employment;

(d) a reasonable person – not someone who is overly sensitive – would have found that the offensive acts or statements materially altered the terms or conditions of the person's employment; and

(e) [name of plaintiff] believed that the offensive acts or statements materially altered the terms or conditions of [his/her] employment.

To determine whether the conduct in this case was "so severe or pervasive" that it materially altered the terms or conditions of [name of plaintiff]'s employment, you should consider all the circumstances, including:

(a) how often the discriminatory conduct occurred;

(b) its severity;

(c)whether it was physically or psychologically threatening or humiliating; and

(d) whether it unreasonably interfered with [name of plaintiff]'s work performance.

A "material alteration" is a significant change in conditions. Conduct that amounts only to ordinary socializing in the workplace does not create a hostile work environment. A hostile work environment will not result from occasional horseplay, [sexual flirtation,] offhand comments, simple teasing, sporadic use of offensive language, or occasional jokes related to [race/religion/sex/national origin]. But discriminatory intimidation, ridicule, insults, or other verbal or physical conduct may be so extreme that it materially alters the terms or conditions of employment.

In this case, [name of plaintiff] claims that [name of harasser], [his/her] co-worker, created and carried on the hostile work environment.

You can hold [name of defendant] responsible for the hostile work environment only if [name of plaintiff] proves by a preponderance of the evidence that [name of plaintiff]'s supervisor [, or a person with the authority to receive, address, or report a complaint of harassment,] knew, or should have known, of the hostile work environment and permitted it to continue by failing to take remedial action.

To show that a supervisor [, or a person with the authority to receive, address, or report a complaint of harassment,] "should have known" of a hostile work environment, [name of plaintiff] must prove that the hostile environment was so pervasive and so open and obvious that any reasonable person in the supervisor's position [, or in the position of a person with the authority to receive, address, or report a complaint of harassment,] would have known that the harassment was occurring.

For the fifth element, if you find that:

(a) [name of harasser] harassed [name of plaintiff] because of [his/her] [race/religion/sex/national origin];

(b) the harassment created a hostile work environment;

(c)[name of plaintiff]'s supervisor knew, or in the exercise of reasonable care should have known, about the hostile work environment; and

(d) [name of plaintiff]'s supervisor did not take prompt remedial action to eliminate the hostile work environment,

then you must decide whether [name of plaintiff] suffered damages because of the hostile work environment.

If the damages would not have existed except for the hostile work environment, then you may find that [name of plaintiff] suffered those damages because of the hostile work environment.

If you find that [name of plaintiff] suffered damages because of the hostile work environment, you must decide the issue of [his/her] compensatory damages.

When considering the issue of [name of plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]'s damages as a result of the hostile work environment, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [name of plaintiff] has proved them by a preponderance of the evidence, and no others:

(a) net lost wages and benefits to the date of your verdict; and

(b) emotional pain and mental anguish.

To determine the amount of [name of plaintiff]'s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

To determine whether and how much [name of plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury – tangible and intangible. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like mental anguish. You must determine what amount will fairly compensate [him/her] for those

claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

[**Mitigation of Damages:** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]'s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[**Punitive Damages:** [Name of plaintiff] also asks you to award punitive damages. The purpose of punitive damages is not to compensate [name of plaintiff] but, instead, to punish [name of defendant] for wrongful conduct and to deter similar wrongful conduct. You will only reach the issue of punitive damages if you find for [name of plaintiff] and award [him] [her] compensatory damages.

To be entitled to an award of punitive damages [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] acted with either malice or with reckless indifference toward [name of plaintiff]'s federally protected rights. Specifically, [name of plaintiff] must show that an employee of [name of defendant], acting in a managerial capacity, either acted with malice or with reckless indifference to [name of plaintiff]'s federally protected rights.

There is no bright-line rule about which employees act in a managerial capacity. You must determine whether an employee acted in a "managerial capacity" based upon the type of authority [name of defendant] gave the employee and the amount of discretion that the employee has in what is done and how it is accomplished.

To show that [name of defendant] acted with malice, [name of plaintiff] must show that an employee acting in a managerial capacity knew that federal law prohibits discrimination and discriminated against [name of plaintiff] anyway. To show that [name of defendant] acted with reckless indifference to [name of

plaintiff]'s federally protected rights, [name of plaintiff] must show that an employee acting in a managerial capacity acted with serious disregard for whether the conduct violated federal law. Either malice or reckless indifference is sufficient to entitle [name of plaintiff] to an award of punitive damages; [name of plaintiff] need not prove both.

An employer may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where the managerial employees' acts are contrary to the employer's good faith efforts to comply with the law by implementing policies and programs designed to prevent unlawful discrimination in the workplace. However, the mere existence of policies prohibiting discrimination does not preclude punitive damages if the policies are ineffective.

There is no single factor that determines whether [name of defendant] acted with malice or with reckless indifference to [name of plaintiff]'s federally protected rights. In determining whether to award punitive damages, you may consider factors such as: [(1) whether [name of defendant] engaged in a pattern of discrimination toward its employees]; [(2) whether [name of defendant] acted spitefully or malevolently]; [(3) whether [name of defendant] showed a blatant disregard for civil legal obligations]; [(4) whether [name of defendant] failed to investigate reports of discrimination]; [(5) whether [name of defendant] failed to

take corrective action concerning discriminatory acts or comments by its employees]; and [(6) whether the person accused of discrimination was included in the employer's decision making process concerning [name of plaintiff]'s [discharge] [denied promotion].]

If you find that punitive damages should be assessed against [name of defendant], you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of such damages.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of harasser] harassed [name of plaintiff] because of [his/her] [race/religion/sex/national origin]?

Answer Yes or No ____________

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That the harassment created a hostile work environment for [name of plaintiff]?

Answer Yes or No ____________

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

3. That [name of plaintiff]'s supervisor knew, or in the exercise of reasonable care should have known, about the hostile work environment?

Answer Yes or No ______________

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

4. That [name of plaintiff]'s supervisor took prompt remedial action to eliminate the hostile work environment?

Answer Yes or No ______________

If your answer is "Yes," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "No," go to the next question.

5. That [name of plaintiff] suffered damages because of the hostile work environment?

Answer Yes or No ______________

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

6. That [name of plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No ______________

If your answer is “Yes,”
in what amount? $______________

7. That [name of plaintiff] should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No ______________

If your answer is “Yes,”
in what amount? $______________

[If you did not award damages in response to either Question Nos. 6 or 7, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If you awarded damages in response to Question Nos. 6 or 7 (or both), go to the next question.]

[8. That punitive damages should be assessed against [name of defendant]?

Answer Yes or No ______________

If your answer is “Yes,”
in what amount? $______________

SO SAY WE ALL.

____

Foreperson's Signature

DATE: ____________________

ANNOTATIONS AND COMMENTS

I. Cause of Action

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Such disparate treatment can take the form of a "hostile work environment that changes the terms and conditions of employment, even though the employee is not discharged, demoted, or reassigned." *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 807 (11th Cir. 2010) (en banc) (internal quotation marks omitted).

Pattern Instruction 4.6 provides instructions for Title VII workplace harassment by a supervisor. Pattern Instruction 4.7 provides instructions for Title VII workplace harassment by a co-worker and may also be used where the alleged harasser is a third party, such as a customer. *E.g., Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1258 n.2 (11th Cir. 2003).

A. Not For Tangible Employment Action Cases

Pattern Instruction 4.7 is intended to be used for any Title VII hostile work environment claim where there is no contention that the hostile work environment culminated in a "tangible employment action." For those claims, Pattern Instruction 4.5, *supra*, or Pattern Instruction 4.8, *infra*, may be used. Pattern Instruction 4.5 is a general disparate treatment charge, and Pattern Instruction 4.8 applies to a subset of "tangible employment action" claims where the disparate treatment is alleged to be based on the refusal of unwelcome sexual advances.

In a case where there is a factual dispute as to whether the hostile work environment culminated in a tangible employment action, it may be necessary to combine the instructions and to instruct the jury on the definition of "tangible employment action." "'A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227, 1231 (11th Cir. 2006) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)).

B. Retaliatory Hostile Work Environment Cases

The Eleventh Circuit recognized a cause of action for retaliatory hostile work environment under Title VII. *Gowski v. Peake*, 682 F.3d 1299, 1312 (11th Cir. 2012). The Eleventh Circuit in *Gowski* applied the "severe or pervasive" requirement for a hostile work environment claim that is described in Pattern Instruction 4.7 (and not the "materially adverse action" standard applied to retaliation claims under *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006)), so Pattern Instruction 4.7 may be modified for use in a retaliatory hostile work environment case – the main difference would be that the questions regarding whether protected status motivated the hostile work environment would need to ask whether protected activity motivated the hostile work environment. If there is a fact dispute regarding whether the plaintiff engaged in protected activity, then instructions and interrogatories from Pattern Instruction 4.21, *infra*, should be inserted into Pattern Instruction 4.7.

II. Elements and Defenses

The definition of a hostile work environment is adapted from *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-23 (1993). *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 808-11 (11th Cir. 2010) (en banc); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245-46 (11th Cir. 1999) (en banc).

A. "Because of" the Protected Trait

The plaintiff must prove that the hostile work environment was *because of* the protected trait. *See Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 809 (11th Cir. 2010) (en banc) ("Although gender-specific language that imposes a change in the terms or conditions of employment based on sex will violate Title VII, general vulgarity or references to sex that are indiscriminate in nature will not, standing alone, generally be actionable. Title VII is not a general civility code.") (internal quotation marks omitted). "Evidence that co-workers aimed their insults at a protected group may give rise to the inference of an intent to discriminate on the basis of sex, even when those insults are not directed at the individual employee." *Id*. at 811. Pattern Instruction 4.7 does not elaborate on the "because of" requirement.

B. Prompt Remedial Action

An employer may be held liable under Title VII for the harassing conduct of its non-supervisory employees, customers, or other third parties "if the employer fails to take immediate and appropriate corrective action in response to a hostile work environment of which the employer knew or reasonably should have known." *Beckford v. Dep't of Corr.*, 605 F.3d 951, 957-58 (11th Cir. 2010) (finding that prison could be held liable for harassing conduct of inmates). Pattern instruction 4.7 does not define "prompt remedial action."

C. Affirmative Defense

The Supreme Court recognized an affirmative defense to hostile work environment claims *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998). Under this defense, an employer may be held vicariously liable "for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence." *Id*. at 807. "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id*.

"The *Faragher* defense is available to employers who defend against complaints of 'an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the [plaintiff] employee.'" *Beckford v. Dep't of Corr.*, 605 F.3d 951, 960 (11th Cir. 2010) (alterations in original) (emphasis omitted) (quoting *Faragher*, 524 U.S. at 807). The *Faragher* defense does *not* apply where the employee complains "of harassment by someone other than a supervisor." *Id*. at 961. Accordingly, Pattern Instruction 4.7 does not contain an affirmative defense instruction.

III. Remedies

Please refer to the annotations and comments for Pattern Instruction 4.5, *supra*.