**ANNOTATIONS AND COMMENTS**

 **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.

 **Elements and Defenses**

**“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.

 **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).

 **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”).

 **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*.

 **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*.

 **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.

 **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).

 **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)).