**ANNOTATIONS AND COMMENTS**

 **Cause of Action**

The Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (“ADEA”), prohibits employment discrimination on the basis of age. Pattern Instruction 4.10 is meant to be used for ADEA disparate treatment claims based on any adverse employment action, including but not limited to failure to hire, failure to promote, discharge, reduction in force, and elimination of position.

Pattern Instruction 4.10 is not intended to be used for ADEA retaliation claims. Pattern Instruction 4.22, *infra*, may be adapted to address such claims. An instruction on ADEA retaliation should incorporate the damages instructions of Pattern Instruction 4.10.

The Eleventh Circuit has assumed without deciding that the ADEA provides a cause of action for hostile work environment. *See E.E.O.C. v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1249 & n.7 (11th Cir. 1997). Pattern Instruction 4.10 is not intended to be used for hostile work environment claims that do not involve a tangible employment action; Pattern Instructions 4.6 and 4.7, *supra*, may be adapted to address claims for an age-based hostile work environment.

 **Elements and Defenses**

 **“Employee”**

To prevail on an ADEA claim (other than a failure-to-hire claim), the plaintiff must prove that he was an employee of the defendant. In a failure-to-hire case, the pattern charge and interrogatories should be modified so that the jury does not have to find that the plaintiff was an employee of the defendant. If there is a dispute about whether the plaintiff was an employee of the defendant, this issue should be determined as a threshold matter and should be inserted as the first fact to be considered by the jury. For example, the ADEA does not provide a cause of action for discrimination against an independent contractor. *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1495 n.13 (11th Cir. 1993). If there is a genuine fact dispute regarding the plaintiff’s status as an employee or independent contractor, that issue should be determined by the jury. *See Garcia v. Copenhaver, Bell & Assocs., M.D.’s*, 104 F.3d 1256, 1266-67 (11th Cir. 1997). Please refer to Pattern Instruction 4.24, *infra*, for a pattern instruction regarding the independent contractor-employee distinction. Pattern Instruction 4.25, *infra*, addresses the “joint employer” issue, and Pattern Instructions 4.26 and 4.27, *infra*, address situations where one company may be considered the alter ego of an individual or corporation.

 **Causation**

The ADEA prohibits discrimination “because of [an] individual’s age,” 29 U.S.C. § 623, and the prohibition is “limited to individuals who are at least 40 years of age,” *id*. § 631.

In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), the Supreme Court held that a plaintiff asserting an ADEA disparate treatment claim must prove that his or her age was the but-for cause, not simply a motivating factor, of the adverse employment action and that the burden of persuasion does not shift to the employer to show that it would have taken the same action regardless of the plaintiff’s age. *Id*. at 174-78. As a result, the “same decision” defense (also known as the “mixed motive” defense) is no longer viable in ADEA cases. *See Mora v. Jackson Mem’l Found., Inc.*, 597 F.3d 1201, 1203-04 (11th Cir. 2010) (per curiam). Pattern Instruction 4.10 incorporates this causation standard and does not contain a mixed motive instruction.

Pattern Instruction 4.10 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, *supra*. *See also Mitchell v. City of Lafayette*, 504 Fed. App’x 867, 869-70 (11th Cir. 2013) (per curiam) (explaining that, even after *Gross*, ADEA claims are analyzed under the *McDonnell Douglas* framework); *Sims v. MVM, Inc.*, 704 F.3d 1327, 1333-34 (11th Cir. 2013) (evaluating pretext in ADEA context).

Pattern Instruction 4.10 does not contain an optional cat’s paw charge based on *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011). The Supreme Court in *Staub* applied the cat’s paw theory to a claim under the Uniformed Services Employment and Reemployment Rights Act (“USERRA”), 38 U.S.C. § 4301, *et seq.*, which requires proof that protected military status “is a motivating factor in the employer’s action.” *Staub*, 131 S. Ct. at 1190-91 (quoting 38 U.S.C. § 4311). A cat’s paw charge may be given in an appropriate case, and the cat’s paw instruction in Pattern Instruction 4.5, *supra*, may be used as a starting point, though the court should modify it because of the differences in causation standards between Title VII/USERRA (“motivating factor”) and the ADEA (“but for”). A stricter causation standard applies to cat’s paw claims under a “but for” statute like the ADEA. *Sims v. MVM, Inc.*, 704 F.3d 1327, 1335-37 (11th Cir. 2013) (evaluating cat’s paw argument in ADEA context and finding that a different standard applies to claims under the ADEA).

 **Remedies**

Pattern Instruction 4.10 contains an instruction on willful violations, which is to be used in cases where the plaintiff alleges a willful violation of the ADEA. The willful damages instruction is adapted from *Formby v. Farmers and Merchants Bank*, 904 F.2d 627, 632 (11th Cir. 1990) (per curiam). If the jury finds that the defendant acted willfully, then the court should award as damages the amount calculated by the jury plus an equal amount as liquidated damages. 29 U.S.C. § 626; *accord Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1340 (11th Cir. 1999).

Front pay should not be included in liquidated damages awards because “while liquidated damages are intended to be punitive in nature, the express terms of the ADEA limit the calculation of liquidated damages to double the amount of lost pecuniary wages. Front pay, however, is equitable rather than compensatory relief.” *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1340 (11th Cir. 1999) (internal citations omitted). Therefore, liquidated damages are limited to double the amount of full back pay and lost fringe benefits. *Id*.

A court may award both prejudgment interest and liquidated damages in an ADEA case because the legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature. *See Lindsey v. Am. Cast Iron Pipe Co.*, 810 F.2d 1094, 1102 (11th Cir. 1987) (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985)). “ADEA liquidated damages awards punish and deter violators, while FLSA liquidated damages merely compensate for damages that would be difficult to calculate.” *Id*.

“[N]either punitive damages nor compensatory damages for pain and suffering are recoverable under the ADEA.” *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1446 (11th Cir. 1985).

 **Disparate Impact Claims**

The ADEA provides a right to jury trial for all claims covered by the Act, including disparate impact claims. 29 U.S.C. § 626. In *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 240 (2005), the Supreme Court held that the ADEA authorizes recovery on disparate impact claims in accordance with *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which announced a disparate impact theory of recovery in Title VII cases. Pattern Instruction 4.10 does not include a disparate impact charge.

Should the court need to craft a disparate impact instruction, the following points may be useful. The disparate impact ground of recovery is narrower in the ADEA context than in the Title VII context. First, the ADEA permits a disparate impact claim “where the differentiation is based on reasonable factors other than age.” 29 U.S.C. § 623. Second, the 1991 amendment to Title VII modified the Supreme Court’s holding in *Ward’s Cove Packing v. Atonio*, 490 U.S. 642 (1989), in which the Court narrowly construed the employer’s exposure to disparate-impact liability under Title VII. Because the 1991 amendment to Title VII did not affect the ADEA, it follows that the standards of *Ward’s Cove* remain applicable to disparate impact actions under the ADEA. *Smith*, 544 U.S. at 240. Under *Ward’s Cove*, “it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.” *Smith*, 544 U.S. at 241 (emphasis omitted) (internal quotation marks omitted).

In an ADEA disparate-impact case, the employer may assert the affirmative defense that its employment decision was made on the basis of reasonable factors other than age, and the employer bears the burdens of production and persuasion on this defense. *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 93-95 (2008).

 **Miscellaneous Issues**

Trial by jury is available in ADEA disparate treatment cases. *Lorilard v. Pons*, 434 U.S. 575, 585 (1978).

The ADEA does not abrogate the states’ sovereign immunity. *Kimel v. Fla. Bd. Of Regents*, 528 U.S. 62, 92 (2000).

A court may award attorney’s fees to a prevailing ADEA defendant only upon finding that the plaintiff litigated in bad faith. *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1437 (11th Cir. 1998).