**ANNOTATIONS AND COMMENTS**

 **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.

 **Elements and Defenses**

 **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).

 **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*.

 **“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).

 **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.

 **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*.