**ANNOTATIONS AND COMMENTS**

**I. Causes of Action**

Pattern Instruction 4.22 is intended to be used for retaliation claims under 42 U.S.C. § 1981 (“§ 1981”), Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e-3(a), the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 623(d); the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12203; and the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 215(a)(3).

Pattern Instruction 4.22 is not intended to be used for retaliation claims arising under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §4301 *et seq*. (“USERRA”) or the Family and Medical Leave Act (“FMLA”), 29 U.S.C. § 2601 *et seq*. For USERRA retaliation claims, please see Pattern Instruction 4.19, *supra*. For FMLA retaliation claims, please see Pattern Instruction 4.15, *supra*.

**II. Elements and Defenses**

1. **Participation Clause Claims v. Opposition Clause Claims**

Title VII’s anti-retaliation provision contains two clauses: the “opposition clause” and the “participation clause.” 42 U.S.C. § 2000e-3(a). The opposition clause “prohibits retaliation against an employee for opposing any practice made unlawful by Title VII.” *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000). The participation clause “protects activities which occur in conjunction with or after the filing of a formal charge with the EEOC.” *Id.* Due to differences between these two clauses, the pattern charge provides separate charges for each type of claim.

The Eleventh Circuit has held that “expansive protection is available” for participation-clause activity. *Id.* at 1176-77 (citing *Pettway v. Am. Cast Iron Pipe Co*., 411 F.2d 998, 1007 (5th Cir. 1969)). Therefore, an employee cannot be fired for anything written in an EEOC charge. *Id*. Thus, if employee engaged in participation clause activity, that activity is protected under Title VII, and no “good faith” inquiry is necessary.

By contrast, where a plaintiff’s retaliation claim arises from the opposition to an allegedly unlawful practice, a plaintiff must show that he “had a good faith, reasonable belief that the employer was engaged in unlawful employment practices.” *Howard v. Walgreen Co.*, 605 F.3d 1239, 1244 (11th Cir. 2010). The plaintiff “need not prove the underlying claim of discrimination which led to [his] protest.” *Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491, 1494 (11th Cir. 1989). The plaintiff must show that he held a reasonable, good faith belief that the discrimination occurred. *Id.* To establish that he held a reasonable, good faith belief that discrimination occurred, the plaintiff must show not only that he subjectively believed that his employer’s behavior was discriminatory, “but also that his belief was objectively reasonable in light of the facts and record presented.” *Butler v. Ala. Dep’t of Transp*., 536 F.3d 1209, 1213 (11th Cir. 2008) (quoting *Little v. United Techs., Carrier Transicold Div*., 103 F.3d 956, 960 (11th Cir. 1997)). The protection afforded under the opposition clause extends to an employee who speaks out about sexual harassment, not only on her own initiative but also in answering questions during an employer’s investigation of a co-worker’s complaints. *Crawford v. Metro. Gov’t of Nashville & Davidson Cnty., Tenn*., 555 U.S. 271, 277 (2009).

The anti-retaliation provisions of the ADEA and the ADA track the language of Title VII’s anti-retaliation provision. *See* 29 U.S.C.§ 623(d) (prohibiting discrimination “because” employee opposed practices made unlawful by the ADEA or participated in activities in connection with an ADEA EEOC charge); 42 U.S.C. § 12203 (a) (prohibiting discrimination “because” employee opposed practices made unlawful by the ADA or participated in activities in connection with an ADA EEOC charge). The anti-retaliation provisions of the FLSA are similar to Title VII’s. 29 U.S.C. § 215 (a)(3) (prohibiting discrimination “because” employee participated in activities in connection with an FLSA EEOC charge or took other specified actions); 29 U.S.C. § 218c (prohibiting discrimination “because” employee took certain actions in objection to FLSA violations). The Eleventh Circuit has instructed that “the same elements are required to prove a claim of retaliation under Title VII or § 1981.” *Martin v. Fin. Asset Mgmt. Sys., Inc.*, 959 F.3d 1048, 1051 n.2 (11th Cir. 2020). Therefore, Pattern Instruction 4.22 includes alternative instructions for participation clause claims and opposition clause claims.

**B. Adverse Employment Action**

Pattern Instruction 4.22 includes a charge on the definition of an adverse employment action, which is based on the Supreme Court’s decision in *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). That case requires the plaintiff to prove that the challenged retaliatory conduct is materially adverse. *Id*. at 68. This definition of adverse employment action applies to retaliation claims under the FLSA. *See, e.g.,* *Smith v. Haynes & Haynes P.C.*, 940 F.3d 635, 648 (11th Cir. 2019) (applying *Burlington Northern* to an FLSA retaliation claim). While unreported Eleventh Circuit decisions have applied *Burlington Northern* to ADA and ADEA retaliation claims, no binding Eleventh Circuit cases have done so. As discussed above, the anti-retaliation provisions of the ADEA and the ADA track the language of Title VII’s anti-retaliation provision.

**C. Causation**

In *Gross v. FBL Financial Services, Inc*., 557 U.S. 167 (2009), the Supreme Court held that, based on the statutory language of the ADEA, a plaintiff must prove that “age was the ‘but-for’ cause of the employer’s adverse decision,” not merely a motivating factor in the decision. *Id*. at 176-77. The Court also rejected the mixed-motive defense (also known as the same-decision defense) in the context of the ADEA, noting that unlike Title VII, the ADEA did not incorporate a mixed-motive defense. *Id*. at 173-75. Although the Eleventh Circuit has not, as of this publication, issued an opinion on this matter, the Committee believes that *Gross’s* rationale extends to retaliation claims under the ADEA, the ADA, and the FLSA because the statutory causation language is the same as or similar to the statutory causation language that applies in ADEA discrimination claims. *See* 29 U.S.C. § 215 (a)(3) (FLSA); 29 U.S.C. § 623(a), (d) (ADEA); 42 U.S.C. § 12203(a) (ADA). For these reasons, Pattern Instruction 4.22 instructs that the adverse employment action must be “because of” the plaintiff’s protected activity.

In addition, Pattern Instruction 4.22 applies to Title VII retaliation claims. In *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 352 (2013), the Supreme Court extended *Gross*’s rationale to Title VII retaliation claims given the lack of any meaningful textual difference between the text in Title VII’s anti-retaliation provision and the ADEA’s anti-retaliation provision. Therefore, “Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in [42 U.S.C.] § 2000e-2(m).” *Id*. at 360.

The Supreme Court recently altered the causation standard for claims under the federal-sector provision of the Age Discrimination in Employment Act, 29 U.S.C. § 633a(a). *Babb v. Wilkie*, 140 S. Ct. 1168, 1174 (2020). The Eleventh Circuit extended that change to retaliation claims under the federal-sector provision of Title VII, 42 U.S.C. § 2000e-16(a). *Babb v. Sec’y, Dep’t of Veterans Affs.*, 992 F.3d 1193, 1196 (11th Cir. 2021). The Supreme Court ruled that as to liability, a federal-sector plaintiff need not prove that the protected characteristic was a but-for cause of the ultimate personnel action (though a plaintiff must prove but-for causation to obtain certain remedies, including backpay and reinstatement). *Babb*, 140 S. Ct. at 1176-78. Instead, a plaintiff may show a violation of the statute by proving (i) that the protected characteristic was the but-for cause of *differential treatment* and (ii) the differential treatment tainted the ultimate personnel action. *Id*. As of the latest revision of this instruction, the law is not sufficiently settled to provide clear guidance on jury instructions for federal-sector cases. Still, courts should bear in mind the different causation requirements.

**D. Pretext**

Pattern Instruction 4.22 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*.

**III. Remedies**

The remedies for ADA and ADEA retaliation claims match the remedies for disparate-treatment claims under the ADA and ADEA, subject to the limitations discussed in the annotations following Pattern Instruction 4.10, *supra*. *See* 29 U.S.C. § 626 (b) (ADEA); 42 U.S.C. § 12117 (a) (ADA). Thus, the jury charges on damages in the corresponding disparate treatment instructions may be incorporated into the model retaliation instruction as appropriate. The damages instructions from Pattern Instruction 4.10 may also be used for retaliation claims under the FLSA, to the extent they are appropriate in a particular case. However, the relief available under 29 U.S.C. § 216(b) for FLSA retaliation claims may be broader than that available under the ADEA.  For example, other courts have held that emotional distress damages are available in FLSA retaliation cases, although they are not available under the ADEA.  *See, e.g*., *Pineda v. JTCH Apartments, L.L.C.*, 843 F.3d 1062, 1064-66 (5th Cir. 2016). There is no reported Eleventh Circuit case on this issue.

**IV. When the Case Involves Both Discrimination and Retaliation Claims**

In some cases, a plaintiff will bring both discrimination and retaliation claims. In those cases, the court should charge all of the elements of a discrimination and retaliation claim, except damages, separately—and then give a charge on damages that applies to both types of claims.