**ANNOTATIONS AND COMMENTS**

 **Cause of Action**

Under the Equal Protection Clause of the Fourteenth Amendment, public employees have a constitutional right to be free from sex discrimination and race discrimination in public employment. This right to be free from sex and race discrimination includes the right to be free from a hostile work environment based on race or sex. *See, e.g., Bryant v. Jones*, 575 F.3d 1281, 1296 (11th Cir. 2009) (discussing equal protection racial harassment claims); *Cross v. Alabama*, 49 F.3d 1490, 1507-08 (11th Cir. 1995) (discussing equal protection sexual harassment claims).

This pattern instruction focuses on Equal Protection claims based on a hostile work environment. For other types of Equal Protection claims, such as discriminatory discharge based on race or gender, this instruction may be adapted to include the elements and explanations from Pattern Instruction 4.5, *infra*.

 **Elements**

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). The language defining “hostile work environment” is the same as the language in Pattern Instruction 4.6, *infra* (Title VII Hostile Work Environment) because the elements of an Equal Protection hostile work environment claim are the same as hostile work environment claims brought under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. *Bryant v. Jones*, 575 F.3d 1281, 1296 n.20 (11th Cir. 2009). To prevail on an Equal Protection claim, which is brought pursuant to 42 U.S.C. § 1983, the plaintiff must also show that the defendant’s actions were under color of state law. *Watkins v. Bowden*, 105 F.3d 1344, 1355 (11th Cir. 1997) (per curiam).

 **Special Liability Questions**

Supervisor Liability. Liability in § 1983 cases “cannot be premised solely upon a theory of *respondeat superior*.” *Bryant v. Jones*, 575 F.3d 1281, 1299 (11th Cir. 2009). A supervisor may be held liable under § 1983 only “when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation.” *Id*. “The causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so. The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant, and of continued duration, rather than isolated occurrences.” *Id*. at 1299-1300 (internal quotation marks omitted). Pattern Instruction 4.3 is to be used in cases where the plaintiff alleges that the supervisor personally participated in creating the hostile work environment. Pattern Instruction 4.4 is to be used in cases where the plaintiff alleges that there is a causal connection between the supervisor’s actions and the constitutional deprivation.

A “’supervisor’ is not merely a person who possesses authority to oversee plaintiff’s job performance but a person with the power directly to affect the terms and conditions of the plaintiff’s employment.” Bryant, 575 F.3d at 1300; *see also Vance v. Ball State Univ.*, No. 11-556, 2013 WL 3155228 (U.S. June 24, 2013) (holding that “an 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”).

Pattern Instruction 4.3 assumes that there is no genuine fact dispute whether the harasser is a supervisor with the authority to correct the hostile work environment. If there is a fact dispute on this issue, the instruction should be modified accordingly.

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*. To prove a “custom, a plaintiff must establish a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a ‘custom or usage with the force of law.’” *Id*. at 1308 (11th Cir. 2001) (internal quotation marks omitted); *accord Monell*, 436 U.S. at 690-91 (1978)).

Pattern Instruction 4.3 contains language that is intended to guide the jury through the “policy or custom issue.” The instruction does not define the term “policymaker.” If there is a dispute whether the decisionmaker was a final policymaker, then the instruction should be adapted accordingly. An official is considered a final policymaker if his decisions are insulated from review but not if his decisions are subject to meaningful administrative review. *E.g., Doe v. Sch. Bd. of Broward Cnty., Fla.*, 604 F.3d 1248, 1264 (11th Cir. 2010) (citing *Hill v. Clifton*, 74 F.3d 1150, 1152 (11th Cir. 1996) and *Martinez v. City of Opa-Locka, Fla.*, 971 F.2d 708, 714-15 (11th Cir. 1992) (per curiam)); *see also Maschmeier v. Scott*, 269 F. App’x. 941, 943-44 (11th Cir. 2008) (per curiam) (defining meaningful review and explaining how to demonstrate that the review was not meaningful).

 **Remedies**

A plaintiff cannot recover punitive damages in a § 1983 action against a government entity. *E.g., Young Apartments, Inc. v. Town of Jupiter, Fla.*, 529 F.3d 1027, 1047 (11th Cir. 2008) (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981)) (“In a § 1983 action, punitive damages are only available from government officials when they are sued in their individual capacities.”). 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.

For additional annotations and comments regarding remedies, please see the Annotations and Comments following Pattern Instruction 4.1, *supra*.

 **When the Case Involves Hostile Work Environment Claims Under More than One Statute**

In some cases, a plaintiff will bring a hostile work environment claim under more than one statute based on the same set of facts (Title VII, Equal Protection Clause, and 42 U.S.C. § 1981). The jury instruction on these separate claims can be combined because the elements of an Equal Protection hostile work environment claim are the same as hostile work environment claims brought under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. *Bryant v. Jones*, 575 F.3d 1281, 1296 n.20 (11th Cir. 2009). Two issues to consider when combining instructions: statutes of limitations differ, so the instruction and verdict form should take that into account; the availability of punitive damages differs by statute and type of defendant, so the instruction and verdict form should take that into account.