**ANNOTATIONS AND COMMENTS**

 **Cause of Action**

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2. Such disparate treatment can take the form of a “hostile work environment that changes the terms and conditions of employment, even though the employee is not discharged, demoted, or reassigned.” *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 807 (11th Cir. 2010) (en banc) (internal quotation marks omitted).

Pattern Instruction 4.6 provides instructions for Title VII workplace harassment by a supervisor. Pattern Instruction 4.7 provides instructions for Title VII workplace harassment by a co-worker and may also be used where the alleged harasser is a third party, such as a customer.

 **Not For Tangible Employment Action Cases**

Pattern Instruction 4.6 is intended to be used for any Title VII hostile work environment claim where there is no contention that the hostile work environment culminated in a “tangible employment action.” For those claims, Pattern Instruction 4.5, *supra*, or Pattern Instruction 4.8, *infra*, may be used. Pattern Instruction 4.5 is a general disparate treatment charge, and Pattern Instruction 4.8 applies to a subset of “tangible employment action” claims where the disparate treatment is alleged to be based on the refusal of unwelcome sexual advances.

In a case where there is a fact dispute whether the hostile work environment culminated in a tangible employment action, it may be necessary to combine the instructions and to instruct the jury on the definition of “tangible employment action.” “‘A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.’” *Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227, 1231 (11th Cir. 2006) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)). In such a case, if the jury finds a tangible employment action, it will not need to consider the affirmative defense available in hostile work environment cases based on a supervisor’s harassment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998) (“No affirmative defense is available, however, when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.”).

In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 140 (2004), the Supreme Court concluded that constructive discharge due to a “supervisor’s official act” is a “tangible employment action,” so the affirmative defense established in *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998) does not apply. In contrast, constructive discharge due to continuing harassment by a supervisor is not a “tangible employment action,” so the *Faragher* defense is available. *Suders*, 542 U.S. at 140. Please see “Affirmative Defense” section below for more information on the *Faragher* defense. The elements of a constructive discharge claim are addressed in Pattern Instruction 4.23, *infra*.

 **Retaliatory Hostile Work Environment Cases**

The Eleventh Circuit recognized a cause of action for retaliatory hostile work environment under Title VII. *Gowski v. Peake*, 682 F.3d 1299, 1312 (11th Cir. 2012). The Eleventh Circuit in *Gowski* applied the “severe or pervasive” requirement for a hostile work environment claim that is described in Pattern Instruction 4.6 (and not the “materially adverse action” standard applied to retaliation claims under *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006)), so Pattern Instruction 4.6 may be modified for use in a retaliatory hostile work environment case – the main difference would be that the questions regarding whether protected *status* motivated the hostile work environment would need to ask whether protected *activity* motivated the hostile work environment. If there is a fact dispute regarding whether the plaintiff engaged in protected activity, then instructions and interrogatories from Pattern Instruction 4.21, *infra*, should be inserted into Pattern Instruction 4.6.

 **Elements and Defenses**

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).

 **Supervisor**

Pattern Instruction 4.6 assumes that there is no genuine fact dispute as to whether the harasser is a “supervisor.” If there is a fact dispute on this issue, the instruction should be modified accordingly. “[A]n 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.” *Vance v. Ball State Univ.*, No. 11-556, 2013 WL 3155228 (U.S. June 24, 2013).

 **“Because of” the Protected Trait**

The plaintiff must prove that the hostile work environment was *because of* the protected trait. *See Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 809 (11th Cir. 2010) (en banc) (“Although gender-specific language that imposes a change in the terms or conditions of employment based on sex will violate Title VII, general vulgarity or references to sex that are indiscriminate in nature will not, standing alone, generally be actionable. Title VII is not a general civility code.”) (internal quotation marks omitted). “Evidence that co-workers aimed their insults at a protected group may give rise to the inference of an intent to discriminate on the basis of sex, even when those insults are not directed at the individual employee.” *Id*. at 811. Pattern Instruction 4.6 does not elaborate on the “because of” requirement.

 **Affirmative Defense**

The Supreme Court recognized an affirmative defense to hostile work environment claims in *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998). Under this defense, an employer may be vicariously liable “for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.” *Id*. at 807. “The defense comprises two necessary elements: that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Id*. If the employer exercises reasonable care to prevent and correct harassing behavior and the employee takes advantage of the preventive or corrective opportunities, the employer is still entitled to the affirmative defense if it establishes that it responded to the employee’s complaint with reasonable and prompt corrective action. *Nurse “BE” v. Columbia Palms W. Hosp. Ltd. P’ship*, 490 F.3d 1302, 1311-12 (11th Cir. 2007). Pattern Instruction 4.6 contains an instruction on the *Faragher* defense.

 **Remedies**

Please refer to the annotations and comments for Pattern Instruction 4.5, *supra*.