**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. *E.g., Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1258 n.2 (11th Cir. 2003).

**Not For Tangible Employment Action Cases**

Pattern Instruction 4.7 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 factual dispute as to 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)).

**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 4.7 (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 4.7 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 4.7.

**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, 808-11 (11th Cir. 2010) (en banc); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245-46 (11th Cir. 1999) (en banc).

**“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 4.7 does not elaborate on the “because of” requirement.

**Prompt Remedial Action**

An employer may be held liable under Title VII for the harassing conduct of its non-supervisory employees, customers, or other third parties “if the employer fails to take immediate and appropriate corrective action in response to a hostile work environment of which the employer knew or reasonably should have known.” *Beckford v. Dep’t of Corr.*, 605 F.3d 951, 957-58 (11th Cir. 2010) (finding that prison could be held liable for harassing conduct of inmates). Pattern instruction 4.7 does not define “prompt remedial action.”

**Affirmative Defense**

The Supreme Court recognized an affirmative defense to hostile work environment claims *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998). Under this defense, an employer may be held 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*.

“The *Faragher* defense is available to employers who defend against complaints of ‘an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the [plaintiff] employee.’” *Beckford v. Dep’t of Corr.*, 605 F.3d 951, 960 (11th Cir. 2010) (alterations in original) (emphasis omitted) (quoting *Faragher*, 524 U.S. at 807). The *Faragher* defense does *not* apply where the employee complains “of harassment by someone other than a supervisor.” *Id*. at 961. Accordingly, Pattern Instruction 4.7 does not contain an affirmative defense instruction.

**Remedies**

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