**ANNOTATIONS AND COMMENTS**

 **Cause of Action**

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex and other protected traits. 42 U.S.C. § 2000e-2. An employer may be held liable under Title VII if a supervisor takes a “tangible employment action” (such as discharge or demotion) against the employee because the employee refused to give in to the supervisor’s sexual demands. *E.g., Hulsey v. Pride Restaurants, LLC*, 367 F.3d 1238, 1245 (11th Cir. 2004); *accord Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1311 (11th Cir. 2001) (“[W]hen a supervisor engages in harassment which results in an adverse ‘tangible employment action’ against the employee, the employer is automatically held vicariously liable for the harassment.”). Pattern Instruction 4.8 addresses this type of disparate treatment claim, which the courts previously referred to as “quid pro quo” claims but now refer to as “tangible employment action” sexual harassment claims. *Frederick*, 246 F.3d at 1311.

For all other “tangible employment action” disparate treatment claims, Pattern Instruction 4.5, *supra*, may be used. For cases where the plaintiff’s claims are based on a hostile work environment but there is no contention that the hostile work environment culminated in a tangible employment action. Pattern Instruction 4.6 (supervisor harassment), *supra*, or Pattern Instruction 4.7 (co-worker or third party harassment), *supra*, may be used.

 **Elements**

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The elements of a “tangible employment action” sexual harassment claim (also called “quid pro quo” claim) are derived from cases such as *Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227, 1231-32, (11th Cir. 2006) and *Hulsey v. Pride Restaurants, LLC*, 367 F.3d 1238, 1245 (11th Cir. 2004). In “tangible employment action” sexual harassment cases, the employer is strictly liable for the supervisor’s unlawful conduct. *See, e.g., Hulsey*, 367 F.3d at 1245 (“An employer is liable under Title VII if it (even unknowingly) permits a supervisor to take a tangible employment action against an employee because she refused to give in to his sexual overtures… regardless of whether the employee took advantage of any employer-provided system for reporting harassment.”); *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1311 (11th Cir. 2001) (“[W]hen a supervisor engages in harassment which results in an adverse ‘tangible employment action’ against the employee, the employer is automatically held vicariously liable for the harassment.”).

 **“Tangible Employment Action”**

A “tangible employment action” is required to prevail on a “tangible employment action” theory. Pattern Instruction 4.8 does not define “tangible employment action.” If there is a fact dispute as to whether an employment action amounts to a “tangible employment action,” the instruction and verdict form should be adapted accordingly. “‘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)).

 **Causation**

If the employee establishes that the employee rejected the supervisor’s unwelcome sexual advances and that the employee suffered a tangible employment action, the employee must still establish that the employee’s refusal of the supervisor’s unwelcome sexual advances was a motivating factor that prompted the tangible employment action. *See, e.g., Myers v. Cent. Fla. Invs., Inc.*, 237 F. App’x 452, 455 (11th Cir. 2007) (per curiam) (affirming summary judgment against plaintiff on tangible employment action theory because plaintiff “failed to offer evidence rebutting” the employer’s legitimate nondiscriminatory reason for her termination). In cases where the dispute centers on the causation element, the court may wish to include a modified version of the legitimate nondiscriminatory reason instruction (and the optional pretext instruction) from Pattern Instruction 4.5, *supra*.

A “tangible employment action” is an adverse employment action such as a termination or a denied promotion. Therefore, Pattern Instruction 4.8 includes the causation language applicable to Title VII disparate treatment claims: “motivating factor,” and Pattern Instruction 4.8 also includes an optional “same decision” defense charge. *See Alwine v. Buzas*, 89 F. App’x 196, 210-11 (10th Cir. 2004) (finding no error in district court’s “mixed motive” defense instruction on plaintiff’s “quid pro quo harassment claim”); *cf. Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) (concluding that district court did not abuse its discretion in giving a mixed motive instruction – including the same decision defense – because the plaintiff had presented sufficient evidence for a reasonable jury to conclude that sex was a motivating factor for the employer’s decision).

 **Remedies**

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