**ANNOTATIONS AND COMMENTS**

* + 1. **Scope of Instruction**

This instruction applies to any claim in which a prisoner or private citizen who is not suing in his or her capacity as a public employee alleges that a public official retaliated against him or her for exercising a constitutional right. For public employees asserting a First Amendment retaliation claim, see Pattern Instruction 4.1.

* + 1. **Elements of the Claim**

The elements of the claim are derived from *Smith v. Mosley*, 532 F.3d 1270, 1276 (11th Cir. 2008): (1) the speech was constitutionally protected; (2) the defendant’s retaliatory conduct adversely affected the protected speech; and (3) there is a causal connection between the retaliatory actions and the adverse effect on speech. *See also Bennett v. Hendrix*, 423 F.3d 1247, 1250, 1254 (11th Cir. 2005).

* + - 1. **Protected Conduct**

Whether the conduct is constitutionally protected is a question of law for the court. If necessary, additional contextual information about the protected conduct may be added to the second paragraph of the instruction.

* + - 1. **Adverse Effect on Protected Speech**

To show the defendant’s conduct adversely affected protected speech, a plaintiff must show the defendant’s conduct would likely “deter a person of ordinary firmness” from exercising his or her First Amendment rights. *See, e.g.*, *Bennett*, 423 F.3d at 1254 (“A plaintiff suffers adverse action if the defendant’s allegedly retaliatory conduct would likely deter a person of ordinary firmness from the exercise of First Amendment rights.”); *Smith v. Mosley*, 532 F.3d 1270, 1277 (11th Cir. 2008) (“The second element required [the plaintiff] to show that the discipline he received would likely deter a [prisoner] of ordinary firmness from complaining about the conditions of his confinement.” (second alteration in original) (internal quotation marks and citation omitted)). The Committee has used the language “deter a similarly situated reasonable person” because it is easier to understand and conveys the same idea.

* + - 1. **Causation**

First Amendment retaliation claims have a unique causation element. “In order to establish a causal connection, the plaintiff must show that the defendant was subjectively motivated to take the adverse action because of the protected speech.” *Castle v. Appalachian Tech. Coll.*, 631 F.3d 1194, 1197 (11th Cir. 2011); *see also Smith*, 532 F.3d at 1278 (“The causal connection inquiry asks whether the defendants were subjectively motivated to discipline because [the plaintiff] complained of some of the conditions of confinement.”). Courts decide the “subjective motivation issue” using the burden-shifting formula set forth by the Supreme Court in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). *Smith*, 532 F.3d at 1278.

“[O]nce the plaintiff shows that her protected conduct was a motivating factor, the burden shifts to the defendant to show that she would have taken the same action in the absence of the protected conduct, in which case the defendant cannot be held liable.” *Castle*, 631 F.3d at 1197; *see also Smith*, 532 F.3d at 1278 n.22 (quoting *Thaddeus-X v. Blatter*, 175 F.3d 378, 388 n.4 (6th Cir. 1999) (alterations in original) (“Under the *Mt. Healthy* approach, if the government official ‘can prove that [he] would have taken the adverse action in the absence of the plaintiff’s protected conduct, [he] cannot be held liable.’”)).

* + 1. **Damages**

The Eleventh Circuit has noted that physical injury “rarely” results from a First Amendment violation. *Al-Amin v. Smith*, 637 F.3d 1192, 1197 (11th Cir. 2011). In those rare cases where a prisoner suffers a physical injury resulting from a First Amendment violation, the jury should be instructed concerning recoverable damages. For the damages instruction, see Pattern Instruction 5.13.