

#### 4 PJI 9 | CIVIL RIGHTS ACT - 42 USC §1981 - RACE DISCRIMINATION IN EMPLOYMENT - DISCHARGE OR FAILURE TO PROMOTE

In this case, [Plaintiff] claims that [Defendant] violated the Federal Civil Rights statutes that prohibit employers from discriminating against an employee in the terms and conditions of employment because of the employee's race.

Specifically, [Plaintiff] claims that [Defendant] [describe adverse employment action] [him/her] because of [his/her] race.

[Defendant] denies [Plaintiff]'s claims and asserts that [describe the defendant's defense].

To succeed on [his/her] claim against [Defendant], [Plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Defendant] [describe adverse employment action]; and

Second: [Plaintiff]'s race was a motivating factor that prompted [Defendant] to take that action.

[In the verdict form that I will explain in a moment, you will be asked to answer questions about these factual issues.]

If you find that [Defendant] [describe adverse employment action], you must decide whether [Plaintiff]'s race was a "motivating factor" in the decision.

To prove that race was a motivating factor in [Defendant]'s decision, [Plaintiff] does not have to prove that [his/her] race was the only reason that [Defendant] [describe adverse employment action]. It is enough if [Plaintiff] proves that race influenced the decision. If [Plaintiff]'s race made a difference in [Defendant]'s decision, you may find that it was a motivating factor in the decision.

[Defendant] claims that [Plaintiff]'s race was not a motivating factor in the decision and that [he/she] [describe adverse employment action] for [another reason/other reasons]. An employer may not discriminate against an employee because of the employee's race, but the employer may [describe adverse employment action] an employee for any other reason, good or bad, fair or unfair. If you believe [Defendant]'s reason[s] for the decision [to discharge/not to promote] [Plaintiff], and you find that [Defendant]'s decision was not motivated by [Plaintiff]'s race, you must not second guess [Defendant]'s decision, and you must not substitute your own



judgment for [Defendant]'s judgment - even if you disagree with it.

[Pretext (optional, see annotations): As I have explained, [Plaintiff] has the burden to prove that [his/her] race was a motivating factor in [Defendant]'s decision to [describe adverse employment action]. I have explained to you that evidence can be direct or circumstantial. To decide whether [Plaintiff]'s race was a motivating factor in [Defendant]'s decision to [describe adverse employment action], you may consider the circumstances of [Defendant]'s decision. For example, you may consider whether you believe the reason[s] [Defendant] gave for the decision. If you do not believe the reason[s] [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true discriminatory reasons for the decision.]

[Including Affirmative Defense (if applicable, see annotations): If you find in [Plaintiff]'s favor for each fact [he/she] must prove, you must decide whether [Defendant] has shown by a preponderance of the evidence that [he/she/it] would have [describe adverse employment action] even if [Defendant] had not taken [Plaintiff]'s race into account. If you find that [Plaintiff] would have been [describe adverse employment action] for reasons other than [his/her] race, you must make that finding in your verdict.

If you find for [Plaintiff] and against [Defendant] on this defense, you must consider [Plaintiff]'s compensatory damages.]

[Without Affirmative Defense: If you find in [Plaintiff]'s favor for each fact [he/she] must prove, you must consider [Plaintiff]'s compensatory damages.]

When considering the issue of [Plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [Plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [Plaintiff]'s damages as a result of [describe adverse employment action], no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [Defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [Plaintiff] has proved them by a preponderance of the evidence, and no others:



- (a) net lost wages and benefits from the date of [describe adverse employment action] to the date of your verdict; and
- (b) emotional pain and mental anguish.

To determine the amount of [Plaintiff]'s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

To determine whether and how much [Plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury - tangible and intangible. [Plaintiff] does not have to introduce evidence of a monetary value for intangible things like mental anguish. You will determine what amount fairly compensates [him/her] for [his/her] claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

[Mitigation of Damages: You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [Plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [Defendant]. To prove that [Plaintiff] failed to mitigate damages, [Defendant] must prove by a preponderance of the evidence that (1) work comparable to the position [Plaintiff] held with [Defendant] was available, and (2) [Plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [Defendant] shows that [Plaintiff] did not make reasonable efforts to obtain any work, then [Defendant] does not have to prove that comparable work was available.

If you find that [Defendant] proved by a preponderance of the evidence that [Plaintiff] failed to mitigate damages, then you should reduce the amount of [Plaintiff]'s damages by the amount that could have been reasonably realized if [Plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[Punitive Damages: [Plaintiff] also asks you to award punitive damages. The purpose of punitive damages is not to compensate [Plaintiff] but, instead, to punish [Defendant] for wrongful conduct and to deter similar wrongful conduct. You will only reach the issue of punitive damages if you find for [Plaintiff] and award [him] [her] compensatory damages.



To be entitled to an award of punitive damages [Plaintiff] must prove by a preponderance of the evidence that [Defendant] acted with either malice or with reckless indifference toward [Plaintiff]'s federally protected rights. Specifically, [Plaintiff] must show that an employee of [Defendant], acting in a managerial capacity, either acted with malice or with reckless indifference to [Plaintiff]'s federally protected rights.

There is no bright-line rule about which employees act in a managerial capacity. You must determine whether an employee acted in a "managerial capacity" based upon the type of authority [Defendant] gave the employee and the amount of discretion that the employee has in what is done and how it is accomplished.

To show that [Defendant] acted with malice, [Plaintiff] must show that an employee acting in a managerial capacity knew that federal law prohibits discrimination and discriminated against [Plaintiff] anyway. To show that [Defendant] acted with reckless indifference to [Plaintiff]'s federally protected rights, [Plaintiff] must show that an employee acting in a managerial capacity acted with serious disregard for whether the conduct violated federal law. Either malice or reckless indifference is sufficient to entitle [Plaintiff] to an award of punitive damages; [Plaintiff] need not prove both.

An employer may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where the managerial employees' acts are contrary to the employer's good faith efforts to comply with the law by implementing policies and programs designed to prevent unlawful discrimination in the workplace. However, the mere existence of policies prohibiting discrimination does not preclude punitive damages if the policies are ineffective.

There is no single factor that determines whether [Defendant] acted with malice or with reckless indifference to [Plaintiff]'s federally protected rights. In determining whether to award punitive damages, you may consider factors such as: [(1) whether [Defendant] engaged in a pattern of discrimination toward its employees]; [(2) whether [Defendant] acted spitefully or malevolently]; [(3) whether [Defendant] showed a blatant disregard for civil legal obligations]; [(4) whether [Defendant] failed to investigate reports of discrimination]; [(5) whether [Defendant] failed to take corrective action concerning discriminatory acts or comments by its employees]; and [(6) whether the person accused of



discrimination was included in the employer's decision making process concerning [Plaintiff]'s [discharge] [denied promotion].]

If you find that punitive damages should be assessed against [Defendant], you may consider the evidence regarding [Defendant]'s financial resources in fixing the amount of such damages.]

### SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [Defendant] [describe adverse employment action]?

Answer Yes or No \_\_\_\_\_

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That [Plaintiff]'s race was a motivating factor that prompted [Defendant] to take that action?

Answer Yes or No \_\_\_\_\_

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

- [3. That [Defendant] would have [describe adverse employment action] even if [Defendant] had not taken [Plaintiff]'s race into account.?

Answer Yes or No \_\_\_\_\_

If your answer is "Yes," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "No," go to the next question.]

4. That [Plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?



Answer Yes or No \_\_\_\_\_

If your answer is "Yes," in what amount?  
\$ \_\_\_\_\_

5. That [Plaintiff] should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No \_\_\_\_\_

If your answer is "Yes," in what amount?  
\$ \_\_\_\_\_

[If you did not award damages in response to either Question Nos. 4 or 5, this will end your deliberations, and your foreperson should go to the end of this verdict form to sign and date it. If you awarded damages in response to Question Nos. 4 or 5 (or both), go to the next question.]

[6. That punitive damages should be assessed against [Defendant]?

Answer Yes or No \_\_\_\_\_

If your answer is "Yes," in what amount?  
\$ \_\_\_\_\_

SO SAY WE ALL.

DATE: \_\_\_\_\_

\_\_\_\_\_  
Foreperson's Signature

((Rev. 03/2022) | *Judicial Council of the United States Eleventh Judicial Circuit*)

### Annotations and Comments

#### I. Cause of Action

42 U.S.C. §1981(a) states that “[a]ll persons within the jurisdiction of the United States shall have the same right... to make and enforce contracts.” 42 U.S.C. §1981(a). “The term ‘make and enforce contracts’ includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” *Id.* §1981(b). Section 1981 prohibits intentional racial discrimination in the making and enforcement of private contracts, including employment contracts.” *Washington v. Kroger Co.*, 218 F. App’x 822, 824 (11th Cir. 2007) (per curiam).

Pattern Instruction 4.9 provides instructions for discharge and failure to promote claims, but it is also intended to be used for any other case in which the plaintiff alleges a racially discriminatory adverse employment action, including discharge, failure to promote, wage discrimination, demotion, or other serious and material changes to the plaintiff’s terms and conditions of employment. Pattern Instruction 4.9 may also be used as the starting point for jury instructions in cases in which the plaintiff alleges the adverse employment action of failure to hire, though slight modifications will be required. Finally, Pattern Instruction 4.9 may be used for claims that a race-based hostile work environment culminated in a “tangible employment action,” such as discharge or demotion. Pattern Instruction 4.9 is not intended to be used for hostile work environment claims that do not involve a tangible employment action; Pattern Instructions 4.6 and 4.7, *supra*, may be adapted to address §1981 claims for a race-based hostile work environment. Pattern Instruction 4.9 is also not intended to be used for §1981 retaliation claims; Pattern Instruction 4.21, *infra*, may be adapted to address such claims. An instruction on §1981 retaliation should incorporate the damages instructions of Pattern Instruction 4.9.11



Section 1981 prohibits race discrimination, and it does not cover purely national origin discrimination. Bullard v. OMI Ga., Inc., 640 F.2d 632, 634 (5th Cir. Unit B Mar. 1981); accord Tippie v. Spacelabs Med., Inc., 180 F. App'x 51, 56 (11th Cir. 2006) (per curiam). However, “[i]n some contexts, national origin discrimination is so closely related to racial discrimination as to be indistinguishable.” Bullard, 640 F.2d at 634 (internal quotation marks omitted).

## II. Elements

### A. Causation

Pattern Instruction 4.9 instructs that the jury must find that the plaintiff’s race was a “motivating factor” in the defendant’s decision. This language tracks the language of Pattern Instructions 4.1 and 4.5, *supra*. In First Amendment retaliation cases brought pursuant to 42 U.S.C. §1983, a “motivating factor” causation standard applies based on Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), in which the Supreme Court held that a plaintiff must show that protected First Amendment “conduct was a ‘substantial factor’ or to put it in other words, that it was a ‘motivating factor’” in the defendant’s challenged action. *Id.* at 287; see also Vila v. Padron, 484 F.3d 1334, 1339 (11th Cir. 2007) (requiring that protected speech play “a substantial or motivating role in the adverse employment action”). In the Title VII context, the “motivating factor” causation standard is based on the statutory language. See 42 U.S.C. §2000e-2(m) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”).

This issue may need to be revisited in the §1981 context in light of the Supreme Court’s decisions in Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009) and University of Texas Southwestern Medical Center v. Nassar, No. 12-484, 2013 WL 3155234 (U.S. June 24, 2013). In Gross, the Supreme Court held that to prove discrimination under the Age Discrimination in Employment Act (“ADEA”), the plaintiff must establish “but for” causation and may not prevail “by showing that age was simply a motivating factor.” Gross, 557 U.S. at 174-78. The rationale for this decision is that the ADEA’s statutory text makes it unlawful for an employer to discriminate against an individual “because of” the individual’s age. *Id.* at 176. Only Title VII’s antidiscrimination provision was amended to allow for employer liability where discrimination “was a motivating factor for any employment practice, even though other factors also motivated the practice.” *Id.* at 177 n.3 (quoting 42 U.S.C. §2000e-2(m)). Also, “[b]ecause an ADEA plaintiff must establish ‘but for’ causality, no ‘same decision’ affirmative defense can exist: the employer either acted ‘because of’ the plaintiff’s age or it did not.” Mora v. Jackson Mem’l Found., Inc., 597 F.3d 1201, 1204 (11th Cir. 2010) (per curiam). In Nassar, the Supreme Court extended the rationale of Gross to Title VII retaliation claims “[g]iven the lack of any meaningful textual difference between the text in” Title



VII's anti-retaliation provision and the ADEA's anti-retaliation provision. Nassar, 2013 WL 3155234, at \*10. Therefore, "Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in [42 U.S.C.] §2000e-2(m)." Id. at \*14.

At the time of this publication, neither the Supreme Court nor the Eleventh Circuit had addressed whether the reasoning of Gross and Nassar applies to claims under §1981. Section 1981 does not contain any specific causation language, such as the "motivating factor" language of Title VII or the "because of" language of the ADEA. Rather, §1981 "prohibits intentional racial discrimination in the making and enforcement of private contracts, including employment contracts." E.g., Washington v. Kroger Co., 218 F. App'x 822, 824 (per curiam) (11th Cir. 2007). It is often said that Title VII and §1981 "have the same requirements of proof and present the same analytical framework," e.g., id., but the test is still whether there was intent to discriminate because of race. E.g., Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1235 (11th Cir. 2000). The "motivating factor" language of §2000e-2(m) was not inserted into §1981.

Because Gross and Nassar do not squarely apply to §1981, because First Amendment cases brought pursuant to 42 U.S.C. §1983 are subject to a "motivating factor" causation standard, and because the issue had not been decided by the Supreme Court or the Eleventh Circuit prior to this publication, the Committee did not recommend changing the "motivating factor" language of Pattern Instruction 4.9. The Committee does, however, recommend that district courts review this issue prior to instructing a jury on §1981.

## B. Pretext (In General)

When analyzing employment discrimination claims in the context of pretrial motions, the courts typically employ the framework established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Under that framework, the plaintiff must establish a prima facie case of discrimination. Alvarez v. Royal Atl. Developers, Inc., 610 F.3d 1253, 1264 (11th Cir. 2010). Once the plaintiff has made a prima facie case, the employer may articulate a legitimate nondiscriminatory reason for its action. Id. If the employer articulates a legitimate nondiscriminatory reason, then the plaintiff must produce evidence that the employer's proffered reason is pretext for discrimination. Id. "The plaintiff can show pretext 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" Kragor v. Takeda Pharms. Am., Inc., 702 F.3d 1304, 1308 (11th Cir. 2012) (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981)). If the decisionmaker's statements can be interpreted as an admission that the proffered reason was a cover-up for

discrimination, then a jury may consider the statement and decide whether discrimination was the real reason for the employer's decision. *Id.* at 1308-09.

The Eleventh Circuit has concluded that “it is unnecessary and inappropriate to instruct the jury on the *McDonnell Douglas* analysis” because such an instruction has potential to confuse the jury. *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1322 (11th Cir. 1999). Nonetheless, it is not error to instruct a jury that one way a plaintiff may show intentional discrimination is by showing that the employer's stated reasons for its actions were not true and were instead pretext or cover to hide discrimination. *Palmer v. Bd. of Regents of Univ. Sys. of Ga.*, 208 F.3d 969, 974-75 (11th Cir. 2000). It is also not necessarily error to refuse to give a pretext instruction. *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1196 (11th Cir. 2004).

Pattern Instruction 4.9 includes an optional pretext charge, which instructs the jury that it may consider the circumstances of the employer's decision – including whether the jury believes the employer's proffered nondiscriminatory reason for its decision – in deciding whether the decision was motivated by a protected trait.

#### C. Pretext (Failure to Promote)

In a failure to promote or failure to hire case where the defendant has presented evidence of a legitimate nondiscriminatory reason for its decision but there is a question of fact as to the relative qualifications of plaintiff and the comparator, the court may consider adding a special interrogatory on the issue. The Eleventh Circuit stated that “a plaintiff cannot prove pretext by simply arguing or even by showing that he was better qualified than the [person] who received the position he coveted. A plaintiff must show not merely that the defendant's employment decisions were mistaken but that they were in fact motivated by race.” *Springer v. Convergys Customer Management Group, Inc.*, 509 F.3d 1344, 1349 (11th Cir. 2007) (per curiam) (alteration in original) (quoting *Brooks v. Cnty. Comm'n of Jefferson Cnty.*, 446 F.3d 1160, 1163 (11th Cir. 2006)). Rather “a plaintiff must show that the disparities between the successful applicant's and his own qualifications were of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff.” *Id.* (internal quotation marks omitted).

#### D. Cat's Paw

In *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011), the Supreme Court approved a “cat's paw” theory of causation in the context of a case under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §4301 et seq. (“USERRA”). In *Staub*, the plaintiff sought to hold his employer liable for the antimilitary animus of his supervisors, who did not make the ultimate decision to fire the plaintiff but did make unfavorable reports that led to the plaintiff's termination. The Supreme Court held that “if a supervisor performs an act



motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.” Staub, 131 S. Ct. at 1194 (reversing Seventh Circuit’s grant of judgment as a matter of law for employer because Seventh Circuit incorrectly required decisionmaker to be wholly dependent on advice of supervisors with discriminatory animus; declining to analyze district court’s jury instruction).

At the time of this publication, there have been no Supreme Court or Eleventh Circuit cases that specifically apply Staub beyond the USERRA context. Pattern Instruction 4.9 does not contain a cat’s paw instruction for claims arising under §1981, but if the court decides that the appropriate causation standard for a §1981 claim is “motivating factor” and that a cat’s paw charge is warranted based on the facts in the case, the court may refer to Pattern Instruction 4.5, *supra*, which includes an optional cat’s paw charge.

#### E. “Same Decision” Defense

The Eleventh Circuit has held that a complete mixed motive defense is available in actions brought pursuant to 42 U.S.C. §1981. *Mabra v. United Food & Commercial Workers Local Union No. 1996*, 176 F.3d 1357, 1357-58 (11th Cir. 1999) (citing *Harris v. Shelby Cnty. Bd. of Educ.*, 99 F.3d 1078, 1084-85 & n.5 (11th Cir. 1996)). The Eleventh Circuit has not decided whether this issue should be revisited in light of *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) and *University of Texas Southwestern Medical Center v. Nassar*, No. 12-484, 2013 WL 3155234 (U.S. June 24, 2013). The Committee recommends that district courts review this issue before instructing a jury on §1981.

### III. Remedies

#### A. Damages (general)

Section 1981, like 42 U.S.C. §1983, does not contain its own damages provisions. Rather, the remedies available have been judicially determined. Plaintiffs may recover punitive and compensatory damages (including pain and suffering), back pay, reinstatement or future earnings, and attorney’s fees. See generally, e.g., *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1268 (11th Cir. 2008) (affirming award of back pay, mental anguish damages, punitive damages, attorney’s fees, and costs).

Damages, including punitive damages, are not capped by Title VII’s damages cap. See, e.g., *id.* at 1284-85 (upholding punitive damages award of \$500,000 where analogous Title VII cap was \$100,000); *Bogle v. McClure*, 332 F.3d 1347, 1330, 1362 (11th Cir. 2003) (rejecting argument that Title VII cap should be applied by analogy in cases under 42 U.S.C. §1983 and upholding award of approximately \$17 million where analogous Title VII cap was \$300,000). A punitive damages award



still must comport with due process, and the Supreme Court has instructed the courts to consider several guideposts in evaluating punitive damages awards. E.g., State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003). The Supreme Court has noted that “few [punitive damages] awards exceeding a single-digit ratio between punitive and compensatory damages... will satisfy due process.” Id. at 424.

## B. Punitive Damages

A plaintiff cannot recover punitive damages from a government entity under §1981. 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. Pattern Instruction 4.3, *supra*, contains a punitive damages instruction that can be used in cases involving individual defendants.

## IV. Special Questions

### A. Governmental Liability

“[Section] 1983 constitutes the exclusive federal remedy for violation by state actors of the rights guaranteed under §1981.” Bryant v. Jones, 575 F.3d 1281, 1288 n.1 (11th Cir. 2009). Therefore, a plaintiff’s §1981 claims against a government entity must be brought through §1983. Butts v. Cnty. of Volusia, 222 F.3d 891, 892 (11th Cir. 2000). This means that plaintiffs pursuing §1981 claims against a government entity must establish that the deprivation was done pursuant to a policy or custom of the government entity. E.g., 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 (1978)).

Pattern Instruction 4.9 does not contain instructions on the “policy or custom” issue. In cases where there is a fact dispute as to whether the actions in question were taken pursuant to a policy or custom, the court should refer to Pattern Instruction 4.3, *supra*, which contains language that is intended to guide the jury through the “policy or custom” issue.

### B. Statute of Limitations

The statute of limitations may be different for different types of claims under §1981. See, e.g., Palmer v. Stewart Cnty. Sch. Dist., 178 F. App’x 999, 1003 (11th Cir. 2006) (per curiam) (noting that four-year catch-all statute of limitations applies



to §1981 actions arising under the 1991 amendments to §1981 but not to causes of action under §1981 as originally enacted). The jury instruction and verdict form may need to be adapted to address this issue in some cases.

#### V. When the Case Involves Disparate Treatment Claims Under More than One Statute

In some cases, a plaintiff will bring a disparate treatment 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 analysis of disparate treatment claims under Title VII is similar to the analysis under the Equal Protection Clause and §1981 where the facts on which the claims rely are the same.” Crawford v. Carroll, 529 F.3d 961, 970 (11th Cir. 2008). Three issues to consider when combining instructions: (1) the causation standards may differ (especially if the courts decide that Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009) applies in the §1981 context), so the instruction and verdict form should take that into account; (2) statutes of limitations differ, so the instruction and verdict form should take that into account; (3) the availability of punitive damages differs by statute and type of defendant, so the instruction and verdict form should take that into account. For more information on the causation issue, please see Annotation IV to Pattern Instruction 4.5, *supra*.

#### VI. Additional Information

See Annotations and Comments for Pattern 4.5, *supra*, some of which may be relevant to a §1981 claim because the analysis of disparate treatment claims under Title VII is similar to the analysis under §1981 “where the facts on which the claims rely are the same.” Crawford v. Carroll, 529 F.3d 961, 970 (11th Cir. 2008).

