

4 PJI 22 | RETALIATION - SECTION 1981, TITLE VII, ADEA, ADA, AND FLSA

In this case, [Plaintiff] claims that [Defendant] retaliated against [Plaintiff] because [he/she] took steps to enforce [his/her] lawful rights under [describe the act or statute involved, e.g., ADEA].

Laws that prohibit discrimination in the workplace also prohibit an employer from taking any retaliatory action against an employee because the employee has asserted rights or made complaints under those laws.

[Opposition clause claims only: An employee may make a discrimination complaint as a means to enforce what [he/she] believed in good faith to be [his/her] lawful rights. So, even if a complaint of discrimination against an employer is later found to be invalid or without merit, the employee cannot be penalized in retaliation for having made such a complaint if you find that the employee made the complaint as a means of seeking to enforce what the employee believed in good faith to be [his/her] lawful rights. To establish "good faith," however, it is insufficient for [Plaintiff] merely to allege that [his/her] belief in this regard was honest and bona fide; the allegations and the record must also establish that the belief, though perhaps mistaken, was objectively reasonable.]

[Plaintiff] claims that [Defendant] [describe adverse employment action] because [Plaintiff] [describe protected activity].

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

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

First: [Plaintiff] engaged in a protected activity;

Second: [Defendant] then took an adverse employment action;

Third: [Defendant] took the adverse employment action because of [Plaintiff]'s protected activity; and

Fourth: [Plaintiff] suffered damages because of the adverse employment action.

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



[For "participation clause" claims: For the first element, [Plaintiff] claims that [he/she] [describe participation clause activity]. If you find that [Plaintiff] [describe participation clause activity], that action is "protected activity."]

[For "opposition clause" claims: For the first element, [Plaintiff] claims that [he/she] engaged in protected activity when [he/she] [describe opposition clause activity]. That action is "protected activity" if it was based on [Plaintiff]'s good-faith, reasonable belief that [Defendant] discriminated against [him/her/another employee] because of [protected trait]. [Name of plaintiff] had a "good faith" belief if [he/she] honestly believed that [Defendant] discriminated against [him/her/another employee] because of [protected trait]. [Plaintiff] had a "reasonable" belief if a reasonable person would, under the circumstances, believe that [Defendant] discriminated against [him/her/another employee] because of [protected trait]. [Plaintiff] does not have to prove that [Defendant] actually discriminated against [him/her/another employee] because of [protected trait]. But [he/she] must prove that [he/she] had a good-faith, reasonable belief that [Defendant] did so.

For the second element, [Plaintiff] claims that [Defendant] took an adverse employment action against [him/her] when [Defendant] [describe adverse employment action]. You must decide whether [describe adverse employment action] is an adverse employment action.

An "adverse employment action" is any type of action that would have made a reasonable employee reluctant to make or support a charge of discrimination. Put another way, if a reasonable employee would be less likely to complain about or oppose alleged discrimination because [he/she] knew that [Defendant] would [describe adverse employment action], then that action is an adverse employment action. If the employment action would not make it less likely for a reasonable employee to make complaints about or oppose the alleged discrimination, it is not an adverse employment action.

For the third element, if you find that [Plaintiff] engaged in protected activity and that [Defendant] took an adverse employment action against [him/her], you must decide whether [Defendant] took that action because of [Plaintiff]'s protected activity. Put another way, you must decide whether [Plaintiff]'s protected activity was the main reason for [Defendant]'s decision.



To determine that [Defendant] took an adverse employment action because of [Plaintiff]'s protected activity, you must decide that [Defendant] would not have taken the action had [Plaintiff] not engaged in the protected activity but everything else had been the same.

[Defendant] claims that [he/she/it] did not [describe adverse employment action] because of [Plaintiff]'s [describe protected activity] and that [he/she/it] took the action for [another reason/other reasons]. An employer may not take an adverse action against an employee because of the employee's protected activity. But an 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 [his/her/its] decision, and you find that [Defendant] did not make [his/her/its] decision because of [Plaintiff]'s protected activity, you must not second guess that decision, and you must not substitute your own judgment for [Defendant]'s judgment - even if you do not agree with it.

[Pretext (optional, see annotations): As I have explained, [Plaintiff] has the burden to prove that [Defendant]'s decision to [describe adverse employment action] was because of [Plaintiff]'s protected activity. I have explained to you that evidence can be direct or circumstantial. To decide whether [Defendant]'s [describe adverse employment action] was because of [Plaintiff]'s protected activity, you may consider the circumstances of [Defendant]'s decision. For example, you may consider whether you believe the reason[s] that [Defendant] gave for the decision. If you do not believe the reason[s] that [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 retaliatory reasons for the decision.]

For the fourth element, you must decide whether [Defendant]'s acts were the proximate cause of damages that [Plaintiff] sustained. Put another way, you must decide, if [Defendant] had not [describe adverse employment action] [Plaintiff], would these damages have occurred?]

If you find that [Defendant]'s acts were the proximate cause of damages that [Plaintiff] sustained, you must determine the amount of damages.

[Insert damages instruction based on substantive charge damages instruction. For claims under Title VII, please see Pattern Instruction 4.5, supra. For claims under Section 1981, please see



Pattern Instruction 4.9, *supra*. For claims under the ADEA, please see Pattern Instruction 4.10, *supra*. For claims under the ADA, please see Pattern Instruction 4.11, *supra*. For claims under the FLSA, please see Pattern Instruction 4.10, *supra*, and the accompanying annotations].

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [Plaintiff] engaged in protected activity?

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 [Defendant] took an adverse employment action against [Plaintiff]?

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] took the adverse employment action because of [Plaintiff]'s protected activity?

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.]

4. That [Plaintiff] suffered damages because of the adverse employment action?

Answer Yes or No _____



[Insert damages interrogatories based on substantive charge damages interrogatories. For claims under Title VII, please see Pattern Instruction 4.5, *supra*. For claims under Section 1981, please see Pattern Instruction 4.9, *supra*. For claims under the ADEA, please see Pattern Instruction 4.10, *supra*. For claims under the ADA, please see Pattern Instruction 4.11, *supra*. For claims under the FLSA, please see Pattern Instruction 4.10, *supra*, and the accompanying annotations].

SO SAY WE ALL.

DATE: _____

Foreperson's Signature

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Annotations and Comments

I. Causes of Action

Pattern Instruction 4.22 is intended to be used for retaliation claims under 42 U.S.C. §1981 (“§1981”), Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. §2000e-3(a), the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. §623(d); the Americans with Disabilities Act (“ADA”), 42 U.S.C. §12203; and the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §215(a)(3).

Pattern Instruction 4.22 is not intended to be used for retaliation claims arising under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §4301 et seq. (“USERRA”) or the Family and Medical Leave Act (“FMLA”), 29 U.S.C. §2601 et seq. For USERRA retaliation claims, please see Pattern Instruction 4.19, *supra*. For FMLA retaliation claims, please see Pattern Instruction 4.15, *supra*.

II. Elements and Defenses

A. Participation Clause Claims v. Opposition Clause Claims

Title VII’s anti-retaliation provision contains two clauses: the “opposition clause” and the “participation clause.” 42 U.S.C. §2000e-3(a). The opposition clause “prohibits retaliation against an employee for opposing any practice made unlawful by Title VII.” *Valdes v. Miami-Dade Coll.*, 463 F. App’x 843, 846 (11th Cir. 2012)



(per curiam). The participation clause “protects activities which occur in conjunction with or after the filing of a formal charge with the EEOC.” EEOC v. Total Sys. Servs., Inc., 221 F.3d 1171, 1174 (11th Cir. 2000). Due to differences between these two clauses, the pattern charge provides separate charges for each type of claim.

The Eleventh Circuit has held that “expansive protection is available” for participation clause activity. EEOC v. Total Sys. Servs., Inc., 221 F.3d 1171, 1176-77 (citing Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1007 (5th Cir. 1969)). Therefore, an employee cannot be fired for anything written in an EEOC charge. Id. Thus, if employee engaged in participation clause activity, that activity is protected under Title VII, and no “good faith” inquiry is necessary.

In contrast, where a plaintiff’s retaliation claim arises from the opposition to an allegedly unlawful practice, “a plaintiff must show that he ‘had a good faith, reasonable belief that the employer was engaged in unlawful employment practices.’” Boyland v. Corr. Corp. of Am., 390 F. App’x 973, 975 (11th Cir. 2010) (per curiam). The plaintiff “need not prove the underlying claim of discrimination which led to [his] protest.” Tipton v. Canadian Imperial Bank of Commerce, 872 F.2d 1491, 1494 (11th Cir. 1989). The plaintiff must show that he held a reasonable, good faith belief that the discrimination existed. Id. To demonstrate that he held a reasonable, good faith belief that discrimination occurred, the plaintiff must show not only that he subjectively believed that his employer’s behavior was discriminatory, “but also that his belief was objectively reasonable in light of the facts and record presented.” Butler v. Ala. Dep’t of Transp., 536 F.3d 1209, 1213 (11th Cir. 2008) (quoting Little v. United Techs., Carrier Transicold Div., 103 F.3d 956, 960 (11th Cir. 1997)). The protection afforded under the opposition clause extends to an employee who speaks out about sexual harassment, not only on her own initiative but also in answering questions during an employer’s investigation of a coworker’s complaints. Crawford v. Metro. Gov’t of Nashville & Davidson Cnty., Tenn., 555 U.S. 271, 277 (2009).

The anti-retaliation provisions of the ADEA and the ADA track the language of Title VII’s anti-retaliation provision. See 29 U.S.C. §623(d) (prohibiting discrimination “because” employee opposed practices made unlawful by the ADEA or participated in activities in connection with an ADEA EEOC charge); 42 U.S.C. §12203 (a) (prohibiting discrimination “because” employee opposed practices made unlawful by the ADA or participated in activities in connection with an ADA EEOC charge). The anti-retaliation provisions of the FLSA are similar to Title VII’s. 29 U.S.C. §215 (a)(3) (prohibiting discrimination “because” employee participated in activities in connection with an FLSA EEOC charge or took other specified actions); 29 U.S.C. §218c (prohibiting discrimination “because” employee took certain actions in objection to FLSA violations). The Eleventh Circuit has instructed that “the same elements are required to prove a claim of

retaliation under Title VII or §1981.” Martin v. Fin. Asset Mgmt. Sys., Inc., 959 F.3d 1048, 1051 n.2 (11th Cir. 2020). Therefore, Pattern Instruction 4.22 includes alternative instructions for participation clause claims and opposition clause claims.

B. Adverse Employment Action

Pattern Instruction 4.22 includes a charge on the definition of an adverse employment action, which is based on the Supreme Court’s decision in Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53 (2006), which requires proof that the challenged retaliatory conduct is materially adverse. *Id.* at 68. This definition of adverse employment action applies to retaliation claims under the ADA, ADEA, and FLSA. See, e.g., Burgos-Stefanelli v. Sec’y, U.S. Dept. of Homeland Sec., 410 F. App’x 243, 246 (11th Cir. 2011) (applying Burlington Northern to an ADA retaliation claim); Brown v. Northside Hosp., 311 F. App’x 217, 224 (11th Cir. 2009) (applying Burlington Northern to an ADEA retaliation claim); Darveau v. Detecon, Inc., 515 F.3d 334, 342 (4th Cir. 2008) (applying Burlington Northern to an FLSA retaliation claim).

C. Causation

In Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009), the Supreme Court held that, based on the statutory language of the ADEA, a plaintiff must prove that “age was the ‘but-for’ cause of the employer’s adverse decision,” not merely a motivating factor in the decision. *Id.* at 176-77. The Court also rejected the mixed motive defense (also known as the same decision defense) in the context of the ADEA, noting that unlike under Title VII, a mixed motive defense was not incorporated into the ADEA. *Id.* at 173-75. Although the Eleventh Circuit has not, at the time of this publication, issued an opinion on this matter, the Committee believes that the rationale of *Gross* extends to retaliation claims under the ADEA, the ADA, and the FLSA because the statutory causation language is the same as or similar to the statutory causation language applicable to ADEA discrimination claims. See 29 U.S.C. §215 (a)(3) (FLSA); 29 U.S.C. §623(a), (d) (ADEA); 42 U.S.C. §12203(a) (ADA). For these reasons, Pattern Instruction 4.22 instructs that the adverse employment action must be “because of” the plaintiff’s protected activity.

In addition, Pattern Instruction 4.22 applies to Title VII retaliation claims. In University of Texas Southwestern Medical Center v. Nassar, 570 U.S. 338, 352 (2013), 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 antiretaliation provision and the ADEA’s anti-retaliation provision. 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 360.



The Supreme Court recently altered the causation standard for claims under the federal-sector provision of the Age Discrimination in Employment Act, 29 U.S.C. §633a(a). Babb v. Wilkie, 140 S. Ct. 1168, 1174 (2020). The Eleventh Circuit extended that change to retaliation claims under the federal-sector provision of Title VII, 42 U.S.C. §2000e-16(a). Babb v. Sec’y, Dep’t of Veterans Affs., 992 F.3d 1193, 1196 (11th Cir. 2021). The Supreme Court ruled that as to liability, a federal-sector plaintiff need not prove that the protected characteristic was a but-for cause of the ultimate personnel action (though a plaintiff must prove but-for causation to obtain certain remedies, including backpay and reinstatement). Babb, 140 S. Ct. at 1176-78. Instead, a plaintiff may show a violation of the statute by proving (i) that the protected characteristic was the but-for cause of differential treatment and (ii) the differential treatment tainted the ultimate personnel action. *Id.* As of the latest revision of this instruction, the law is not sufficiently settled to provide clear guidance on jury instructions for federal-sector cases. Still, courts should bear in mind the different causation requirements.

D. Pretext

Pattern Instruction 4.22 includes in brackets an optional charge discussing the inference of pretext. The basis for this charge is explained in further detail in the annotations following Pattern Instruction 4.5, *supra*.

III. Remedies

The remedies for ADA and ADEA retaliation claims match the remedies for disparate treatment claims under the ADA and ADEA, and the remedies for an FLSA retaliation claim are governed by the same damages measures as an ADEA retaliation claim, subject to the limitations discussed in the annotations following Pattern Instruction 4.10, *supra*. See 29 U.S.C. §216(b) (FLSA); 29 U.S.C. §626 (b) (ADEA); 42 U.S.C. §12117 (a) (ADA). Thus, the jury charges on damages in the corresponding disparate treatment instructions may be incorporated into the model retaliation instruction as appropriate.

IV. When the Case Involves Both Discrimination and Retaliation Claims

In some cases, a plaintiff will bring both discrimination and retaliation claims. In those cases, the court should charge all of the elements of a discrimination and retaliation claim except damages separately, then give a charge on damages that applies to both types of claims.

