415.5 PRELIMINARY ISSUE – ADVERSE EMPLOYMENT ACTION

On (claimant’s) claim there is a preliminary issue for you to decide. That issue is whether (describe the alleged conduct) was an adverse employment action.

An adverse employment action is any action taken by the employer against the employee that amounts to a serious and material change in the employee’s terms and conditions of employment.

NOTES ON USE 415.5

1. Use instruction 415.5 when plaintiff claims that the defendant took an adverse employment action other than discharge, demotion, or suspension and the defendant disputes that such action constitutes an adverse employment action.

2. Florida and federal courts have determined that an adverse employment action requires a serious and material change in the employee’s terms and conditions of employment. *Davis v. Town of Lake Park* 245 F.3d 1232 (11th Cir. 2001) (to prove adverse employment action in a case under Title VII, an employee must show a serious and material change in the terms and conditions of employment), *overruled on other ground by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). Courts have found that certain actions besides discharge, demotion, and suspension may constitute an adverse employment action under *F.S.* 448.101 and other similar federal and state employment law statutes. *See*, *e.g.*, *Finch v. Morgan Stanley & Co. LC*, 2016 WL 4248248 (S.D. Fla. August 10, 2016) (denial of leave time may constitute an adverse employment action under Section 448.101); *Miami-Dade County v. Eghbal*, 54 So. 3d 525 (Fla. 3d DCA 2011) (denial of promotion is adverse employment action under Florida Civil Rights Act); *Hill v. Branch Banking and Trust Co.*, 264 F. Supp. 3d 1247 (N.D. Ala. 2017) (negative performance valuations are only adverse employment actions under Title VII when a link can be shown between the review and an alteration of the terms of employment); *Brown v. Snow*, 440 F.3d 1259 (11th Cir. 2006) (a lower score on a performance evaluation, by itself, is not actionable unless the plaintiff can establish that the lower score led to a more tangible form of adverse action, such as ineligibility for promotional opportunities).

(Adopted June 30, 2021.)