

11.3 Age Discrimination—Retaliation

Comment

The ADEA “makes it unlawful for an employer to retaliate against an employee for opposing the employer’s discriminatory practices or participating in any investigation or proceeding under the ADEA[.]” *O’Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763 (9th Cir. 1996). *See* 29 U.S.C. § 623(d). The Ninth Circuit applies the same standard in both ADEA and Title VII retaliation cases. *See Hashimoto v. Dalton*, 118 F.3d 671, 675 n.1 (9th Cir. 1997) (“[T]he ADEA anti-retaliation provision is ‘parallel to the anti-retaliation provision contained in Title VII,’ and . . . ‘cases interpreting the latter provision are frequently relied upon in interpreting the former.’”); *O’Day*, 79 F.3d at 763 (“Section 623(d) is the ADEA equivalent of the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a), and like its counterpart it makes it unlawful for an employer to retaliate against an employee for opposing the employer’s discriminatory practices or participating in any investigation or proceeding under the ADEA.”); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1441 (9th Cir. 1990) (“We rely on cases involving retaliation claims brought under Title VII or Section 1981 as well as the ADEA. Few published opinions involve ADEA retaliatory claims. Those circuits that have considered ADEA retaliation claims have generally adopted the analysis used in Title VII cases without comment.”).

As applicable, Instruction 10.10 (Civil Rights—Title VII—Retaliation—Elements and Burden of Proof) should be given in a form modified to take into account that the activity protected under federal law is opposition to practices made unlawful by the ADEA. *See* 29 U.S.C. § 623(d).