

4 PJI 1 | PUBLIC EMPLOYEE - FIRST AMENDMENT CLAIM - DISCHARGE OR FAILURE TO PROMOTE - FREE SPEECH ON MATTER OF PUBLIC CONCERN

In this case, [Plaintiff] claims that [Defendant], while acting "under color" of state law, intentionally deprived [Plaintiff] of [his/her] constitutional right to free speech by [discharging [him/her] from employment/ denying [him/her] a promotion] because [he/she] [[describe protected speech or conduct]] / [[Defendant] mistakenly believed that [Plaintiff] [describe protected speech or conduct]].

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

Under the First Amendment to the Constitution of the United States, a public employee has a right to freedom of speech on matters of public concern. It is unlawful for a public employer to take action against a public employee because the employee exercises [his/her] First Amendment rights by speaking on a matter of public concern or because the employer mistakenly believes that the employee did so.

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

First: [Defendant]'s actions were "under color" of state law;

Second: [[Plaintiff] [describe protected speech or conduct]]/[[Defendant] mistakenly believed that [Plaintiff] [describe protected speech or conduct]];

Third: [Defendant] [discharged [Plaintiff] from employment/denied [Plaintiff] a promotion];

Fourth: [[Plaintiff]'s [describe protected speech or conduct]]/[[Defendant]'s [describe mistaken belief]] was a motivating factor in [Defendant]'s decision [to discharge [Plaintiff]/not to promote [Plaintiff]]; and

Fifth: [Plaintiff] suffered damages because of [Defendant]'s actions.

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

[To be used when the parties stipulate that the defendants acted "under color" of state law: The parties have agreed that [Defendant] acted "under color" of state law so you should accept that as a true and proven fact.]



[To be used when the parties dispute whether the defendants acted "under color" of state law: For the first element, you must decide whether [Defendant] acted "under color" of state law. A government official acts "under color" of law when [he/she] acts within the limits of lawful authority. A government official also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

For the second element, if you find that [Plaintiff] [describe protected speech or conduct], then you have found that [he/she] engaged in "protected speech."

[To be used when it is alleged that the public employer mistakenly believed that employee engaged in protected activity: For the second element, if you find that [Defendant] mistakenly believed that [Employee] engaged in [describe protected speech or activity], then you have found the second element to be met, whether or not [Plaintiff] actually engaged in such [speech/conduct].]

For the third element, you must decide whether [Defendant] [discharged [Plaintiff] from employment/denied [Plaintiff] a promotion].

For the fourth element, you must decide whether [Plaintiff]'s protected speech / [Defendant]'s mistaken belief was a "motivating factor" in [Defendant]'s decision. To prove that [[Plaintiff]'s protected speech] / [[Defendant]'s mistaken belief] was a motivating factor in [Defendant]'s decision, [Plaintiff] does not have to prove that [[his/her] protected speech] / [[Defendant]'s mistaken belief] was the only reason for [Defendant]'s actions. It is enough if [[Plaintiff] proves that [his/her] protected speech] / [[Defendant]'s mistaken belief] influenced [Defendant]'s decision. If [[Plaintiff]'s protected speech] / [[Defendant]'s mistaken belief] made a difference in [Defendant]'s decision, you may find that it was a motivating factor in the decision.

[Defendant] claims that [[Plaintiff]'s protected speech]/[[Defendant]'s mistaken belief] was not a motivating factor in [Defendant]'s decision and that [he/she/it] [discharged/did not promote] [Plaintiff] for [another reason/other reasons]. A public employer may not take action against a public employee because the employee exercised protected First Amendment



rights or because the public employer believed that the employee did so. But a public employer may [discharge/decline to promote] a public employee for any other reason, good or bad, fair or unfair. If you believe [Defendant]'s reason[s] for [his/her/its] decision [to discharge/not to promote] [Plaintiff], and you find that [his/her/its] decision was not motivated by [[Plaintiff]'s protected speech] / [[Defendant]'s mistaken belief], you must not second guess [his/her/its] 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 [[his/her] protected speech]/[[Defendant]'s mistaken belief that [Plaintiff] engaged in protected speech] was a motivating factor in [Defendant]'s decision [to discharge/not to promote] [Plaintiff]. I have explained to you that evidence can be direct or circumstantial. To decide whether [[Plaintiff]'s protected speech] / [[Defendant]'s mistaken belief] was a motivating factor in [Defendant]'s decision [to discharge/not to promote] [Plaintiff], 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 coverup to hide the true unconstitutional reasons for the decision.]

If you find that [[Plaintiff] [describe protected speech or conduct]]/[[Defendant] mistakenly believed that [named of plaintiff] [describe protected speech or conduct]] and that this [protected speech] / belief was a "motivating" factor in [Defendant]'s decision to [discharge [Plaintiff] from employment/deny [Plaintiff] a promotion], you must decide whether [Plaintiff] suffered damages as a result. If the damages would not have existed except for the [discharge/denied promotion], then you may find that [Plaintiff] suffered those damages because of the [discharge/denied promotion].

[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 made the same decision even if [he/she/it] had not taken [[Plaintiff]'s protected activity] / [[his/her/its] mistaken belief that [named of plaintiff] [describe protected speech or conduct]] into



account. If you find that [Plaintiff] would [have been dismissed/not have been promoted] for reasons other than [[his/her] protected speech] / [[Defendant]'s mistaken belief that [named of plaintiff] [describe protected speech or conduct]], your verdict should be for [Defendant].

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 the [discharge/denied promotion], 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 the [discharge] [denied promotion] 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] claim. 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: To be used only for individual-capacity claims against individual defendants: [Plaintiff] also claims that [Defendant]'s acts were done with malice or reckless indifference to [Plaintiff]'s federally protected rights, which would entitle [him/her] to punitive damages in addition to compensatory damages. [Plaintiff] must prove by a preponderance of the evidence that [he/she] is entitled to punitive damages. You will only reach the issue of punitive damages if you find that [Plaintiff] has proved the elements of [his/her] claim against [Defendant], and you award [Plaintiff] compensatory damages. You may not assess punitive damages against [public employer].

If you find for [Plaintiff] and find that [Defendant] acted with malice or reckless indifference to [Plaintiff]'s federally protected rights, the law allows you, in your discretion, to award [Plaintiff] punitive damages as a punishment for [Defendant] and as a deterrent to others.

A person acts with malice if the person's conduct is motivated by evil intent or motive. A person acts with reckless indifference to the protected federal rights of another person when the person engages in conduct with a callous disregard for whether the conduct violates those protected federal rights.

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



damages against one or more of the individual defendants, and not others, or against more than one individual defendant in different amounts.]]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [Defendant]'s actions were "under color" of state law?

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] [describe protected speech or conduct]]/[Defendant] mistakenly believed that [named of plaintiff] [describe protected speech or conduct]]?

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] [discharged [Plaintiff] from employment/denied [Plaintiff] a promotion]?

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] [describe protected speech or conduct]]/[Defendant]'s mistaken belief that [named of plaintiff] [describe protected speech or conduct]] was a motivating factor in [Defendant]'s decision [to discharge [Plaintiff] from employment/not to promote [Defendant]]?

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.

5. That [Defendant] would have [discharged [Plaintiff] from employment/denied [Plaintiff] a promotion] even if [Defendant] had not taken [[Plaintiff]'s protected activity]/[[Defendant]'s mistaken belief that [named of plaintiff] [describe protected speech or conduct]] 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.]

6. That [Plaintiff] suffered damages because of [Defendant]'s acts?

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.

7. 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?
\$ _____

8. 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 No. 7 or Question No. 8, 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 No. 7 or Question No. 8 (or both), go to the next question.

9. 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. Causes of Action

This pattern charge contemplates cases in which a public employee sues members of a governing body who have the legal authority to take the adverse employment action about which the employee complains (e.g., school boards, city councils, county commissions). If the action is brought against a municipality or other government entity that is capable of being sued, then the pattern charge should be modified to reflect that the employee who took the adverse employment action on behalf of the government entity did so under color of state law and was authorized to do so either as the final decisionmaker or pursuant to the governing body's policy and/or practice.

Pattern Instruction 4.1 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 discriminatory adverse employment action, including demotion, pay cut, transfer to a less desirable job, or other adverse employment action.

II. Elements and Defenses

A. "Under Color of State Law"

To prevail on a First Amendment claim, the plaintiff must prove that the defendant or the defendant's representative acted under color of state law. This issue is usually undisputed and need not be charged. For cases in which the "under color of" issue is disputed, Pattern Instruction 4.1 contains an optional "under color" of element and instruction.

B. Whether Employee's Speech is Protected

A threshold issue in most public employee freedom of speech cases is whether the employee engaged in protected speech. Under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), an employee's speech is not protected unless the plaintiff spoke as a citizen and not as part of his official duties. *Garcetti*, 547 U.S. at 421. To date, the Eleventh Circuit cases on this issue have decided the "citizen-employee" issue as a matter of law, and the cases generally say that the issue is a question of law, not a question of fact. See, e.g., *Battle v. Bd. of Regents*, 468 F.3d 755, 757, 761-62 (11th Cir. 2006) (per curiam) (affirming grant of summary judgment where there was no genuine dispute that speech was part of employee's official duties); accord *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1283-84 (11th Cir. 2009) (affirming judgment on the pleadings where there was no genuine fact dispute that employees made statements pursuant to official duties); *Boyce v. Andrew*, 510 F.3d 1333, 1343-47 (11th Cir. 2007) (per curiam) (reversing denial of qualified immunity based on "official duties" issue). Nonetheless, there could be a genuine fact dispute on the question. See *D'Angelo v. Sch. Bd. of Polk Cnty.*, 497 F.3d 1203, 1211 (11th Cir. 2007) (affirming judgment as a matter of law based on "official duties" issue where there was no genuine fact dispute, but noting that such a case may arise). In cases



where there is a dispute as to whether the plaintiff was speaking on a matter of public concern and not as part of his official employment duties, the instruction and verdict form should be adapted to cover this issue.

An employee may challenge an employer's action as unlawful even if the employer makes a factual mistake about the employee's behavior or activities. Heffernan v. City of Paterson, N.J., 136 S. Ct. 1412 (2016).

C. Adverse Employment Action

To prevail on a First Amendment retaliation claim, the plaintiff must prove that the employer subjected the plaintiff to an "adverse employment action." Pattern Instruction 4.1 does not define "adverse employment action." In most cases, the question whether an employer's decision amounts to an "adverse employment action" will not be disputed because the decision is clearly an adverse employment action, such as termination, failure to promote, or demotion with pay cut. If there is a fact dispute as to whether an employment action amounts to an "adverse employment action," the instruction and verdict form should be adapted accordingly. Pattern Instruction 4.21, *infra*, contains an adverse employment action charge that may be used. An "adverse employment action" "must involve an important condition of employment" and exists "when the alleged employment action would likely chill the exercise of constitutionally protected speech." Akins v. Fulton Cnty., Ga., 420 F.3d 1293, 1300-01 (11th Cir 2005) (internal quotation marks omitted) (listing examples of "adverse employment actions," including constructive discharge, transfer to a less desirable position, and actions that negatively impact "an employee's salary, title, position, or job duties").

D. Causation

Pattern Instruction 4.1 charges that the protected speech must be a "motivating factor" in the employer's decision. This instruction is 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"). To eliminate potential confusion that the terms "substantial" and "motivating" have different meanings, Pattern Instruction 4.1 charges that the protected speech must be a "motivating factor" in the defendant's decision.

The model instruction 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, *infra*.

III. Individual Liability

An “official decisionmaker” is individually liable under §1983 for taking an adverse employment action in violation of the plaintiff’s First Amendment rights. See Quinn v. Monroe Cnty., 330 F.3d 1320, 1326 (11th Cir. 2003) (“The ‘decisionmaker’ inquiry addresses who has the power to make official decisions and, thus, be held individually liable.” (emphasis omitted)). The model instruction presumes that the defendant’s status as an official decisionmaker is undisputed or has been resolved by the court.

In a case where a genuine fact dispute exists as to the defendant’s status as an official decisionmaker, the instruction and verdict form should be adapted accordingly. The following principles of law may be helpful in fashioning a jury charge. The official decisionmaker may be identified by a rule, handbook, or organizational chart, or “by examining the statutory authority of the official alleged to have made the decision.” Id. at 1328. In the termination context, a defendant is an official decisionmaker if he or she has the power to effectuate termination, even if the termination decision is subject to further review. Id. On the other hand, a supervisor who merely has the power to recommend a termination is not an official decisionmaker, even if the recommendation is “rubber stamp[ed]” by the actual decisionmaker. Id. at 1327; accord Kamensky v. Dean, 148 F. App’x 878, 879-80 (11th Cir. 2005) (per curiam) (declining to extend a “rubber stamp” exception to the decisionmaker inquiry for individual liability). Although other circuits have taken a different approach to this issue, e.g., Tejada-Batista v. Morales, 424 F.3d 97, 102 (1st Cir. 2005) (holding that where a supervisor’s biased adverse recommendation to the official decisionmaker was a but-for cause of the official decisionmaker’s decision to take adverse employment action, the biased subordinate may be individually liable even if the official decisionmaker’s own motive was pure), at the date of this publication, the Eleventh Circuit has not reconsidered its holding in Quinn.

IV. Governmental Liability

A government entity cannot be held liable for the actions of its employees under 42 U.S.C. §1983 based on a theory of respondeat superior. 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 n.7 (1978)). “Rather only deprivations undertaken pursuant to governmental ‘custom’ or ‘policy’ may lead to the imposition of governmental liability.” Id.

Pattern Instruction 4.1 does not contain a “policy or custom” charge. In cases where there is a jury question as to whether the decision was made pursuant to a policy or custom, then the instruction should be adapted accordingly. Pattern Instruction 4.3, *infra*, contains language that is intended to guide the jury through the “policy or custom” issue, and that language may be used. Please refer to Pattern Instruction 4.3, *infra*, and the accompanying annotations.



V. Special Questions

The First Amendment protects independent contractors from being terminated from at-will government contracts in retaliation for the exercise of protected free speech. Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 684-85 (1996). Accordingly, the model instruction applies in such cases. The Eleventh Circuit has yet to decide whether to extend this protection to First Amendment claims brought by independent contractors without pre-existing relationships (i.e., “disappointed bidders”). See Webster v. Fulton Cnty., Ga., 283 F.3d 1254, 1257 (11th Cir. 2002).

VI. Remedies

Damages under §1983 are determined by common law compensation principles. Wright v. Sheppard, 919 F.2d 665, 669 (11th Cir. 1990). “In addition to damages based on monetary loss or physical pain and suffering... a §1983 plaintiff also may be awarded compensatory damages based on demonstrated mental and emotional distress, impairment of reputation, and personal humiliation.” Slicker v. Jackson, 215 F.3d 1225, 1231 (11th Cir. 2000).

The court, in its discretion, may award front pay as an alternative to reinstatement, E.g., Haskins v. City of Boaz, 822 F.2d 1014, 1015 (11th Cir. 1987). Front pay is a question for the court and not the jury, so it is not included as a remedy in Pattern Instruction 4.1.

A plaintiff cannot recover punitive damages in a §1983 action against a government entity. See Young Apartments, Inc. v. Town of Jupiter, Fla., 529 F.3d 1027, 1047 (11th Cir. 2008) (“In a §1983 action, punitive damages are only available from government officials when they are sued in their individual capacities.” (citing City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981))). 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.

Few awards exceeding a single digit ratio between punitive and compensatory damages will “comport with due process.” State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

A plaintiff is not automatically entitled to a nominal damages instruction for constitutional violations. See Oliver v. Falla, 258 F.3d 1277, 1282 (11th Cir. 2001) (finding that because the plaintiff failed to request a nominal damages instruction, he waived “any entitlement to such damages”). A plaintiff is entitled to nominal damages, however, if a nominal damages instruction is requested and a violation of a fundamental constitutional right is established. See Hughes v. Lott, 350 F.3d 1157, 1162 (11th Cir. 2003) (citing Carey v. Phipps, 435 U.S. 247, 255 (1978)); see also Kelly v. Curtis, 21 F.3d 1544, 1557 (11th Cir. 1994) (“When constitutional rights are violated, a plaintiff may recover nominal damages even though he suffers no compensable injury.” (emphasis omitted)).

