

4 PJI 2 | PUBLIC EMPLOYEE - FIRST AMENDMENT CLAIM - DISCHARGE OR FAILURE TO PROMOTE - POLITICAL DISLOYALTY OR KEY EMPLOYEE

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 [named of plaintiff] [describe protected speech or conduct]].

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

Under the First Amendment to the Constitution of the United States, every citizen has a right to "freedom of speech," which includes the right to engage in "political activity" without governmental interference or penalty. It is unlawful for a public employer to take action against a public employee [- except for certain "key" employees, as I will explain in a moment -] because the employee engaged in political activity, such as holding meetings and hearing the views of political candidates, running for office, or supporting political candidates, or because the employer mistakenly believed 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] engaged in constitutionally protected political activity, a form of free speech, by [describe protected activity]] / [[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 activity]]/[[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 acts.

[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 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 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 activity], then you have found that [he/she] engaged in “protected activity.”

[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 activity] / [[Defendant]’s mistaken belief that [Plaintiff] [describe protected speech or conduct]] was a “motivating factor” in [Defendant]’s decision. To prove that [[Plaintiff]’s protected activity]/[[Defendant]’s mistaken belief] was a motivating factor in [Defendant]’s decision, [Plaintiff] does not have to prove that [[his/her] protected activity] / [[Defendant]’s mistaken belief] was the only reason for [Defendant]’s actions. It is enough if [Plaintiff] proves that [[his/her] protected activity] / [[Defendant]’s mistaken belief] influenced [Defendant]’s decision. If [[Plaintiff]’s protected activity]/[[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 activity]/[[Defendant]'s mistaken belief] was not a motivating factor in [his/her/its] 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 [his/her] protected First Amendment rights or because the employer believed that the employee exercised [his/her] protected First Amendment rights. 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 activity or a mistaken belief that the employee engaged in protected activity, 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 activity]/[the employer's mistaken belief that the employee engaged in protected activity] 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 activity]/[the employer's mistaken belief that the employee engaged in protected activity] 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 cover-up to hide the true unconstitutional reasons for the decision.]

If you find that [[Plaintiff] [describe protected activity]]/[Defendant] mistakenly believed that [Plaintiff] [describe protected speech or conduct]] and that this [protected activity / 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 "Same Decision" 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] / [[Defendant]'s mistaken belief that [Plaintiff] engaged in protected activity] into account. If you find that [Plaintiff] would [have been dismissed/not have been promoted] for reasons other than [[his/her] protected activity] / [[Defendant]'s mistaken belief], your verdict should be for [Defendant].]

If you find for [Plaintiff] and against [Defendant] on this defense, you must [consider [Plaintiff]'s compensatory damages/decide the issue of [Defendant]'s "key-employee" defense.]]

[Including "Key Employee" Defense: If you find by a preponderance of the evidence that [Plaintiff] suffered damages as a result of [Defendant]'s acts [and that [Plaintiff] would not have been [discharged] [denied a promotion] for reasons unrelated to [[his/her] protected activity]]/[[Defendant]'s mistaken belief that [Plaintiff] engaged in protected activity], then you must decide whether [Defendant] has proved by a preponderance of the evidence that [Plaintiff] was a "key" employee whose job duties and responsibilities were such that [Defendant] had a right to expect and demand political loyalty from [Plaintiff] as a condition of employment.

An elected official such as [Defendant] must stand for election and is politically responsible or accountable for the acts of certain key employees. Therefore, elected officials have a right to expect and demand political loyalty from key employees. If a key employee engages or is believed to have engaged in politically disloyal activity, that employee may be [terminated] [denied a promotion] even though the politically disloyal activity would otherwise be a form of free speech or free association protected by the First Amendment. On the other hand, non-key employees continue to enjoy full First Amendment protection and cannot be [terminated] [denied a promotion] simply because they engaged in politically disloyal activity or are believed to have done so.



[Defendant] claims that [Plaintiff] was a "key" employee. [Defendant] has the burden to prove by a preponderance of the evidence that [Plaintiff] was a "key employee." A key employee is one who holds a position that implicates political concerns in its effective functioning, so politically disloyal activity may interfere with the key employee's performance of public duties. To decide whether [Plaintiff] was a key employee by virtue of [Plaintiff]'s position as [describe plaintiff's job], you should consider factors such as:

(a) Whether [Plaintiff] acted as an advisor or formulated plans or policies for the implementation of broad goals concerning the operation of the [describe the office or department in which [Plaintiff] worked];

(b) Whether the [Plaintiff] exercised independent judgment in carrying out [his] [her] responsibilities;

(c) Whether [Plaintiff] had regular contact with or worked closely with [Defendant];

(d) Whether [Plaintiff] frequently interacted with the public as [Defendant]'s representative or alter ego; and

(e) Whether [Plaintiff] had access to confidential information not generally available to [Defendant]'s other employees.

No one of these factors is more important than any of the others, and a job can be a "key" position even if one or some of these factors do not apply. You must weigh these factors and then decide whether the [Plaintiff] was, or was not, a "key" employee.]

If you find that [Plaintiff] was a key employee, then you will indicate that on the verdict form, and your foreperson should sign and date the verdict form. If you find that [Plaintiff] was not a key employee, you must then decide the issue of [Plaintiff]'s compensatory damages.]

[Without Affirmative Defense: If you find by a preponderance of the evidence that [Plaintiff] suffered damages because of [Defendant]'s acts, you must then decide the issue of [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] 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: 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" 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] engaged in constitutionally protected political activity, a form of free speech, by [describe protected activity]/That [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.¹³

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]'s [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 [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.

[5. That [Defendant] would have [discharged [Plaintiff] from employment/denied [Plaintiff] a promotion] even if [he/she/it] 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] was a "key employee?"

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.]

7. 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.

8. 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?
\$ _____ 15

9. 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. 8 or Question No. 9, 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. 8 or Question No. 9 (or both), go to the next question.

10. 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

Generally, an employer may not take an adverse employment action against an employee who exercises rights under the First Amendment, including the right to engage in political activity. Pattern Instruction 4.2 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. 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 4.2 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, 1301-02 (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).

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).

B. Causation

Pattern Instruction 4.2 charges that the protected political activity 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 4.2 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*.

C. “Key Employee” Defense

Pattern Instruction 4.2 contains an instruction regarding the “key employee” defense. This instruction is based on *Branti v. Finkel*, 445 U.S. 507 (1980), in which the Supreme Court held that governmental employers cannot condition employment upon an employee’s political affiliation, which is protected by the First Amendment, unless the “hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.” *Id.* at 518; see also *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 73-74 (1990) (holding that employment decisions such as promotions, transfers, and recalls after layoffs, cannot be based upon political affiliation or other protected political activity unless the patronage practice is narrowly tailored to advance vital governmental interests); *Cutcliffe v. Cochran*, 117 F.3d 1353, 1357 (11th Cir. 1997) (explaining that the question whether a particular deputy sheriff is a “key employee” may depend on the deputy’s individual job functions).

D. Candidacy Defense

A defense related to the “key employee” defense is the “candidacy defense,” which the Eleventh Circuit recognized in *Underwood v. Harkins*, 698 F.3d 1335 (11th Cir. 2012). The “candidacy defense” applies in cases where an elected official dismisses an employee because that employee opposed the elected official in an election. The Eleventh Circuit held that “an elected official may dismiss an immediate subordinate for opposing her in an election without violating the First Amendment if the subordinate, under state or local law, has the same duties and powers as the elected official.” *Id.* at 1343. Pattern Instruction 4.2 does not contain a “candidacy defense” instruction but should be modified to include this defense when relevant.

III. Remedies

For annotations and comments regarding remedies, including remedies available against a government entity, please see the Annotations and Comments following Pattern Instruction 4.1, *supra*.1

