

**4 PJI 21 | RETALIATION - 42 USC §1981**

In this case, [Plaintiff] claims that [Defendant] retaliated against [Plaintiff] because [he/she] took steps to enforce [his/her] lawful rights under the Federal Civil Rights statutes that prohibit employers from discriminating against an employee in the terms and conditions of employment because of the employee's race.

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.

An employee may make a discrimination claim if the employee believes that the employer has taken an adverse employment action against the employee because the employee has exercised a means to enforce what [he/she] believed in good faith to be [his/her] lawful rights. So, even if a complaint is later found to be unfounded, the employee cannot be penalized for having made such a complaint if you find that the employee acted in good faith to be [his/her] lawful rights. "good faith," however, it is insufficient to allege that [his/her] belief in the truth of the allegations and the propriety of the complaint is reasonable.

[Plaintiff] must describe adverse employment action] because [describe protected activity].

[Defendant] must deny the claim and asserts that [describe the defendant's defense].

To succeed on this 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: [Plaintiff]'s protected activity was a motivating factor that prompted [Defendant] to take the adverse employment action; 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 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]. [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] because of [protected trait]. But [he/she] must have had a good-faith, reasonable belief that [Defendant] discriminated against [him/her] because of [protected trait].

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

An “adverse employment action” is a type of action that would have made [Plaintiff] reluctant to make or support a charge of discrimination. In other words, if a reasonable employee would not have complained about or opposed alleged discrimination, [Plaintiff] 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 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 [Plaintiff]’s protected activity was a “motivating factor” in the decision.

To prove that protected activity was a motivating factor in [Defendant]’s decision, [Plaintiff] does not have to prove that [his/her] protected activity was the only reason that [Defendant] [describe adverse employment action]. It is enough if [Plaintiff] proves that [his/her] protected activity influenced the decision. If [Plaintiff]’s protected activity 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 was not a motivating factor in the decision and that [he/she] [describe adverse employment 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 another reason, good or bad, fair or unfair. If you believe [Plaintiff]'s decision was not motivated by [Plaintiff]'s protected activity, you must not second guess that decision, but you must use your own judgment for [Defendant]'s decision. You do not agree with it.

[Pretext (optional, see annotations)] If you have explained, [Plaintiff] has the burden to prove that [he/her] protected activity was a motivating factor in [Defendant]'s decision to [describe adverse employment action]. [Defendant] explained to you that evidence can be [describe evidence]. To decide whether [Plaintiff]'s protected activity was a motivating factor in [Defendant]'s [describe adverse employment action], you may consider [Plaintiff]'s protected activity as a motivating factor in [Defendant]'s decision. For example, [Plaintiff] [describe evidence] you believe the reason[s] that [Defendant] [describe evidence] is. If you do not believe the reason[s] [describe evidence] for the decision, you may consider whether the [describe evidence] so unbelievable that [it was/they were] a coincidence. The true retaliatory reasons for the decision.]

[Including Affirmative Defense (if applicable, see annotations): If you find in [Plaintiff]'s favor the first three elements [he/she] must prove, you must decide whether [Defendant] has shown by a preponderance of the evidence that [he/she/it] would have [describe adverse employment action] [Plaintiff] even if [Defendant] had not taken [Plaintiff]'s protected activity into account. If you find that [Plaintiff] would have been [describe adverse employment action] for reasons other than [his/her] protected activity, you must make that finding in your verdict

If you find for [Plaintiff] and against [Defendant] on this defense, 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], whether these damages would have occurred.]

[Without Affirmative Defense: For the \_\_\_\_\_ element, you must decide whether [Defendant]'s acts were the proximate cause of damages that [Plaintiff] sustained. If yes, you must decide, if [Defendant] had not taken the adverse employment action [Plaintiff], whether the damages would have occurred.]

If you find that [Defendant] was the proximate cause of damages that [Plaintiff] sustained, you must determine the amount of damages.

[Insert damages instruction from Pattern Instruction 4, supra.]

TO THE JURY

Do you believe that \_\_\_\_\_ of the evidence:

1. \_\_\_\_\_ was engaged in protected activity?

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 [Plaintiff]'s protected activity was a motivating factor that prompted [Defendant] to take that action?

Answer Yes or No \_\_\_\_\_

If your answer is "No," this ends your deliberations, and your foreperson should sign and

date the last page of the verdict form. If your answer is "Yes," go to the next question.

[4. That [Defendant] would [Plaintiff] even if [Defendant] had not taken [Plaintiff] into account?

Answer Yes or No

If you answer "Yes," this ends your damages interrogatories. If you answer "No," the person should sign and return the verdict form. If your answer is "No," go to the next question.]

5. To what extent, if any, did [Defendant] cause [Plaintiff] damages because of the adverse employment action?

\_\_\_\_\_ damages interrogatories based on the adverse charge damages interrogatories for [Plaintiff] under § 1981; please see Pattern Instruction 400.1 supra.]

SO SAY WE ALL.

DATE: \_\_\_\_\_

\_\_\_\_\_  
Foreperson's Signature

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## Annotations and Comments

### I. Causes of Action

Pattern Instruction 4.21 is intended to be used for retaliation claims under 42 U.S.C. § 1981 (“§ 1981”), though the Committee recommends that district courts review the causation annotation prior to instructing a jury on § 1981 retaliation.

Pattern Instruction 4.21 is not intended to be used for retaliation claims arising under 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(c); the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 215(a)(3). For retaliation claims under these statutes, please see Pattern Instruction 4.22, *infra*. Pattern Instruction 4.21 is intended to be used for retaliation claims arising under the Uniformed Services Employees’ and Employers’ Rights Act of 1994, 38 U.S.C. § 4303; the Family and Medical Leave Act (“FMLA”), 29 U.S.C. § 2615(a)(3). For retaliation claims under these statutes, please see Pattern Instruction 4.19, *supra*. Finally, Pattern Instruction 4.15, *supra*, is intended to be used for Title VII retaliatory hostile work environment claims, please see annotation 4.7.

### II. Elements and Defense

#### A. Protected

§ 1981 does not contain an explicit anti-retaliation provision, but the Supreme Court has held that § 1981 to provide for a retaliation claim based on discrimination. See, e.g., *Andrews v. Lakeshore*, 141 F.3d 112-13 (11th Cir. 1998) accord *CBOCS W., Inc. v. Humphrey*, 557 U.S. 511 (2008) (recognizing § 1981 retaliation claim). The Supreme Court has held that § 1981 claims brought under § 1981 “using the burden-shifting scheme for Title VII claims, since both statutes have the same proof requirements.” *Jackson v. Geo Grp., Inc.*, 312 F. App’x 229, 233 (11th Cir. 2009) (per curiam). In applying Title VII’s framework to § 1981 retaliation claims, the Eleventh Circuit has analyzed § 1981 claims under Title VII’s opposition clause. *Id.* at 233-34 & n.8 (applying Title VII’s antiretaliation provision to § 1981 retaliation claim and noting that the plaintiff only had an “opposition clause” claim). Pattern Instruction 4.21 includes an opposition clause claim.

#### B. Adverse Employment Action

Pattern Instruction 4.21 includes a charge on the definition of an adverse employment action, which is based on the Supreme Court’s decision in *Burlington Northern & 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.

### C. Third Party Reprisals

In Thompson v. North American Stainless, LP, 131 S. Ct. 863 (2011), the Supreme Court held that third-party reprisals are actionable under the anti-retaliation provision of Title VII. Id. at 868. The plaintiff in Thompson stated a claim for retaliation by alleging that he was intentionally terminated because his fiancée filed an EEOC charge of discrimination against their mutual employer. Id. at 870. In cases involving third party reprisals, the charge will need to be adapted.

### D. 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 employment decision,” not merely a motivating factor in the decision. Id. at 175. The Court rejected the mixed motive defense (also known as the “motivating factor” defense) in the context of the ADEA, noting that unlike under Title VII, the ADEA’s causation provision was not incorporated into the ADEA. Id. at 176. In Southwestern Medical Center v. Nassar, No. 15-1601, 2016 WL 1024 (2016), the Supreme Court extended the “but-for” causation standard to Title VII retaliation claims “[g]iven the lack of a textual basis for a ‘motivating factor’ test” in Title VII’s anti-retaliation provision. Nassar, 2016 WL 1024 at \*4. Retaliation claims must be proved according to the “but-for” causation test, not the lessened causation test stated in Gross. Id. at \*4.

In Fulton v. City of Philadelphia, No. 15-1675, 2016 WL 1024 (2016), the Supreme Court held that, pursuant to 42 U.S.C. § 1983, a plaintiff must prove that the adverse employment action was “caused by” the protected speech. Id. at \*4. The Court applies based on Mt. Healthy City School v. Mervin, 429 U.S. 274 (1977), in which the Supreme Court held that protected First Amendment “conduct was a ‘motivating factor’” in the adverse employment action. Id. at 287; see also Vila v. Padron, 484 F.3d 1334, 1341 (9th Cir. 2007) (requiring that protected speech play “a substantial or motivating role in the adverse employment action”).

The Eleventh Circuit did not, prior to this publication, decide whether the rationale of Gross and Nassar extends to § 1981 claims, including § 1981 retaliation claims. See Annotation II(A) to Pattern Instruction 4.9, *supra*. The Committee recommends that district courts review this issue prior to instructing a jury on § 1981 retaliation.

### E. Pretext

Pattern Instruction 4.21 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 Title VII retaliation claims match the remedies for Title VII disparate treatment claim. See 42 U.S.C. §§ 1981a, 2000e-5(e)(3)(B), (g)(1). 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 separately all of the elements of a discrimination and retaliation claim except damages, then give a charge on damages that applies to both types of claims.

REPEALED