**4.15 Family and Medical Leave Act – Retaliation Claims –**

**29 U.S.C. §§ 2601-2654**

In this case, [name of plaintiff] claims that [name of defendant] violated a federal law called the Family and Medical Leave Act, also known as the FMLA, by [describe challenged employment action] because [describe protected activity]. [Name of defendant] denies [name of plaintiff]’s claims and asserts that [describe the defendant’s] defense.

Under the FMLA, an eligible employee may take up to 12 weeks of leave during any 12-month period for [a serious health condition/the birth or adoption of a child/the care of a spouse, child, or parent who has a serious health condition/active-duty orders/the care of a covered service member]. This leave is called FMLA leave. It is unlawful for an employer to take action against an employee because the employee exercises [his/her] FMLA rights. The FMLA does not require an employer to pay an employee while on FMLA leave.

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

First: [Name of plaintiff] was employed by [name of defendant];

Second: [Name of plaintiff] was eligible for FMLA leave;

Third: [Name of plaintiff] was entitled to FMLA leave;

Fourth: [Name of plaintiff] [describe protected activity];

Fifth: [Name of defendant] [described challenged employment action];

Sixth: [Describe challenged employment action] was an “adverse employment action;” and

Seventh: [Name of defendant] took that action because of [name of plaintiff]’s [described protected activity].

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

[The parties have agreed that [name of plaintiff] was employed by [name of defendant]. You should consider that a proven fact.]

For the second element, [name of plaintiff] was “eligible” for FMLA leave if:

 [name of plaintiff] worked for [name of defendant] for at least 12 months before the date any FMLA leave was to begin, and

 [name of plaintiff] worked for [name of defendant] for at least 1,250 hours during the 12-month period before the date any FMLA leave was to begin.

For the third element, [name of plaintiff] was “entitled” to FMLA leave if:

 [Name of plaintiff] had an FMLA-qualifying reason, and

 [Name of plaintiff] gave [name of defendant] proper notice of [his/her] need for leave.

[A serious health condition that prevented [name of plaintiff] from performing the functions of [his/her] job/The birth or adoption of a child/The care of a spouse, child, or parent who has a serious health condition/Following active-duty orders/The care of a covered service member] is an “FMLA-qualifying reason.”

[A “serious health condition” is an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital, hospice, or residential medical facility, or continuing treatment by a healthcare provider. Ordinarily, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, and other similar conditions do not meet the definition of a “serious health condition” and do not qualify for FMLA leave.]

[Name of plaintiff] “gave proper notice” to [name of defendant] of [his/her] need for FMLA leave if [he/she] notified [name of defendant] of the need to take FMLA leave in a timely manner and in a way that alerted [name of defendant] that [his/her] absence might qualify as an FMLA leave – even if [name of plaintiff] did not expressly mention the FMLA.

If [name of plaintiff] knew of the need for leave more than 30 days before the leave was to begin, [he/she] was required to give [name of defendant] notice at least 30 days before the leave was to begin. If [name of plaintiff] knew of the need for leave less than 30 days before the leave was to begin, [he/she] was required to give [name of defendant] notice as soon as was reasonably possible.

For the fourth element, you must decide whether [name of plaintiff] [describe protected activity]. If you find that [name of plaintiff] [describe protected activity], then you have found that [he/she] engaged in “FMLA-protected activity.”

For the fifth element, you must decide whether [name of defendant] [describe challenged employment action].

For the sixth element, you must decide whether [describe challenged employment action] is an “adverse employment action.” An “adverse employment action” is any type of action that would have made a reasonable employee reluctant to exercise FMLA rights. Put another way, if a reasonable employee would be less likely to exercise [his/her] FMLA rights because [he/she] knew that [name of 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 exercise FMLA rights, it is not an adverse employment action.

For the seventh element, you must decide whether [name of defendant] [describe adverse employment action] because of [name of plaintiff]’s FMLA-protected activity. Put another way, you must decide whether [name of plaintiff]’s FMLA-protected activity was the main reason for [name of defendant]’s decision.

To determine that [name of defendant] [describe adverse employment action] because of [name of plaintiff]’s FMLA-protected activity, you must decide that [name of defendant] would not have [describe adverse employment action] if [name of plaintiff] had not engaged in FMLA-protected activity but everything else had been the same.

To determine that [name of defendant] [describe adverse employment action] because of [name of plaintiff]’s FMLA-protected activity, you must decide that [name of defendant] would not have [describe adverse employment action] if [name of plaintiff] had not engaged in FMLA-protected activity but everything else had been the same.

[Name of defendant] claims that [he/she/it] did not [describe adverse employment action] because of [name of plaintiff]’s [describe protected activity] and that [he/she/it] took the action for [another reason/other reasons]. An employer may not take an adverse action against an employee because of the employee’s FMLA-protected activity. But an employer may [describe adverse employment action] an employee for any other reason, good or bad, fair or unfair. If you believe [name of defendant]’s reason[s] for [his/her/its] decision, and you find that [name of defendant] did not make [his/her/its] decision because of [name of plaintiff]’s FMLA-protected activity, you must not second guess that decision, and you must not substitute your own judgment for [name of defendant]’s judgment – even if you do not agree with it.

[**Pretext (optional, see annotations):** As I have explained, [name of plaintiff] has the burden to prove that [name of defendant]’s decision to [describe adverse employment action] was because of [name of plaintiff]’s FMLA-protected activity. I have explained to you that evidence can be direct or circumstantial. To decide whether [name of defendant]’s [describe adverse employment action] was because of [name of plaintiff]’s FMLA-protected activity, you may consider the circumstances of [name of defendant]’s decision. For example, you may consider whether you believe the reason[s] that [name of defendant] gave for the decision. If you do not believe the reason[s] that [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 retaliatory reasons for the decision.]

If you find that [name of plaintiff] has proved each element [he/she] must prove, you must decide the issue of [name of plaintiff]’s damages.

When considering the issue of [name of plaintiff]’s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]’s damages as a result of [describe challenged employment action], no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

If [name of plaintiff] proved that [he/she] lost wages or benefits because of [name of defendant]’s FMLA violation, then [name of plaintiff] may recover net lost wages and benefits from the date of [describe challenged employment action] to the date of your verdict.

[**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 [name of plaintiff]’s claim for lost pay, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: work comparable to the position [name of plaintiff] held with [name of defendant] was available, and [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]’s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

**Special Interrogatories To The Jury**

**Do you find from a preponderance of the evidence:**

 That [name of plaintiff] was employed by [name of 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.

 That [name of plaintiff] was eligible for FMLA leave?

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.

 That [name of plaintiff] was entitled to FMLA leave?

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.

 That [name of plaintiff] [describe protected activity]?

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.

 That [name of defendant] [describe challenged employment 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 this verdict form. If your answer is “Yes,” go to the next question.

 That [challenged employment action] was an “adverse employment 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 this verdict form. If your answer is “Yes,” go to the next question.

 That [name of defendant] took the adverse employment action because of [name of plaintiff]’s protected activity?

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.

 That [name of plaintiff] should be awarded damages?

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

If your answer is “Yes,”

in what amount? $\_\_\_\_\_\_\_\_\_\_\_\_\_

So Say We All.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Foreperson’s Signature

Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_