**4.19 USERRA – 38 U.S.C. § 4311(b) – USERRA Retaliation**

In this case, [name of plaintiff] claims that [name of defendant] retaliated against [name of plaintiff] because [he/she] took steps to enforce [his/her] lawful rights under the Uniformed Services Employment and Reemployment Rights Act, also called USERRA.

USERRA prohibits an employer from retaliating against an employee because the employee has asserted rights or made complaints under that law. [This prohibition applies regardless of whether the employee has ever served in the uniformed services.]

Specifically, USERRA prohibits an employer from retaliating against an employee who [took action to enforce a protection afforded any person under USERRA/testified or otherwise made a statement in, or in connection with, any proceeding under USERRA/assisted, or otherwise participated in, an investigation under USERRA/exercised a right USERRA provides].

[Name of plaintiff] claims that [name of defendant] [describe adverse employment action] because [he/she] [describe protected activity]. [Name of defendant] denies [name of plaintiff]’s claim and asserts that [describe the Defendant’s defense].

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

First: [Name of plaintiff] engaged, in good faith, in an activity protected by USERRA;

Second: [Name of defendant] took an adverse employment action against [name of plaintiff];

Third: [Name of plaintiff]’s protected activity was a motivating factor that prompted [name of defendant] to take the adverse employment action; and

Fourth: [Name of 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, [name of plaintiff] must prove by a preponderance of the evidence that [he/she] engaged, in good faith, in a protected activity. If you find that [name of plaintiff] made the complaint to enforce what [he/she] believed in good faith to be [his/her] lawful rights, [he/she] may not be penalized – even if the [describe protected activity] is later found to be invalid or without merit. To establish “good faith,” it is not enough for [name of plaintiff] to allege that [his/her] belief was honest and bona fide. The allegations and the record must also establish that the belief was objectively reasonable even though it might have been wrong.

For the second element, [name of plaintiff] claims that [name of defendant] took an adverse employment action against [him/her] when [name of defendant] [describe adverse employment action]. An “adverse employment action” is any type of action that might reasonably deter [name of plaintiff] or another employee from engaging in an activity protected by law. Put another way, if [name of defendant]’s challenged action would make a reasonable employee less likely to exercise [his/her] rights under USERRA, that action is an adverse employment action.

For the third element, you must decide whether [his/her] protected activity was a motivating factor in [name of defendant]’s decision. To prove that [name of plaintiff]’s protected activity was a “motivating factor” in [name of defendant]’s decision, [name of plaintiff] does not have to prove that [his/her] protected activity was the only reason that [name of defendant] [describe adverse employment action]. It is enough if [name of plaintiff] proves that [his/her] protected activity influenced [name of defendant]’s decision. If [name of plaintiff]’s protected activity made a difference in [name of defendant]’s decision, you may find that it was a motivating factor in the decision.

[Name of defendant] claims that [name of plaintiff]’s protected activity was not a motivating factor behind [describe adverse employment action]. [Name of defendant] argues that [he/she/it] [describe adverse employment action] [name of plaintiff] for [another reason/other reasons]. An employer may not take an adverse employment action against an employee because of the employee’s 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 find that [his/her/its] decision was not motivated by [name of plaintiff]’s protected activity, you must not second guess [name of defendant]’s 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 [his/her] protected activity was a motivating factor in [name of defendant]’s decision to [describe adverse employment action]. I have explained to you that evidence can be direct or circumstantial. To decide whether [name of defendant]’s decision to [describe adverse employment action] was because of [name of plaintiff]’s 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.]

For the fourth element, if you find that [name of plaintiff] engaged in protected activity and that [name of defendant] took an adverse employment action against [him/her] because of that protected activity, you must decide whether [name of defendant]’s acts were the proximate cause of damages that [name of plaintiff] sustained. Put another way, you must decide whether these damages would have occurred if [name of defendant] had not [describe adverse employment action].

If you find that [name of defendant]’s acts were the proximate cause of damages [name of plaintiff] sustained, you must determine the amount of damages.

[**Including Affirmative Defense:** If you find in [name of plaintiff]’s favor for each element [he/she] must prove, you must decide whether [name of defendant] has shown by a preponderance of the evidence that [he/she/it] would have taken the same action even if [name of defendant] had not taken [name of plaintiff]’s protected activity into account. If you find that the [name of defendant] would have made the same decision for reasons other than [name of plaintiff]’s protected activity, you must make that finding in your verdict.

If you find for [name of plaintiff] and against [name of defendant] on [his/her/its] defense, you must decide the issue of [name of plaintiff]’s compensatory damages.]

[**Without Affirmative Defense:** If you find in [name of plaintiff]’s favor for each element [he/she] must prove, you must decide the issue of [his/her] compensatory 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 the adverse 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.

To the extent you find that [name of plaintiff] proved damages by a preponderance of the evidence, you must consider only net lost wages and benefits from the date of the adverse employment action to the date of your verdict.

To determine the amount of [name of plaintiff]’s net lost wages and benefits, you should consider evidence of the actual wages [name of plaintiff] lost and the monetary value of any benefits lost.

[**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 [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.]

[**Willful Violation:** [Name of plaintiff] also claims that [name of defendant] willfully violated the law. You will only consider this issue if you find for [name of plaintiff] and award [him/her] compensatory damages.

If the employer knew that [his/her/its] [describe adverse employment action] violated the law, or acted in reckless disregard of that fact, then [his/her/its] conduct was willful. If [name of defendant] did not know, or knew only that the law was potentially applicable and did not act in reckless disregard as to whether [his/her/its] conduct was prohibited by the law, then [name of defendant]’s conduct was not willful.]

**Special Interrogatories To The Jury**

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

That [name of plaintiff], in good faith, engaged in an activity protected by USERRA?

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 an adverse employment action against [name of 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.

That [name of plaintiff]’s protected activity was a motivating factor that prompted [name of 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 this verdict form. If your answer is “Yes,” go to the next question.

[ That [name of defendant] would have taken the same action even if [name of defendant] had not taken [name of plaintiff]’s protected activity 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.]

That [name of plaintiff] suffered damages because of the adverse employment action?

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

That [name of plaintiff] should be awarded damages to compensate for a net loss of wages and benefits from the date of [describe adverse employment action] to the date of your verdict?

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

If your answer is “Yes,”

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

[If you did not award damages in response to Question No. 6, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If you awarded damages in response to Question No. 6, go to the next question.]

[ That [name of defendant] willfully violated the law?

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

So Say We All.

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Foreperson’s Signature

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