**4.2 Public Employee – First Amendment Claim – Discharge or Failure**

**to Promote – Political Disloyalty or Key Employee**

In this case, [name of plaintiff] claims that [name of defendant], while acting “under color” of state law, intentionally deprived [name of 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].

[Name of defendant] denies [name of 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.

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

First: [Name of defendant]’s actions were “under color” of state law;

Second: [Name of plaintiff] engaged in constitutionally protected political activity, a form of free speech, by [describe protected activity];

Third: [Name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion];

Fourth: [Name of plaintiff]’s [describe protected activity] was a motivating factor in [name of defendant]’s decision [to discharge [name of plaintiff]/not to promote [name of plaintiff]]; and

Fifth: [Name of plaintiff] suffered damages because of [name 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 [name of 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 [name of 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 [name of plaintiff] [describe protected activity], then you have found that [he/she] engaged in “protected activity.”

For the third element, you must decide whether [name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion].

For the fourth element, you must decide whether [name of plaintiff]’s 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 for [name of defendant]’s actions. 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 in [his/her/its] decision and that [he/she/it] [discharged/did not promote] [name of 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. 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 [name of defendant]’s reason[s] for [his/her/its] decision [to discharge/not to promote] [name of plaintiff], and you find that [his/her/its] decision was not motivated by [name of plaintiff]’s protected activity, you must not second guess [his/her/its] 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 discharge/not to promote] [name of plaintiff]. I have explained to you that evidence can be direct or circumstantial. To decide whether [name of plaintiff]’s protected activity was a motivating factor in [name of defendant]’s decision [to discharge/not to promote] [name of plaintiff], you may consider the circumstances of [name of defendant]’s decision. For example, you may consider whether you believe the reason[s] [name of 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 [name of plaintiff] [describe protected activity] and that this protected activity was a motivating factor in [name of defendant]’s decision to [discharge [name of plaintiff] from employment/deny [name of plaintiff] a promotion], you must decide whether [name of plaintiff] suffered damages as a result. If the damages would not have existed except for the [discharge/denied promotion], then you may find that [name of plaintiff] suffered those damages because of the [discharge/denied promotion].

[Including “Same Decision” Defense (if applicable, see annotations): If you find in [name of plaintiff]’s favor for each fact [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 made the same decision even if [he/she/it] had not taken [name of plaintiff]’s protected activity into account. If you find that [name of plaintiff] would [have been dismissed/not have been promoted] for reasons other than [his/her] protected activity, your verdict should be for [name of defendant].]

If you find for [name of plaintiff] and against [name of defendant] on this defense, you must [consider [name of plaintiff]’s compensatory damages/decide the issue of [name of defendant]’s “key-employee” defense.]]

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

An elected official such as [name of 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 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.

[Name of defendant] claims that [name of plaintiff] was a “key” employee. [Name of defendant] has the burden to prove by a preponderance of the evidence that [name of 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 [name of plaintiff] was a key employee by virtue of [name of plaintiff]’s position as [describe plaintiff’s job], you should consider factors such as:

Whether [name of 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 [name of plaintiff] worked];

Whether the [name of plaintiff] exercised independent judgment in carrying out [his] [her] responsibilities;

Whether [name of plaintiff] had regular contact with or worked closely with [name of defendant];

Whether [name of plaintiff] frequently interacted with the public as [name of defendant]’s representative or alter ego; and

Whether [name of plaintiff] had access to confidential information not generally available to [name of 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 [name of plaintiff] was, or was not, a “key” employee.]

If you find that [name of 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 [name of plaintiff] was not a key employee, you must then decide the issue of [name of plaintiff]’s compensatory damages.]

[Without Affirmative Defense: If you find by a preponderance of the evidence that [name of plaintiff] suffered damages because of [name of defendant]’s acts, you must then decide the issue of [name of plaintiff]’s 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 [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 [name of 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 [name of plaintiff] has proved them by a preponderance of the evidence, and no others:

Net lost wages and benefits from the date of the [discharge] [denied promotion] to the date of your verdict; and

Emotional pain and mental anguish.

To determine the amount of [name 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 [name of plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury – tangible and intangible. [Name of 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 [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.]

[**Punitive Damages:** To be used only for individual-capacity claims against individual defendants: [Name of plaintiff] also claims that [name of individual defendant]’s acts were done with malice or reckless indifference to [name of plaintiff]’s federally protected rights, which would entitle [him/her] to punitive damages in addition to compensatory damages. [Name of 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 [name of plaintiff] has proved the elements of [his/her] claim against [name of individual defendant] and you award [name of plaintiff] compensatory damages. You may not assess punitive damages against [public employer].

If you find for [name of plaintiff] and find that [name of defendant] acted with malice or reckless indifference to [name of plaintiff]’s federally protected rights, the law allows you, in your discretion, to award [name of plaintiff] punitive damages as a punishment for [name of 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 [name of 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:**

That [name of 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.

That [name of plaintiff] engaged in constitutionally protected political activity, a form of free speech, by [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] [discharged [name of plaintiff] from employment/denied [name of 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.

That [name of plaintiff]’s [describe protected speech or conduct] was a motivating factor in [name of defendant]’s decision [to discharge [name of plaintiff] from employment/not to promote [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 defendant] would have [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion] even if [he/she/it] 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] 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.]

That [name of plaintiff] suffered damages because of [name 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.

That [name of 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? $\_\_\_\_\_\_\_\_\_\_\_\_\_

That [name of 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.

That punitive damages should be assessed against [name of individual defendant]?

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

If your answer is “Yes,”

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

So Say We All.

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Foreperson’s Signature

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