**4.22 Retaliation – Section 1981, Title VII, ADEA, ADA, and FLSA**

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 [describe the act or statute involved, e.g., ADEA].

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.

[***Opposition clause claims only***: An employee may make a discrimination complaint as a means to enforce what [he/she] believed in good faith to be [his/her]

lawful rights. So, even if a complaint of discrimination against an employer is later found to be invalid or without merit, the employee cannot be penalized in retaliation for having made such a complaint if you find that the employee made the complaint as a means of seeking to enforce what the employee believed in good faith to be [his/her] lawful rights. To establish “good faith,” however, it is insufficient for [name of plaintiff] merely to allege that [his/her] belief in this regard was honest and bona fide; the allegations and the record must also establish that the belief, though perhaps mistaken, was objectively reasonable.]

[Name of plaintiff] claims that [name of defendant] [describe adverse employment action] because [name of plaintiff] [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 each of the following facts by a preponderance of the evidence:

First: [Name of plaintiff] engaged in a protected activity;

Second: [Name of defendant] then took an adverse employment action;

Third: [Name of defendant] took the adverse employment action because of [name of plaintiff]’s protected activity; 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 “participation clause” claims***: For the first element, [name of plaintiff] claims that [he/she] [describe participation clause activity]. If you find that [name of plaintiff] [describe participation clause activity], that action is “protected activity.”]

[***For “opposition clause” claims***: For the first element, [name of 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 [name of plaintiff]’s good-faith, reasonable belief that [name of defendant] discriminated against [him/her/another employee] because of [protected trait]. [Name of plaintiff ] had a “good faith” belief if [he/she] honestly believed that [name of defendant] discriminated against [him/her/another employee] because of [protected trait]. [Name of plaintiff] had a “reasonable” belief if a reasonable person would, under the circumstances, believe that [name of defendant] discriminated against [him/her/another employee] because of [protected trait]. [Name of plaintiff] does not have to prove that [name of defendant] actually discriminated against [him/her/another employee] because of [protected trait]. But [he/she] must prove that [he/she] had a good-faith, reasonable belief that [name of defendant] did so.

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]. You must decide whether [describe adverse 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 make or support a charge of discrimination. Put another way, if a reasonable employee would be less likely to complain about or oppose alleged discrimination 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 make complaints about or oppose the alleged discrimination, it is not an adverse employment action.

For the third 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], you must decide whether [name of defendant] took that action because of [name of plaintiff]’s protected activity. Put another way, you must decide whether [name of plaintiff]’s protected activity was the main reason for [name of defendant]’s decision.

To determine that [name of defendant] took an adverse employment action because of [name of plaintiff]’s protected activity, you must decide that [name of defendant] would not have taken the action had [name of plaintiff] not engaged in the 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 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 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 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 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, 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, if [name of defendant] had not [describe adverse employment action] [name of plaintiff], would these damages have occurred?]

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

damages.

[Insert damages instruction based on substantive charge damages instruction. For claims under Title VII, please see Pattern Instruction 4.5, *supra*. For claims under Section 1981, please see Pattern Instruction 4.9, *supra.* For claims under the ADEA, please see Pattern Instruction 4.10, *supra*. For claims under the ADA, please see Pattern Instruction 4.11, *supra*. For claims under the FLSA, please see Pattern Instruction 4.10, *supra*, and the accompanying annotations].

**SPECIAL INTERROGATORIES TO THE JURY**

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

1. That [name of plaintiff] engaged in 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.

2. 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.

3. 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.]

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

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

[Insert damages interrogatories based on substantive charge damages interrogatories. For claims under Title VII, please see Pattern Instruction 4.5, supra. For claims under Section 1981, please see Pattern Instruction 4.9, *supra.* For claims under the ADEA, please see Pattern Instruction 4.10, supra. For claims under the ADA, please see Pattern Instruction 4.11, supra. For claims under the FLSA, please see Pattern Instruction 4.10, supra, and the accompanying annotations].

SO SAY WE ALL.

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Foreperson’s Signature

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