**5.1 Civil Rights – 42 U.S.C. § 1983 Claims – First Amendment Claim –**

**Prisoner Alleging Retaliation or Denial of Access to Courts**

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, violated [his/her] rights under the First Amendment to the United States Constitution.

Specifically, [name of plaintiff] claims that [name of defendant] violated [his/her] constitutional right of access to the courts by [describe [name of defendant]’s conduct, *e.g.*, by making a disciplinary report against [him/her]] because [he/she] [attempted to use the legal system/communicated an intent to use the legal system] about [describe [name of plaintiff]’s grievance, *e.g.*, concerning [his/her] continuation in a close-confinement status].

A convicted prisoner loses some constitutional rights, such as the right to liberty, after being convicted of a criminal offense. But the prisoner keeps other constitutional rights. One of those retained rights is the First Amendment right of access to the courts to challenge the lawfulness of [name of plaintiff]’s conviction and the constitutionality of [his/her] confinement conditions. If [name of plaintiff] had no right to go to court to address these claims, the Constitution’s guarantees would have no meaning, because there would be no way to enforce the guarantees.

The Constitutional right of access to the courts means that a prisoner has the right to file claims and other papers with the court, and the exercise of that right, or plan to exercise that right, cannot be the basis for a penalty or further punishment. This is true because, once again, if [name of plaintiff] could be punished for exercising a constitutional right or for giving a good-faith notice of intent to do so, the right itself would be meaningless.

But to maintain discipline and security, prison authorities do have the right to impose reasonable restrictions on the exercise of constitutional rights.

[The prohibition against prisoners making written threats is one reasonable restriction on the exercise of First Amendment rights. And, in this case, [name of defendant] claims that [name of plaintiff]’s communication to [him/her/it] about a lawsuit was nothing more than a written threat intended to harass prison officials – not a good-faith notice of intent to sue that was given in an effort to reach a settlement in a pending, legitimate dispute.]

So to succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of plaintiff] [attempted to use the legal system/communicated [his/her] intent to use the legal system to [name of defendant]];

Second: That [name of plaintiff]’s [attempt to use the legal system/communication to [name of defendant] of [his/her] intent to use the legal system] was made in good faith as an exercise of [his/her] First Amendment rights and was not a bad-faith threat intended as an act of harassment;

Third: That [name of defendant] intentionally retaliated against or punished [name of plaintiff] because of [his/her] [attempt to use the legal system/communication of [his/her] intent to use the legal system to [name of defendant]]; and

Fourth: That [name of defendant] acted under color of law when [he/she] retaliated against or punished [name of plaintiff].

For the third element, [name of defendant] “retaliates against” [name of plaintiff] if [name of defendant]’s actions would likely deter a similarly situated reasonable person in [name of plaintiff]’s position from exercising First Amendment rights.

[For the fourth element, the parties have agreed that [name of defendant] acted under color of law. So you should accept that as a proven fact.]

[For the fourth element, you must decide whether [name of defendant] acted under color of law. A government official acts “under color” of law when [he/she] acts within the limits of lawful authority. [He/She] 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.]

If you find for [name of plaintiff] and against [name of defendant] on this claim, you must consider the issue of [name of plaintiff]’s damages, if any, caused by [name of defendant]’s violation[s] of [name of plaintiff]’s constitutional rights. [Name of plaintiff] bears the burden to prove any damages by a preponderance of the evidence. [Name of defendant]’s conduct caused [name of plaintiff]’s damages if [name of plaintiff] would not have been damaged without [name of defendant]’s conduct, and the damages were a reasonably foreseeable consequence of [name of defendant]’s conduct.

You should assess the monetary amount that a preponderance of the evidence justifies as full and reasonable compensation for all of [name of plaintiff]’s damages – no more, no less. You must not impose or increase these compensatory damages to punish or penalize [name of defendant]. And you must not base these compensatory damages 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: [List recoverable damages.] [See Annotations and Comments, Part IV.]

[**Nominal Damages:** You may award $1.00 in nominal damages and no compensatory damages if you find that: [name of plaintiff] has submitted no credible evidence of injury; or [name of plaintiff]’s injuries have no monetary value or are not quantifiable with any reasonable certainty[; or [name of defendant] used both justifiable and unjustifiable force against [name of plaintiff] and it is entirely unclear whether [name of plaintiff]’s injuries resulted from the use of justifiable or unjustifiable force].]

[**Mitigation of Damages:** Anyone who claims loss or damages as a result of an alleged wrongful act by another has a duty under the law to “mitigate” those damages – to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you find that [name of defendant] has proved by a preponderance of the evidence that [name of plaintiff] did not seek out or take advantage of a reasonable opportunity to reduce or minimize the loss or damage under all the circumstances, you should reduce the amount of [name of plaintiff]’s damages by the amount that [he/she] could have reasonably received if [he/she] had taken advantage of such an opportunity.]

[**Punitive Damages:** To be used only for claims against individual defendants if plaintiff offers evidence of physical injury:[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 [name of plaintiff] to an award of 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.

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.

[Name of defendant] acts with malice if [his/her] conduct is motivated by evil intent or motive. [Name of defendant] acts with reckless indifference to the protected federal rights of [name of plaintiff] when [name of defendant] engages in conduct with a callous disregard for whether the conduct violates [name of plaintiff]’s 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 punitive damages to be awarded. [You may also assess punitive damages against one or more of the individual Defendants, and not others, or against one or more of the individual Defendants in different amounts.]]

**NOTE:** Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Number 5.8) for use in actions brought under 42 U.S.C. §1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil right actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.