# 6. PUBLIC EMPLOYEE AND PRISONER RETALIATION

## 6.01 PUBLIC EMPLOYEE'S FIRST AMENDMENT FREE SPEECH RETALIATION CLAIM

In this case, Plaintiff claims that Defendant violated [his/her] constitutional right to free speech by [*describe alleged retaliatory conduct*] because Plaintiff [*describe protected speech or conduct*].

To succeed on this claim, Plaintiff must prove each of the following [*number of elements*] things by a preponderance of the evidence:

1. Plaintiff [*describe protected speech or conduct*].

2. Defendant intentionally [*describe alleged retaliatory conduct*].

3. [Plaintiff's [*describe protected speech or conduct*]] [Defendant's belief that Plaintiff [*describe protected speech or conduct*]] was a reason, alone or with other reasons, that Defendant [*describe alleged retaliatory conduct, e.g., terminated plaintiff's employment*].

4. [*Defendant's alleged retaliatory conduct*] would be likely to deter an ordinary employee in plaintiff's circumstances from engaging in similar [speech] [conduct].

5. [Defendant acted under color of law.]

If you find that Plaintiff did not prove each of these things by a preponderance of the evidence, then you must decide for Defendant. If you find that Plaintiff did prove each of these things by a preponderance of the evidence, then you must consider whether Defendant has proved by a preponderance of the evidence that there were other reasons that would have led Defendant to [*describe alleged retaliatory conduct*] even if Plaintiff had not [*describe protected speech or conduct*]. If you find that Defendant proved this by a preponderance of the evidence, then you must decide for Defendant. If you find that Defendant did not prove this by a preponderance of the evidence, then you must decide for Plaintiff, and consider the issue of damages.

### Committee Comment

**a. Whether plaintiff spoke as a private citizen:** A government employee who makes a statement pursuant to his official duties is not protected by the First Amendment. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); *Kingman v. Frederickson*, 40 F.4th 597, 601 (7th Cir. 2022). *See also Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014) (testimony at trial regarding employment-related issues is protected by First Amendment). This is a question of law for the court to resolve. *See Gross v. Town of Cicero*, 619 F.3d 697, 704 (7th Cir. 2010). In cases in which there is a factual dispute that bears on the Court's determination, a special interrogatory may be submitted to the jury on this point.

**b. Whether plaintiff spoke on matter of public concern:** A plaintiff who satisfies the *Garcetti* standard must also satisfy the *Connick-Pickering* balancing test to determine whether he engaged in protected conduct. *See Spiegla v. Hull*, 481 F.3d 961, 965-66 (7th Cir. 2007). This involves balancing the employee's interest in commenting on the matter against employer's interest "in promoting effective and efficient public service." *Id.* at 965. This is a question of law determined by the court. *Carreon v. Illinois Dep't of Hum. Servs.*, 395 F.3d 786, 791 (7th Cir. 2005). In a case in which a disputed factual issue bears on the Court's determination of whether the plaintiff spoke on a matter of public concern, a special interrogatory may be submitted to the jury on this point.

**c. Causation:** In the wake of *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), where the Court determined that a mixed motive instruction was never appropriate in a case under the Age Discrimination in Employment Act (ADEA), the Seventh Circuit issued contradictory opinions in the First Amendment context. *Compare Fairley v. Andrews*, 578 F.3d 518, 525–26 (7th Cir. 2009) (applying "but for" standard), *with Greene v. Doruff*, 660 F.3d 975, 978-979 (7th Cir. 2011) (applying "motivating factor" standard). In *Kidwell v. Eisenhauer*, 679 F.3d 957, 965 (7th Cir. 2012), discussing *Fairley* and *Greene,* the court indicated that "[i]n the end"—that is, at trial—"the plaintiff must demonstrate that, but for his protected speech, the employer would not have taken the adverse action." The court said that the "motivating factor" formulation applies at summary judgment when the plaintiff is attempting to establish a prima facie case of discrimination. *Id.* However, in *Smith v. Wilson*, 705 F.3d 674, 681 (7th Cir. 2013), the court concluded that *Greene* "held that *Gross* was 'inapplicable' to suits 'to enforce First Amendment rights'. . . [because] the Supreme Court has never abandoned the *Mt. Healthy* [mixed motive] rule" for First Amendment cases." *Id.* at 681 (quoting *Greene*, 660 F.3d at 977). The Committee follows this guidance in *Smith* but notes that the matter may still be subject to dispute. In drafting the instruction, to simplify, the Committee chose not to use the words "substantial or motivating," instead asking the jury to consider whether the Plaintiff's protected conduct "was a reason, alone or with other reasons" for the defendant's conduct.

**d. Ordinary employee standard:** The Seventh Circuit has said that the plaintiff must show that defendant's conduct would deter an ordinary person from exercising his First Amendment rights. *See Santana v. Cook Cnty. Bd. of Rev.*, 679 F.3d 614, 622-23 (7th Cir. 2012). Other cases use the term "person of ordinary firmness," but the Committee opted for the simpler "ordinary employee" standard because the "ordinary firmness" formulation is opaque. *See, e.g., Surita v. Hyde*, 665 F.3d 860, 878 (7th Cir. 2011); *Bridges v. Gilbert*, 557 F.3d 541, 552 (7th Cir. 2009); *Hutchins v. Clarke*, 661 F.3d 947, 958 (7th Cir. 2011) (Williams, J., concurring). "Adverse employment action" as that term is used in the employment discrimination context is not required, and the retaliatory conduct "need not be great in order to be actionable." *Mosley v. Bd. of Educ. of City of Chicago*, 434 F.3d 527, 533 (7th Cir. 2006); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982). The Committee also

concluded, though not without debate, that the standard appropriately takes into account the circumstances of the particular plaintiff's employment, and thus expressed the standard as that of an "ordinary employee in plaintiff's circumstances." The Committee notes that no Seventh Circuit case expressly adopts a context-specific formulation, but several cases take into account the particular circumstances of the plaintiff's employment in assessing what would deter an ordinary employee from exercising his First Amendment rights. *See, e.g., Swetlik v. Crawford*, 738 F.3d 818, 825 n.2 (7th Cir. 2013) (the question in First Amendment retaliation cases is "often fact specific"); *Power v. Summers*, 226 F.3d 815, 820-821 (7th Cir. 2000) (taking into account, in assessing the materiality of the denial of a raise, the plaintiff's salary and the fact that she was part of a tenure system).

The Committee also notes that there may be room for dispute over whether the "deter an ordinary person" requirement is an element in a case involving employment termination, on the theory that retaliatory termination would deter any person from engaging in protected activity. However, *Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir. 2006), uses the "deterrence" requirement in a termination case, though the court noted the point was undisputed in that case.

**e. Color of law:** The fifth element should be eliminated if "color of law" is not in dispute. If the element is contested, Instruction 7.03 should be given.

## 6.02 PUBLIC EMPLOYEE'S FIRST AMENDMENT POLITICAL AFFILIATION CLAIM

In this case, Plaintiff claims that Defendant violated [his/her] constitutional right to free association by [*describe alleged retaliatory conduct*] because of [his/her] [*describe political affiliation*].

To succeed on this claim, Plaintiff must prove each of the following [*number of elements*] things by a preponderance of the evidence:

1. Plaintiff [*describe political affiliation*].

2. Defendant intentionally [*describe alleged retaliatory conduct*].

3. [Plaintiff's political affiliation] [Defendant's belief that Plaintiff [*describe protected speech or conduct*]] was a reason, alone or with other reasons, that Defendant [*describe alleged retaliatory conduct, e.g., terminated plaintiff's employment*].

4. [*Defendant's alleged retaliatory conduct*] would be likely to deter an ordinary employee in plaintiff's circumstances from [*describe political affiliation*].

5. [Defendant acted under color of law.]

If you find that Plaintiff did not prove each of these things by a preponderance of the evidence, then you must decide for Defendant. If you find that Plaintiff did prove each of these things by a preponderance of the evidence, then you must consider whether Defendant has proved by a preponderance of the evidence that there were other reasons that would have led Defendant to [*describe alleged retaliatory conduct*] even if Plaintiff had not [*describe protected speech or conduct*]. If you find that Defendant proved this by a preponderance of the evidence, then you must decide for Defendant. If you find that Defendant did not prove this by a preponderance of the evidence, then you must decide for Plaintiff, and consider the issue of damages.

### Committee Comment

**a. Authority:** "It is well established that hiring, firing, or transferring government employees based on political motivation violates the First Amendment, with certain exceptions for policymaking positions and for employees having a confidential relationship with a superior." *Hall v. Babb*, 389 F.3d 758, 762 (7th Cir. 2004) (citations omitted). *Gregorich v. Lund*, 54 F.3d 410, 414 (7th Cir. 1995), holds that such claims are analyzed "under the approach announced by the Supreme Court in *Pickering v. Bd. of Educ.,* 391 U.S. 563 (1968) and reiterated in *Connick v. Myers*, 461 U.S. 138 (1983). . . . To be protected, a public employee's expressive activity must 'be on a matter of public concern' and his interest in the expression must outweigh

the State's interest in promoting the efficiency of its public services." (quoting *Waters v. Churchill*, 511 U.S. 661, 667 (1994)).

**b. Causation:** *See* Instruction 6.01, comment c.

**c. Ordinary employee standard:** *See* Instruction 6.01, comment d.

**d. Policymaker/confidential employee exception:** A government employee may be fired for political reasons only when "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518 (1980). *See also Kiddy-Brown v. Blagojevich*, 408 F.3d 346, 354-355 (7th Cir. 2005); *Allen v. Martin*, 460 F.3d 939, 944 (7th Cir. 2006); *Riley v. Blagojevich*, 425 F.3d 357, 359 (7th Cir. 2005). "[D]efendants bear the burden of establishing that plaintiff's position falls within the exception . . . for certain policy-making or confidential positions." *Milazzo v. O'Connell*, 108 F.3d 129, 132 (7th Cir. 1997); *see also Matlock v. Barnes*, 932 F.2d 658, 663 (7th Cir. 1991). There may be some cases in which the determination of whether an employee was a policymaker or confidential employee depends on disputed facts. *See, e.g., Soderbeck v. Burnett Cnty.*, 752 F.2d 285, 288-89 (7th Cir. 1985); *Nekolny v. Painter*, 653 F.2d 1164, 1169-70 (7th Cir. 1981). If so, it may be necessary to submit to the jury the question of whether the employee had responsibilities that involved policymaking or the exercise of political judgment. In these situations, an appropriate instruction should be prepared.

**e. Color of law:** The fifth element should be eliminated if "color of law" is not in dispute. If the element is contested, Instruction 7.03 should be given.

## 6.03 PRISONER/DETAINEE FIRST AMENDMENT RETALIATION CLAIM

An inmate's right to [*describe with specificity the type of speech or conduct at issue*] is protected by the Constitution.

In this case, Plaintiff claims that Defendant [*describe alleged retaliation*] in retaliation for [*describe plaintiff's alleged speech or conduct*].

To succeed on this claim, Plaintiff must prove each of the following [number of elements] things by a preponderance of the evidence:

1. Plaintiff [*describe protected speech or conduct*].

2. Defendant intentionally [*describe alleged retaliatory conduct*].

3. [Plaintiff's [*describe protected speech or conduct*]] [Defendant's belief that Plaintiff [*describe protected speech or conduct*]] was reason, alone or with other reasons,] that Defendant [*describe alleged retaliatory conduct, e.g., terminated plaintiff's employment*].

4. [*Defendant's alleged retaliatory conduct*] would be likely to deter an average person in Plaintiff's circumstances from engaging in similar [protected speech or conduct].

[5. Defendant acted under color of law.]

If you find that Plaintiff did not prove each of these things by a preponderance of the evidence, then you must decide for Defendant. If you find that Plaintiff did prove each of these things by a preponderance of the evidence, then you must consider whether Defendant has proved by a preponderance of the evidence that there were other reasons that would have led Defendant to [*describe alleged retaliatory conduct*] even if Plaintiff had not [*describe protected speech or conduct*]. If you find that Defendant proved this by a preponderance of the evidence, then you must decide for Defendant. If you find that Defendant did not prove this by a preponderance of the evidence, then you must decide for Plaintiff, and consider the issue of damages.

### Committee Comment

The Committee drafted this instruction to be consistent with Instructions 6.01 and 6.02 regarding public employees' First Amendment retaliation claims.

**a. Scope of instruction:** This instruction applies to any claim in which a prisoner is alleging that a prison official retaliated against him/her for exercising a constitutional right. Most cases involve alleged retaliation for complaining about prison conditions, either through a lawsuit or grievance, in violation of the right of access to the courts or the right to free speech under the First Amendment. *E.g.,*

*Smith v. Peters*, 631 F.3d 418, 421 (7th Cir. 2011) (retaliation for "complaining about mistreatment"); *Dobbey v. Illinois Dep't. of Corr.*, 574 F.3d 443, 447 (7th Cir. 2009) (retaliation for filing grievance); *Pearson v. Welborn*, 471 F.3d 732, 741 (7th Cir. 2006) (retaliation for making verbal complaint); *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002) (retaliation for filing lawsuit). The basic elements of a retaliation claim are the same irrespective of the particular underlying constitutional right.

**b. Protected conduct:** The court should not ask the jury to decide whether the conduct is constitutionally protected; that is a question of law for the court that should be determined before trial, generally under the standard set forth in *Turner v. Safley*, 482 U.S. 78 (1987). *See, e.g., Watkins v. Kasper*, 599 F.3d 791, 796-97 (7th Cir. 2010).

**c. Deter an average prisoner:** The case law requires a plaintiff to show that defendant's conduct would "deter a person of ordinary firmness" from exercising his/her First Amendment rights. *See, e.g., Douglas v. Reeves*, 964 F.3d 643, 645-647 (7th Cir. 2020). The Committee has substituted the term "average" because it is easier to understand and conveys the same idea and has also particularized the frame of reference to that of an "average person in Plaintiff's circumstances." The standard focuses on an average person in the plaintiff's circumstances, often referred to as "a prisoner of ordinary firmness." *See id.*, at 647-48 (plaintiff failed to show that alleged adverse action was "sufficient to deter a *prisoner* of ordinary firmness. It is not enough that [plaintiff] felt slighted by the recreation placement. He needed to point to a deprivation with some significant deterrent effect in the prison context."); *May v. Trancoso*, 412 F. App'x 899, 904 (7th Cir. 2011) (considering whether an adverse action would "reasonably be expected to deter an inmate from protesting in the future"); *Troutman v. Miami Corr. Facility*, No. 17 C 409, 2017 WL 4784669, at *3 (N.D. Ind. Oct. 24, 2017) ("It is not plausible that a prisoner of ordinary firmness would be deterred from filing prison grievances because his grievances were not answered to his satisfaction."); *Johnson v. Kingston*, 292 F. Supp. 2d 1146, 1152 (W.D. Wis. 2003) (whether "retaliatory act is . . . one that could be said to have had the effect of deterring an inmate 'of ordinary firmness' from engaging in similar activity").

The Committee opted to use the term "average person in Plaintiff's circumstances" rather than "average prisoner" because the latter formulation might be confusing to lay jurors, who typically will lack the experience necessary to consider how an "ordinary prisoner" would act. This is consistent with the formulations used by the Second and Fourth Circuits. *See Blankenship v. Manchin*, 471 F.3d 523, 530 (4th Cir. 2006); *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 225 (2d Cir.2006). *Cf. Holzemer v. City of Memphis*, 621 F.3d 512, 520 (6th Cir. 2010) ("This inquiry is intensely context-driven: Although the elements of a First Amendment retaliation claim remain constant, the underlying concepts that they signify will vary with the setting—whether activity is 'protected' or an action is 'adverse' will depend on context.").

**d. Causation:** The Committee has adopted the "mixed motive" standard of causation used in the instruction for non-prisoners. *See* Instruction 6.01, comment c.

**e. Color of law:** The fifth element should be eliminated if the "color of law" issue is not in dispute. If the element is contested, Instruction 7.03 should be given.