

2.22 UNLAWFUL EMPLOYMENT PRACTICES UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION (LAD) — RETALIATION (N.J.S.A. 10:5-12(d) and -12(r)) (Approved 09/2009; Revised 01/2019)

NOTE TO JUDGE

The *Law Against Discrimination* (LAD) has two specific subsections, *N.J.S.A.* 10:5-12(d)¹ and -12(r)², addressing employer retaliation against employees for engaging in “protected” activity. Subpart (d) identifies two categories of employee activity that are “protected” under the Law:

(1) opposing practices or acts that are unlawful under the LAD, *i.e.*, complaining about, or protesting against, discrimination in the workplace; and ³

(2) seeking legal advice regarding rights under the LAD,

¹ *N.J.S.A.* 10:5-12(d) provides in full as follows: “[It is unlawful] [f]or any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or because that person has sought legal advice regarding rights under this act, shared relevant information with legal counsel, shared information with a governmental entity, or filed a complaint, testified or assisted in any proceeding under this act or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.”

² *N.J.S.A.* 10:5-12(r) provides in full as follows: “[It is unlawful] [f]or any employer to take reprisals against any employee for requesting from, discussing with, or disclosing to, any other employee or former employee of the employer, a lawyer from whom the employee seeks legal advice, or any government agency information regarding the job title, occupational category, and rate of compensation, including benefits, of the employee or any other employee or former employee of the employer, or the gender, race, ethnicity, military status, or national origin of the employee or any other employee or former employee of the employer, regardless of whether the request was responded to, or to require, as a condition of employment, any employee or prospective employee to sign a waiver, or to otherwise require an employee or prospective employee to agree, not to make those requests or disclosures. Nothing in this subsection shall be construed to require an employee to disclose such information about the employee herself to any other employee or former employee of the employer or to any authorized representative of the other employee or former employee.

³ These cases are often referred to as “opposition” cases.

sharing relevant information with legal counsel, sharing information with a governmental agency or filing a complaint or testifying or assisting in any proceeding under this Act.⁴

In addition, this section of the LAD provides that it is unlawful for an employer “to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.” *N.J.S.A.* 10:5-12(d).

Subpart (r) makes it unlawful for any employer to retaliate against an employee because she requests from or shares with another employee or a former employee of the employer, a lawyer from whom she seeks legal advice or a government agency, the following information: (1) the terms and conditions of her employment (2) the terms and conditions of the employment of another employee or former employee of the employer (3) the gender, race, ethnicity, military status, or national origin of the employee or (4) the gender, race, ethnicity, military status, or national origin of another employee or former employee of the employer. Subpart (r) also makes it unlawful for an employer to require any employee or prospective employee to waive or agree not to make such requests or disclosures as a condition of employment.

The court should be aware that the jury charge to be given in a retaliation case varies depending on the type of “protected activity” in which the employee claims to have engaged. Those differences are explained below in the course of discussing the text of the Charge.

Finally, as is the case when charging the jury under Charge 2.21 (Disparate Treatment), the court should not charge the *prima facie* elements of the plaintiff’s case, unless those elements remain at issue at the time of trial, having not already been decided as a result of motion practice either at the summary judgment stage or at the close of evidence at trial, or having not been stipulated to by the parties. For a full discussion of when and why the *prima facie* elements should not be charged to the jury, see the Introductory Note to the Court in Charge 2.21.

⁴ These cases are often referred to as “participation” cases.

Plaintiff claims that the defendant retaliated against [him/her] because of [insert alleged LAD protected activity]. Defendant denies these allegations and instead maintains that [he/she/it] [insert alleged retaliatory action] because [insert defendant's explanation, such as "plaintiff's job performance was inadequate", "plaintiff's job was eliminated", etc.].

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

First: The plaintiff [insert alleged LAD protected activity];⁵

Second: The plaintiff was subjected to retaliation at the time, or after, the protected conduct took place.⁶

Third: There was a causal connection between [insert alleged retaliatory action] and [insert alleged LAD protected activity], sufficient to show that plaintiff's [insert alleged LAD protected activity] played a role in the decision and made an actual difference in the defendant's decision to [insert alleged retaliatory action].

I will now discuss each of these three elements with you in more detail:

⁵ This issue is not charged to the jury if the court has already decided it as a matter of law or the parties have stipulated to it.

⁶ See footnote 5.

(1) The “Protected Activity” Element of Plaintiff’s Case:

NOTE TO JUDGE

If the first element of the plaintiff’s case -- whether the plaintiff engaged in protected activity -- remains at issue, the Court should charge the jury as follows, depending on whether the case is an “opposition” case, or a “participation” case.

For “opposition” cases, where plaintiff alleges he/she complained to his/her employer about discrimination, and that fact remains at issue in the case, charge the following:

To establish this first element of [his/her] case, the plaintiff need not prove the merits of [his/her] [*describe the plaintiff’s protected activity*], but only that, in doing so, [he/she] was acting under a good faith and reasonable belief⁷ that the [plaintiff’s or *insert someone else’s name*] right to be free from discrimination on the basis of [*insert the legally protected characteristic*] was violated.

For “participation” cases, where the plaintiff alleges he/she sought legal advice regarding rights under the LAD, shared relevant information with legal counsel, shared information with a governmental entity, or filed a complaint, testified or assisted in any proceeding within the meaning of the LAD, and that fact remains at issue in the case, charge the following:

To establish this first element of [his/her] case, the plaintiff must prove that [he/she] sought legal advice regarding rights under the Law Against Discrimination, shared relevant information with legal counsel, shared information with a governmental entity, or filed a complaint or testified or assisted in a proceeding [such

⁷ See *Carmona v. Resorts Int’l Hotel, Inc.*, 189 N.J. 354, 373 (2007).

as a proceeding before the Division on Civil Rights or the Equal Employment Opportunity Commission], in which it was alleged that [his/her] employer discriminated against a person.

For cases where the plaintiff alleges he/she requested, disclosed or discussed information about the terms and conditions of his/her employment or the employment of another employee or former employee of the employer, or discussed his/her protected status or the protected status of another employee or former employee of the employer, and that fact remains at issue in the case, charge the following:

To establish this first element of [his/her] case, the plaintiff must prove that [he/she] requested from, discussed with, or disclosed to, any other employee or former employee of the employer, a lawyer from whom the employee sought legal advice, or any government agency, information regarding the job title, occupational category, and rate of compensation, including benefits, of the employee or any other employee or former employee of the employer, or the gender, race, ethnicity, military status, or national origin of the employee or any other employee or former employee of the employer.

(2) The “Retaliation” (“Adverse Action”) Element of Plaintiff’s Case:

NOTE TO JUDGE

If the second element of the plaintiff’s case -- whether defendant took an adverse action against plaintiff -- remains at issue, the court should charge the jury as follows:

To establish the second element, the plaintiff must show that [he/she] was subjected to retaliation by [his/her] employer. The term retaliation can include, but is not limited to, being discharged, demoted, not hired, not promoted or disciplined. In addition, many separate but relatively minor instances of behavior directed against the plaintiff may combine to make up a pattern of retaliatory behavior.⁸

(3) The “Causal Connection” Element of Plaintiff’s Case:

The third and final element is whether the plaintiff can prove the existence of a causal connection between the protected activity and the alleged retaliation by [his/her] employer. Ultimately, in considering this third element of the plaintiff’s case, you must decide whether the plaintiff’s [insert alleged LAD protected activity] played a role in and made an actual difference in the defendant’s decision⁹ to [insert alleged retaliation action]. It is the plaintiff’s burden to prove that it is more likely than not that, the defendant retaliated against the plaintiff because of the plaintiff’s [insert alleged LAD protected activity]. That is the ultimate issue you must decide: did the defendant [insert alleged retaliatory action] because of the plaintiff’s [insert alleged LAD protected activity]. The plaintiff may prove this directly, by proving that a retaliatory reason more likely than not motivated the defendant’s action, or

⁸ See *Nardello v. Twp. of Voorhees*, 377 N.J. Super. 428, 433-436 (App. Div. 2005); *Green v. Jersey City Bd. of Educ.*, 177 N.J. 434, 448 (2003).

⁹ See *Donofry v. Autotote Systems, Inc.*, 350 N.J. Super. 276, 295 (App. Div. 2001); see also Model Civil Jury Charge 2.21 for an alternate formulation to be used with the jury.

indirectly, by proving that the defendant's stated reason for [his/her/its] action is not the real reason for [his/her/its] action.

You may find that the defendant had more than one reason or motivation for [his/her/its] actions. For example, you may find that the defendant was motivated both by the plaintiff's [insert alleged LAD protected activity] and by other, non-retaliatory factors, such as the plaintiff's job performance. To prevail, the plaintiff is not required to prove that [his/her] [insert alleged LAD protected activity] was the only reason or motivation for the defendant's actions. Rather, the plaintiff must only prove that [his/her] [insert alleged LAD protected activity] played a role in the decision and that it made an actual difference in the defendant's decision.¹⁰ If you find that the plaintiff's [insert alleged LAD protected activity] did make an actual difference in the defendant's decision, then you must enter judgment for the plaintiff. If, however, you find that the defendant would have made the same decision regardless of the plaintiff's [insert alleged LAD protected activity], then you must enter judgment for the defendant.

Because direct proof of intentional retaliation is often not available, the plaintiff is allowed to prove retaliation by circumstantial evidence. In that regard,

¹⁰ See Model Civil Jury Charge 2.21 and cases cited therein at fn. 2; see also *Donofry*, *supra*, 350 N.J. Super. at 296 (“Plaintiff need not prove that his whistle-blowing activity was the only factor in the decision to fire him.”); *Kolb v. Burns*, 320 N.J. Super. 467, 479 (App. Div. 1999) (burden on plaintiff is to show “retaliatory discrimination was more likely than not a determinative factor in the decision”).

you are to evaluate whatever indirect evidence of retaliation that you find was presented during the trial. **[The court may refer to specific types of indirect evidence presented during the trial, such as prior conduct and/or comments of the parties, etc.]**

One kind of circumstantial evidence can involve the timing of events, *i.e.*, whether the defendant's action followed shortly after the defendant became aware of the plaintiff's [*insert alleged LAD protected activity*]. While such timing may be evidence of retaliation, it may also be simply coincidental – that is for you to decide.

Another kind of circumstantial evidence might involve evidence that the defendant became antagonistic or otherwise changed [*his/her/its*] demeanor toward the plaintiff after the defendant became aware of the plaintiff's protected activity. But again, this may be evidence of retaliation, or it may have no relationship to retaliation at all, but it is for you to decide.

In addition, you should consider whether the explanation given by the defendant for [*his/her/its*] action was the real reason for [*his/her/its*] actions. If you don't believe the reason given by the defendant is the real reason the defendant [*insert alleged retaliatory action*] you may, but are not required to, find that the plaintiff has proven [*his/her*] case of retaliation. You are permitted to do so because, if you find the defendant has not told the truth about why [*he/she/it*] acted, you may conclude that [*he/she/it*] is hiding the retaliation. However, while you are permitted

to find retaliation based upon your disbelief of the defendant's stated reasons, you are not required to do so. This is because you may conclude that the defendant's stated reason is not the real reason, but that the real reason is something other than illegal retaliation.

The plaintiff at all times bears the ultimate burden of proving to you that it is more likely than not that the defendant engaged in intentional retaliation. To decide whether the plaintiff has proven intentional retaliation, you should consider all of the evidence presented by the parties, using the guidelines I gave in the beginning of my instructions regarding evaluating evidence generally, such as weighing the credibility of witnesses. **[The court should refer to any other general instructions where appropriate.]** Keep in mind that in reaching your determination of whether the defendant engaged in intentional retaliation, you are instructed that the defendant's actions and business practices need not be fair, wise, reasonable, moral or even right, so long as the plaintiff's [*insert alleged LAD protected activity*] did not play a role and make an actual difference in the defendant's decision to [*insert alleged retaliatory action*].

I remind you that the ultimate issue you must decide is whether the defendant engaged in illegal retaliation against the plaintiff by [*insert alleged retaliatory action*], and that the plaintiff has the burden to prove that retaliation occurred.