

**2.41 WORKER'S COMPENSATION RETALIATION** (Approved 01/2019)

The worker's compensation act makes it unlawful for an employer (or its duly authorized agent) to discharge or in any other manner discriminate against an employee as to [his/her] employment because the employee has claimed or attempted to claim worker's compensation benefits from the employer.<sup>1</sup> Plaintiff claims that the defendant [*insert retaliatory action*] against [him/her] because [he/she] filed a petition for worker's compensation. Defendant denies these allegations and instead maintains that [he/she/it] [*insert retaliatory action*] plaintiff because [*insert employer's proffered reason for its action*].

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

**First:** The plaintiff claimed or attempted to claim worker's compensation benefits;

**Second:** The defendant took retaliatory action against the plaintiff at the time, or after, the plaintiff claimed or attempted to claim workers' compensation benefits;

**Third:** There was a causal connection between the retaliatory action and the plaintiff's claim or attempt to claim worker's compensation benefits sufficient to show that plaintiff's claim or attempt to claim worker's compensation benefits played a role and made an actual difference in the defendant's decision to [*insert retaliatory action*].

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<sup>1</sup> N.J.S.A. 34:15-39.1

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

To establish this first element of [his/her] case, the plaintiff must prove that [he/she] claimed or attempted to claim worker's compensation benefits from the defendant. To prove this element of [his/her] case, the plaintiff may but is not required to show that [he/she] physically filed a claim petition for worker's compensation benefits.<sup>2</sup> Rather, the plaintiff must show only that [he/she] notified [his/her] employer of [his/her] injury and inquired of the procedure for claiming benefits.<sup>3</sup>

***NOTE TO JUDGE***

The plaintiff may also prove this element of the case by showing that he/she exercised a right protected by the worker's compensation act. *See, e.g., Carter, supra, 344 N.J. Super. at 555* (termination for attending medical appointment for work-related injury constitutes the claiming of worker's compensation benefits); *Galante v. Sandoz, 196 N.J. Super. 568, 570* (App. Div. 1984) (time off with statutory compensation during a period of temporary disability is a worker's compensation benefit). In such cases, the charge should be tailored to the facts of the case.

To establish the second element, the plaintiff must show that [he/she] was subjected to retaliatory action by [his/her] employer. Retaliatory action can be a discharge, suspension, demotion or any other adverse employment action taken against an employee in the terms and conditions of employment.<sup>4</sup> An adverse

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<sup>2</sup> *Carter v. AFG Industries, Inc., 344 N.J. Super. 549, 555* (App. Div. 2001); *Cerrachio v. Alden Leeds, Inc., 223 N.J. Super. 435, 442* (App. Div. 1988).

<sup>3</sup> *Cerrachio, supra, 223 N.J. Super. at 443.*

<sup>4</sup> *N.J.S.A. 34:19-2(e).*

employment action does not need to be a single incident. Rather, it can include many separate but relatively minor instances of adverse action against an employee.<sup>5</sup>

The third and final element is whether the plaintiff can prove the existence of a causal connection between [his/her] claim or attempt to claim worker's compensation benefits and the alleged retaliation by [his/her] employer. It is the plaintiff's burden to prove that it is more likely than not that the defendant retaliated against the plaintiff because the plaintiff claimed or attempted to claim worker's compensation benefits. That is the ultimate issue you must decide: did the defendant retaliate against the plaintiff because of the plaintiff's worker's compensation claim. The plaintiff may prove this directly, by proving that a retaliatory reason more likely than not motivated the defendant's action, or indirectly, by proving that the defendant's stated reason for its action is not the real reason for its action.<sup>6</sup>

You may find that defendant had more than one reason or motivation for its actions. For example, you may find that defendant was motivated both by a retaliatory reason and by other, non-retaliatory factors, such as plaintiff's job

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<sup>5</sup> *Green v. Jersey City Bd. of Ed.*, 177 N.J. 434, 448 (2003); *Nardello v. Twp. of Voorhees*, 377 N.J. Super. 428, 434-435 (App. Div. 2005); *Beasley v. Passaic County*, 377 N.J. Super. 585, 609 (App. Div. 2005).

<sup>6</sup> *Estate of Roach v. TRW, Inc.*, 164 N.J. 598, 612 (2000) (holding that in “[e]xamining whether a retaliatory motive existed, jurors may infer a causal connection based on the surrounding circumstances”).

performance. To prevail, plaintiff is not required to prove that retaliation was the only reason or motivation for defendant's actions. Rather, plaintiff must only prove that plaintiff's claim or attempt to claim worker's compensation benefits played a role in the decision and that it made an actual difference in defendant's decision. If you find that retaliation did make an actual difference in defendant's decision, then you must enter judgment for the plaintiff. If, however, you find that defendant would have made the same decision regardless of whether plaintiff claimed or attempted to claim worker's compensation benefits, then you must enter judgment for the defendant.<sup>7</sup>

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

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<sup>7</sup> *Donofry v. Autotote Systems, Inc.* 350 N.J. Super. 276, 296 (App. Div. 2001) (holding that “[p]laintiff’s ultimate burden of proof is to prove by a preponderance of the evidence that his protected whistle-blowing activity was a determinative...motivating factor in defendant’s decision to [take adverse employment action against plaintiff] – that it made a difference [plaintiff need not prove that his whistle-blowing activity was the only factor in the decision to take adverse employment action]”).

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 claim or attempt to claim worker's compensation. 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 changed for the worse toward the plaintiff after the defendant became aware of the plaintiff's worker's compensation claim. But again, this may be evidence of retaliation, or it may have no relationship to retaliation at all, but that is for you to decide.

In addition, you should consider whether the explanation given by the defendant for his action was the real reason for [*his/her*] actions. If you don't believe the reason given by the defendant is the real reason the defendant [*insert retaliatory action*] the plaintiff 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 worker's compensation claim did not cause the defendant's decision to [*insert retaliatory action*] the plaintiff.

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