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Government Retaliation Against its Employee (Whistleblower Act)[1]

Massachusetts law prohibits a governmental employer from retaliating against its employee for engaging in certain types of activity. PLF has sued DFT, his/her [former] government employer,[2] for unlawful retaliation by [add details]. The parties agree [if they have stipulated; if not, consider saying: I instruct you as a matter of law] that DFT is a government body covered by this law.[3]

To prove his/her claim, PLF must show that three things are more likely likely true than not true:

1. PLF engaged in protected activity while working as a government employee at DFT,
2. DFT retaliated against PLF because of that protected activity; and
3. DFT's retaliation harmed PLF.[4]

I will now describe each of these three items in a little more detail.

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[1] G.L. c. 149, § 185 is commonly called the Whistleblower Act, including by the Massachusetts courts. See, e.g., *Tryon* v. *Mass. Bay Transp. Auth.*, 98 Mass. App. Ct. 673, 674 (2020); *Trychon* v. *Mass. Bay Transp. Auth.*, 90 Mass. App. Ct. 250, 250 (2016). However, the statute does not use the word "whistleblower," and one of the three claims it authorizes, based on refusal to participate in certain activities, does not involve reporting government misbehavior. Some judges believe that the word "whistleblower" currently carries political baggage that might affect jury behavior. For that reason, this instruction refers to "government retaliation against its employee" rather than "whistleblowing." A judge using these instructions might choose to use the term "whistleblower" to substitute for, or to supplement, the language employed in this model instruction.

[2] G.L. c. 149, § 185(a)(2) defines "Employer" subject to the law as "the Commonwealth, and its agencies or political subdivisions, including, but not limited to, cities, towns, counties and regional school districts, or any authority, commission, board or instrumentality thereof."

[3] G.L. c. 149, § 185 does not mention individual liability of supervisors or other employees of the defendant agency, and federal courts have held that it creates no individual liability. See *Ahanotu* v. *Mass. Tpk. Auth.,* 466 F. Supp. 2d 378 (D. Mass. 2006).

[4] *Antonellis* v. *Dep't of Elder Affairs*, 98 Mass. App. Ct. 251, 264 (2020), quoting *Trychon* v. *Mass. Bay Transp. Auth.,* 90 Mass. App. Ct. 250, 255 (2016).

(a) Protected Activity

First, PLF must prove that [he/she] engaged in activity protected by this law.

<Only instruct on the particular type or types of whistleblowing activities claimed by PLF; the three "options" are laid out below.>

<First option: if claim is retaliation under G.L. c. 149, § 185(b)(1) for disclosure or threatened disclosure, instruct as follows:>

In the circumstances of this case, PLF must show that the following things are more likely true than not true:

- While working as an employee of DFT,
- PLF disclosed, or threatened to disclose,
- to a supervisor at DFT or to a government agency or public body or its employee [consider naming the agency or body at issue],
- an activity, policy, or practice of DFT [or of a different governmental body with whom DFT had a business relationship],
- that PLF reasonably believed either violated a law, or posed a risk to public health, safety, or the environment.[5]

PLF does not need to prove that the government conduct at issue actually violated a law. PLF need prove only that [he/she] reasonably believed that the conduct violated a law, or posed a risk to public health, safety, or the environment.

<if the alleged violation is not self-explanatory> For purposes of this case, if PLF reasonably believed that the conduct violated [name law, regulation, etc.], that belief meets this requirement. [instruct on the substance of the law, regulation, etc. if appropriate]

"Reasonably believed" has two parts. First, PLF [himself/herself] must have actually held that belief. Second, an objective, ordinary person would have

[5] G.L. c. 149, § 185(b)(1).

thought that PLF's belief was "reasonable," based on all the facts and circumstances.

<if the 185(b)(1) claim is based on disclosure to a public body, rather than disclosure to a supervisor, add the following:> PLF must also prove that PLF notified a supervisor about the activity, policy, or practice in writing and allowed DFT a reasonable opportunity to correct the activity, policy, or practice before reporting the matter to an outside government agency.[6] However, PLF need not provide this written notice if at least one of the following conditions existed:[7]

- if PLF was reasonably certain that one or more supervisors at DFT knew about the activity, policy, or practice, and the situation was an emergency; or
- if PLF reasonably feared physical harm as a result of the disclosure; or
- if PLF's disclosure concerned what PLF reasonably believed to be a crime, and [he/he] made that disclosure to a court, a grand jury, or trial jury, or to a prosecutor or police officer.

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[6] G.L. c. 149, § 185(c)(1). *Cristo* v. *Worcester County Sheriff's Office,* 98 Mass. App. Ct. 372, 377 (2020) (notice requirement applies only to disclosure-based claims, that is, claims under G.L. c. 149, § 185(b)(1)); *id.* at 379 (notice is required "only before an employee brings misconduct to the attention of a public body, not before an employee brings misconduct to the attention of a supervisor").

[7] G.L. c. 149, § 185(c)(2).

<Second option: if claim is retaliation under G.L. c. 149, § 185(b)(2) for testifying or providing information during an investigation, instruct as follows:>

In the circumstances of this case, PLF must show that the following things are more likely true than not true:

- While working as an employee of DFT,
- PLF [provided information to] [testified before] a public body conducting an investigation into an activity, policy, or practice of DFT [or of a different governmental body with whom DFT has a business relationship]
- that PLF reasonably believed either violated a law, or posed a risk to public health, safety, or the environment.[8]

PLF does not need to prove that the government conduct that [he/she] testified about, or provided information about, actually violated a law. PLF need prove only that [he/she] reasonably believed that the conduct violated a law, or posed a risk to public health, safety, or the environment.

<if the alleged violation is not self-explanatory> For purposes of this case, if PLF reasonably believed that the conduct violated [name law, regulation, etc.], that belief meets this requirement. [instruct on the substance of the law, regulation, etc. if appropriate]

"Reasonably believed" has two parts. First, PLF [himself/herself] must have actually held that belief. Second, an objective, ordinary person would have thought that PLF's belief was "reasonable," based on all the facts and circumstances.

[8] G.L. c. 149, § 185(b)(2).

<Third option: if claim is retaliation under G.L. c. 149, § 185(b)(3) for objecting to or refusing to participate in an activity, instruct as follows:>

In the circumstances of this case, PLF must show that the following things are more likely true than not true:

- While working as an employee of DFT,
- PLF objected to, or refused to participate in,
- an activity, policy, or practice that PLF reasonably believed either violated a law, or posed a risk to public health, safety, or the environment.[9]

PLF does not need to prove that the government conduct that [he/she] objected to, or refused to participate in, actually violated a law. PLF need prove only that [he/she] reasonably believed that the conduct violated a law, or posed a risk to public health, safety, or the environment.

<if the alleged violation is not self-explanatory> For purposes of this case, if PLF reasonably believed that the conduct violated [name law, regulation, etc.], that belief meets this requirement. [instruct on the substance of the law, regulation, etc. if appropriate]

"Reasonably believed" has two parts. First, PLF [himself/herself] must have actually held that belief. Second, an objective, ordinary person would have thought that PLF's belief was "reasonable," based on all the facts and circumstances.

(b) Retaliation

The second thing PLF must prove is that DFT retaliated against PLF because PLF engaged in the protected activity.

"Retaliation" means that DFT discharged, suspended, or demoted PLF, or took other adverse action against PLF concerning the terms and conditions

[9] G.L. c. 149, § 185(b)(3).

of PLF's employment, and did so because PLF engaged in the protected activity.[10]

So PLF must prove that DFT's desire to retaliate against PLF for engaging in protected activity was a real factor in DFT's decision to treat PLF adversely. PLF need not prove that his/her protected activity was the only reason for DFT's action against PLF. But PLF must prove that his/her protected activity is what made the difference in how DFT treated him/her. In other words, PLF must prove that DFT would not have treated PLF adversely unless PLF had engaged in the protected activity.[11]

(c) Harm Suffered by PLF

Third, PLF must prove the damages—meaning dollar value of the injury—that PLF suffered because DFT retaliated against [him/her] for engaging in protected activity. If PLF proves this claim, you should award an amount of money that will fairly compensate PLF for losses incurred because of DFT's conduct. The purpose is not to reward PLF, and it is not to punish DFT. PLF must prove, more likely than not, what the nature and amount of the damages are. For example, if you find that DFT employer reduced PLF's wages in retaliation for engaging in protected activity, PLF must prove the amount of the wage reduction.

If you find that DFT fired PLF in retaliation for engaging in protected activity, then you must decide whether PLF is entitled to back pay, front pay, or both.

- Back pay is the compensation lost by PLF from the date of termination until today. This compensation includes all lost wages and other compensation[12] that PLF would have earned up

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[10] G.L. c. 149, § 185(a)(5).

[11] See *Edwards* v. *Commonwealth*, 488 Mass. 555, 571-573 (2021).

[12] The statute entitles a plaintiff to compensation for "lost wages, benefits and other remuneration." G.L. c. 149, § 185(d)(4). In fact, the law allows for compensation in the amount of three times those wages and benefits, plus interest, without expressly stating whether the decision to treble these damages is for the judge or the jury. The Appeals Court has twice

to today but for DFT's retaliation, decreased by the amount of any wages earned by PLF from another employer after DFT fired PLF.

- Front pay is any compensation lost by PLF from today into the future because of DFT's retaliation. In calculating front pay, you should consider the following factors:
  - the amount of wages and benefits that PLF more likely than not would have received from DFT between today and the date PLF would have retired;
  - whether PLF has other employment opportunities;
  - what amount of wages and benefits PLF will probably receive from another employer until [his/her] retirement;
  - the possibility of inflation and wage increases in the future.

If you choose to award front pay, you must reduce that future pay to its present value. That is because PLF can invest a front pay award today so that the entire sum will start earning interest immediately. PLF will not have to wait for future paychecks before receiving the money. Therefore, if you award front pay, you must determine the amount of money that, if invested today at a reasonable rate of interest, would provide PLF with the future income stream that you have decided that PLF will lose because of DFT's retaliation.

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implicitly approved a Superior Court judge's decision to reserve this question to himself or herself. See *Tryon* v. *Mass. Bay Transp. Auth.*, 98 Mass. App. Ct. 673, 677, 687 (2020); *Cristo* v. *Worcester County Sheriff's Office,* 98 Mass. App. Ct. 372, 381 (2020). Noting the absence of statutory guidance about the standard to be applied, the Appeals Court has said that the judge should base her treble damages decision on whether the defendant's conduct was "outrageous, because of the defendant's evil motive or [its] reckless indifference to the rights of others," the test employed in treble damages analyses under other employment statutes. *Id.*, quoting *Goodrow* v. *Lane Bryant, Inc.,* 432 Mass. 165, 178 (2000) (which interpreted G.L. c. 151, § 1B). While recognizing that *Cristo* and *Tryon* do not expressly prohibit a judge from letting the jury decide the treble damages question, these instructions assume that a judge will generally decide that issue, and therefore do not include a jury instruction about treble damages.

<*If applicable:*> [Expert witness] testified about how to make these calculations and expressed [his/her] opinion as to what PLF should be awarded for both back pay and front pay. You are free to accept or reject all or part of that testimony, keeping in mind my earlier instructions about the testimony of expert witnesses.

[<*If applicable:*> PLF also says that [he/she] was harmed because DFT's retaliation [reduced the size of PLF's pension] [deprived PLF of the ability to qualify for a pension]]. If PLF has proved that this is more likely true than not true, then you may award compensation to PLF for this reduction in pension benefits, after considering the same factors I described above concerning loss of front pay.[13]

Sometimes there is an element of uncertainty in putting a dollar value on the amount of harm suffered by a plaintiff. That does not necessarily prevent you from awarding full and fair compensation, as long as the evidence makes it possible for you to determine the amount in a reasonable manner. We leave that amount to your judgment, as members of the jury. You may not determine PLF's damages, or harm suffered, by mere guesswork, but it is enough if the evidence allows you to draw fair and reasonable conclusions about the extent of the harm.

[13] Cf. *DaPrato* v. *Mass. Water Res. Auth.*, 482 Mass. 375, 396-397 (2018) (front pay for lost pension benefits in an FMLA case). See also *id.* at 396, n. 24 (citing authorities under other statutes).