

## Wage Act — Retaliation.

PLF claims that DFT retaliated against him/her because PLF tried to enforce his/her rights under the Wage Act.<sup>1</sup> To prove this claim, PLF must prove that four things are more probably true than not true:

1. PLF asserted [his/her] rights under the Wage Act.
2. PLF reasonably and in good faith believed that [DFT employer] was engaged in wrongful conduct under the Wage Act.
3. [DFT employer] penalized PLF in some way because PLF asserted [his/her] rights under the Wage Act.
4. PLF suffered some harm or injury because of the retaliation.

I will discuss each of these requirements in a little more detail.

### (a) Asserting Rights under the Wage Act

First, PLF must prove that [he/she] asserted rights under the Wage Act.

For example, a person can seek to assert or enforce [his/her] Wage Act rights by complaining to someone in a position to remedy the situation. The complaint can be to a government agency, such as the Attorney General's office, or to the person's supervisor at work. The person making the complaint is then protected from retaliation. This law also protects an employee from retaliation for filing a Wage Act lawsuit.

< *If applicable*:> In addition, the law protects an employee from retaliation for certain other kinds of involvement in Wage Act proceedings, even if those proceedings do not involve the employee's own wages.<sup>2</sup> Specifically,

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<sup>1</sup> G.L. c. 149, § 148A ("No employee shall be penalized by an employer in any way as a result of any action on the part of the employee to seek his or her rights" under the Wage Act).

<sup>2</sup> *Id.* ("Any employer who discharges or in any other manner discriminates against any employee because such employee has made a complaint to the attorney general or any other person, or assists the attorney general in any investigation under this chapter . . . or has testified or is about to testify in any such proceedings, shall have violated this section . . .")

if an employee participates in any Wage Act proceeding by assisting in an investigation by the Attorney General, or by testifying or agreeing to testify in such a proceeding, the employer cannot penalize the employee.<sup>3</sup>

**(b) Belief That [DFT Employer] Was Violating the Wage Act**

Second, PLF must prove that [he/she] reasonably and in good faith believed that [DFT employer] was engaged in wrongful conduct under the Wage Act.<sup>4</sup> PLF need not win a Wage Act claim for nonpayment of wages in order to win [his/her] claim for retaliation for asserting [his/her] Wage Act rights. Therefore, if you decide that [DFT employer] did not actually deprive PLF of earned wages, you still must decide whether [DFT employer] penalized PLF for complaining, reasonably and in good faith, about what PLF believed was an unlawful failure to pay wages.

**(c) Penalty for Asserting Wage Act Rights.**

Third, PLF must prove that [DFT employer] penalized [him/her] because PLF asserted or tried to enforce rights under the Wage Act.

One possible penalty would be to terminate the employment of PLF. [*if applicable:*> But lesser penalties are also prohibited. Such lesser penalties might include a demotion, a pay cut, a transfer to a less desirable shift or work location, or, as the retaliation law puts it, being “penalized by an employer in any way.”]

<*For liability of individual defendants,*<sup>5</sup> *see instructions under “Wage Act — Earned Wages.”*>

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<sup>3</sup> *Smith v. Winter Place LLC*, 447 Mass. 363, 367-368 (2006).

<sup>4</sup> *Fraelick v. Perket PR, Inc.*, 83 Mass. App. Ct. 698, 706 (2013).

<sup>5</sup> The retaliation statute does not expressly provide for individual liability of the President, Treasurer, and “any officers or agents having the management of” the employer, as do the statutes covering failure to pay earned wages and misclassification. While no court has expressly held that personal liability exists for retaliation, courts have discussed claims for individual liability in retaliation cases as if such liability exists. See, e.g., *Bradley v. Quincy Community Action Programs, Inc.*, 94 Mass. App. Ct. 1112 (2018) (unpublished decision); *Joyce v. The Upper Crust*, 2015 Wage & Hour Cas.2d 186, 186 (D. Mass. 2015). See also *Cook*

PLF must prove not only that he/she suffered some penalty, but also that [DFT employer] took that action because PLF tried to assert or enforce rights under the Wage Act. An employer may lawfully penalize an employee for many reasons. It will be up to you to decide whether PLF has proved that [DFT employer] imposed the penalty on [PLF] in retaliation for PLF's asserting [his/her] rights under the Wage Act.

#### **(d) Damages**

Fourth, PLF must prove the damages—meaning the harm or injury—that PLF suffered because [DFT employer] retaliated against [him/her] for asserting [his/her] rights under the Wage Act. [For example, if you find that [DFT employer] reduced PLF's wages in retaliation for exercising Wage Act rights, PLF must prove the amount of the wage reduction.]

If you find that [DFT employer] fired PLF in retaliation for exercising Wage Act rights, then PLF is entitled to both back pay and front pay.

**Back pay** is the compensation lost by PLF from the date of termination until today. This compensation includes all lost wages that PLF would have earned up to today but for [DFT employer's] retaliation, decreased by the amount of any wages earned by PLF from another employer after [DFT employer] fired PLF. "Wages" for this purpose includes not only regular wages or salary, but also other types of compensation I described earlier in discussing PLF's claim for failure to pay earned wages.

**Front pay** is any compensation lost by PLF from today into the future because of [DFT employer's] retaliation. In calculating front pay, you should consider the following factors:

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*v. Patient Edu, LLC*, 465 Mass. 548, 551–552 (2013) ("If a liberal, even if not literally exact, interpretation of certain words [in the Wage Act] is necessary to accomplish the purpose indicated by the words as a whole, such interpretation is to be adopted rather than one which will defeat that purpose").

- the amount of wages and benefits that PLF more likely than not would have received from [DFT employer] between now and the date PLF has proven would have been [his/her] retirement date;
- 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 he can invest 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 [he/she] will lose because of [DFT employer]'s retaliation.

< *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. Later on I will give you additional instructions about the testimony of witnesses who testify about their opinions based on their special training and experience.

Sometimes there is an element of uncertainty in proving the amount of damages. 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 by mere guesswork, but it is enough if the evidence allows you to draw fair and reasonable conclusions about the extent of the damages.