**10.8 Civil Rights—Title VII—Retaliation—Elements and Burden of Proof**

The plaintiff seeks damages against the defendant for retaliation. The plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

1. the plaintiff:

[participated in an activity protected under federal law, that is [*specify protected activity, e.g., filing a discrimination complaint*]]

*or*

[opposed an unlawful employment practice, that is [*specify unlawful employment practice*]]; and

2. the employer subjected the plaintiff to an adverse employment action, that is [*specify adverse employment action*]; and

3. the plaintiff was subjected to the adverse employment action because of [[his] [her]] [participation in a protected activity] [opposition to an unlawful employment practice].

A plaintiff is “subjected to an adverse employment action” because of [[his] [her]] [participation in a protected activity] [opposition to an unlawful employment practice] if the adverse employment action would not have occurred but for that [participation] [opposition].

If you find that the plaintiff has proved all three of these elements, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

**Comment**

Because the third element is whether the plaintiff was subjected to the adverse employment action “because of” his or her participation in a protected activity or opposition to an unlawful employment practice, consider including the definition of “because of” from Instruction 10.3.

Title VII makes it an unlawful employment practice for a person covered by the Act to discriminate against an individual “because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” 42 U.S.C. § 2000e-3(a). *See Crawford v. Metro. Gov’t of Nashville & Davidson Cty., Tenn*., 555 U.S. 271, 274 (2009) (noting that the “antiretaliation provision has two clauses . . .. The one is known as the ‘opposition clause,’ the other as the ‘participation clause’”); *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997) (“An employer can violate the anti-retaliation provisions of Title VII in either of two ways: ‘(1) if the [adverse employment action] occurs because of the employee’s opposition to conduct made an unlawful employment practice by the subchapter, or (2) if it is in retaliation for the employee’s participation in the machinery set up by Title VII to

enforce its provisions.’” (alterations in original) (citations omitted)).

When an affirmative defense is asserted, this instruction should be accompanied by the appropriate affirmative defense instruction.

For a definition of “adverse employment action” in the context of retaliation, *see* Instruction 10.10 (Civil Rights—Title VII— “Adverse Employment Action” in Retaliation Cases).

In order to be a protected activity, the plaintiff’s opposition must have been directed toward a discriminatory act by an employer or an agent of an employer. *See Silver v. KCA, Inc.*, 586 F.2d 138, 140-42 (9th Cir. 1978) (holding that employee’s opposition to a racially discriminatory act of a co-employee cannot be the basis for a retaliation action); *E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013-14 (9th Cir. 1983) (holding that employee’s objections to discriminatory practices by warehouse personnel manager, on facts presented, constituted opposition to discriminatory actions of employer).

Informal as well as formal complaints or demands are protected activities under Title VII. *See Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 506 (9th Cir. 2000).

Regarding the third element, “a plaintiff making a retaliation claim under § 2000e-3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.” *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013) (rejecting motivating factor test in retaliation claim). The causation element may be inferred based on the proximity in time between the protected action and the retaliatory act; however, if the proximity in time is the only evidence to support plaintiff’s retaliatory act, it must be “very close” in time. *See Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (holding causation may be inferred from proximity in time between acts); *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001). There is no per se too long or too short period of time that satisfies the causation requirement. *Howard v. City of Coos Bay*, 871 F.3d 1032, 1046 (9th Cir. 2017).

Individuals who violate 42 U.S.C. § 1981 for retaliatory conduct can be held personally liable for punitive damages “1) if they participated in the deprivation of Plaintiffs’ constitutional rights; 2) for their own culpable action or inaction in the training, supervision, or control of their subordinates; 3) for their acquiescence in the constitutional deprivations; or 4) for conduct that showed a reckless or callous indifference to the rights of others.” *Flores v. City of Westminster*, 873 F.3d 739, 757 (9th Cir. 2017).

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