# 9.11A Particular Rights—First Amendment—Convicted Prisoner/Pretrial Detainee’s Claim of Retaliation

As previously explained, the plaintiff has the burden of proving that the [act[s]] [failure to act] of the defendant deprived the plaintiff of particular rights under the United States Constitution. In this case, the plaintiff alleges the defendant deprived [him] [her] [other pronoun] of [his] [her] [other pronoun] rights under the First Amendment to the Constitution when [*insert factual basis of the plaintiff’s claims*].

 Under the First Amendment, a [prisoner] [pretrial detainee] has the right to access the courts and petition the government for redress of grievances. This includes the right to [file prison grievances] [pursue civil rights litigation against prison officials] [*specify particular constitutional interest*]. To establish the defendant deprived the plaintiff of this First Amendment right, the plaintiff must prove the following additional elements by a preponderance of the evidence:

1. the plaintiff was engaged in conduct protected under the First Amendment;
2. the defendant took adverse action against the plaintiff;
3. the defendant took adverse action against the plaintiff because of the plaintiff’s protected conduct;
4. the adverse action taken by the defendant chilled the plaintiff’s exercise of [his] [her] [other pronoun] First Amendment rights; and
5. the action taken by the defendant did not reasonably advance a legitimate correctional goal.

For this type of claim, adverse action is action that would chill or silence a person of ordinary firmness from engaging in that activity.

To prevail, the plaintiff must show that [his] [her] [other pronoun] protected conduct was the substantial or motivating factor behind the defendant’s conduct. A substantial or motivating factor is a significant factor. [The chronology of events may be considered as circumstantial evidence of a causal connection between the adverse action and the plaintiff’s protected conduct.]

**Comment**

 Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3–9.8, and when the plaintiff is a convicted prisoner or a pretrial detainee.

Allegations of retaliation against a prisoner’s First Amendment rights to speech or to petition the government may support a section 1983 claim. *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995); *Valandingham v. Bojorquez*, 866 F.2d 1135, 1138 (9th Cir. 1989) (holding that labeling a prisoner a snitch in retaliation for petitioning prison and government officials for redress of grievances states a viable claim); *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985) (holding that prison officials could not transfer an inmate to another prison in retaliation for the inmate’s exercise of his First Amendment right). “Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005); *accord* *Watison v. Carter*, 668 F.3d 1108, 1114-15 (9th Cir. 2012) (identifying same elements).

The filing of grievances and the pursuit of civil rights litigation against prison officials are both protected activities. *Rhodes*, 408 F.3d at 567-68; *see also* *Blaisdell v. Frappiea*, 729 F.3d 1237, 1243 (9th Cir. 2013) (“Prisoners have the right to litigate without active interference, a guarantee that exists so prisoners have a viable mechanism to remedy prison injustices.”) (internal quotation marks, brackets, and citation omitted).

Adverse action taken against a prisoner “need not be an independent constitutional violation. The mere threat of harm can be an adverse action.” *Watison*, 668 F.3d at 1114 (internal brackets and citations omitted). Adverse actions include threats of discipline, transfer, or harm and do not need to be an independent constitutional violation. *Brodheim v. Cry*, 584 F.3d 1262, 1269-70 (9th Cir. 2009) (holding that an inmate may prevail on a First Amendment claim against an officer where the officer threatens to transfer the inmate in retaliation for persistent use of the prison grievance system); *see* *Austin v. Terhune*, 367 F.3d 1167, 1171 (9th Cir. 2004) (stating that a false accusation may constitute retaliation where deprivation of a benefit “was the natural and proximate result of” the false accusation and one can infer based on the facts alleged that the accuser “intended that result”).

To establish a retaliatory motive, an inmate “must show that his protected conduct was the substantial or motivating factor behind the defendant’s conduct.” *Johnson v. Ryan*, 55 F.4th 1167, 1201-02 (9th Cir. 2022) (citing *Brodheim*, 584 F.3d at 1271). A plaintiff may offer “either direct evidence of retaliatory motive or at least one of three general types of circumstantial evidence [of that motive].” *McCollum v. Cal. Dep’t of Corr. & Rehab.*, 647 F.3d 870, 882 (9th Cir. 2011) (quoting *Allen v. Iranon*, 283 F.3d 1070, 1077 (9th Cir. 2002)). Circumstantial evidence of motive includes: (1) proximity in time between the protected conduct and the alleged retaliation, (2) the defendant’s expressed opposition to the conduct, or (3) other evidence that the reasons proffered by the defendant for the adverse action were false and pretextual. *McCollum*, 647 F.3d at 882 (citing *Allen*, 283 F.3d at 1077). A causal connection between the adverse action and the protected conduct can be shown by a chronology of events from which retaliation can be inferred. *Watison*, 668 F.3d at 1114; *Pratt*, 65 F.3d at 808 (“[T]iming can properly be considered as circumstantial evidence of retaliatory intent.”). Mere speculation that the defendants acted out of retaliation is not sufficient. *Wood v. Yordy*, 753 F.3d 899, 905 (9th Cir. 2014).

The plaintiff must also show that the exercise of First Amendment rights was chilled, though not necessarily silenced, by the alleged retaliatory conduct. *Rhodes*, 408 F.3d at 569. The plaintiff must allege either a chilling effect on future First Amendment activities, or that he suffered some other harm that is “more than minimal.” *Watison*, 668 F.3d at 1114 (reversing dismissal of retaliation claim and holding that “chilling effect” pleading element was satisfied where prisoner alleged “more than minimal” harm because guard refused to serve him one breakfast in retaliation for filing an inmate grievance); *Gomez v. Vernon*, 255 F.3d 1118, 1127 (9th Cir. 2001) (“[A] retaliation claim may assert an injury no more tangible than a chilling effect on First Amendment rights.”). The plaintiff does not have to demonstrate that his speech was “actually inhibited or suppressed.” *Rhodes*, 408 F.3d at 569. “That the retaliatory conduct did not chill the plaintiff from suing the alleged retaliator does not defeat the retaliation claim at the motion to dismiss stage.” *Watison*, 668 F.3d at 1114.

The plaintiff bears the burden of proving the absence of a legitimate correctional goal for the adverse action. *Johnson*, 55 F.4th at 1202 (citing *Pratt*, 65 F.3d at 806). With respect to this fifth factor, the Supreme Court has cautioned that “‘federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment,’ especially with regard to ‘the fine-tuning of the ordinary incidents of prison life, a common subject of prisoner claims.’” *Pratt*, 65 F.3d at 807 (quoting *Sandin v. Conner*, 515 U.S. 472, 482-83 (1995)). A plaintiff successfully pleads that the action did not reasonably advance a legitimate correctional goal by alleging, in addition to a retaliatory motive, that the defendant’s actions were “arbitrary and capricious” or that they were “unnecessary to the maintenance of order in the institution.” *Watison*, 668 F.3d at 1114-15.

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