UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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LUIS ROSALES,

Plaintiff,

9:03-CV-601
(LES)

-against-

LIEUTENANT QUINN; *et al*.

*Defendant*s.

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DEFENDANTS' PROPOSED JURY CHARGES

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TABLE OF CONTENTS

General Introduction/
Province of the Court and Jury

MEMBERS OF THE JURY:

Now that you have heard the evidence and the argument, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Counsel have quite properly referred to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by counsel and that stated by the court in these instructions, you are of course to be governed by the Court's instructions.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice or public opinion. All parties expect that you will carefully and impartially consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

Authority: 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions § 71.01 (4th ed. 1987)

Multiple Defendants

Each defendant is entitled to a fair consideration of his own defense. Now, keep in mind here that each of these defendants is chargeable only for his own individual actions. Unless otherwise stated, all instructions given you govern the case as to each defendant.

Authority: 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions § 71.06 (4th ed. 1987); *Vetters v. Berry*, 575 F.2d 90, 95 (6th Cir. 1978)

State Not a Defendant

The State of New York is not a defendant in this case. This is a suit against individuals.

Authority: *Wilson v. Prasse*, 325 F. Supp. 9 (W.D. Pa. 1971), *aff'd*, 463 F.2d 109 (3d Cir. 1972).

Defendant Must Be Personally Involved

Unless otherwise stated, the jury should consider each instruction given to apply separately and individually to each defendant in the case. As I have told you, you must consider each defendant individually. If I have instructed you to consider evidence only against one particular defendant you may not consider that evidence in considering whether plaintiff has met his burden of proving his claim against another defendant.

The law requires that a defendant be personally involved in conduct that deprived another person of his constitutional rights before that defendant may be held liable for such deprivation. You, therefore, may not find one defendant liable for the actions taken by another defendant; nor may you, in consideration of damages, if you reach the question, award damages against a defendant based on actions taken by another individual, whether or not the individual is a party in this case. You may not hold a defendant liable merely because of the position he holds.

Authority: *McKinnon v. Patterson*, 568 F.2d 930 (2d Cir 1977), *cert denied*, 434 US 1087 (1978); 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions §§ 71.03, 71.07 (4th ed. 1987).

Burden of Proof--Preponderance of Evidence

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his claim by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence in the case, the jury should find for the defendant as to that claim.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

Authority: 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions § 72.01 (4th ed. 1987).

Inferences Defined - Presumption of Regularity -
Ordinary Course of Business - Obedience to Law

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

Unless and until outweighed by evidence in the case to the contrary, you may find that official duty has been regularly performed; that private transactions have been fair and regular; that the ordinary course of business or employment has been followed; that things have happened according to the ordinary course of nature and the ordinary habits of life; and that the law has been obeyed.

Authority: 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions § 72.04 (4th ed. 1987).

Evidence--Direct and Indirect or Circumstantial

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence--such as the testimony of an eyewitness. The other is indirect or circumstantial evidence--the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of *all* evidence in the case, both direct and circumstantial.

Authority: 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions § 72.03 (4th ed. 1987); Some Suggested General Instructions for Federal Civil Cases, Civ. 2.02, 28 F.R.D. 401, 416.

Objections--Stricken Testimony--Sidebar Conferences

As you know, the parties' counsel have made a number of objections throughout the trial, as they are required to do. The Court's rulings on objections made by counsel are not to be considered by you in any respect. Counsel have not only the right, but the duty, to make whatever legal objections there may be to the admission of evidence. And while interruptions of the testimony to voice and discuss objections may have been frustrating to you at times, you must recognize that the law provides for such a procedure in order to ensure a fair trial.

When the Court has sustained an objection, you must disregard the question and may not speculate as to what the answer would have been. Similarly, if the Court has overruled an objection and permitted a question, the Court has not expressed any opinion as to the weight or effect of the evidence.

Whenever testimony was stricken, the reason is of no concern to you, and such stricken testimony must be disregarded by you.

From time to time during the trial, “sidebar” conferences were held out of your hearing. They related to matters of law which do not concern you, and these conferences or their purposes may not enter into your consideration.

Admissions and Pleadings and Stipulated Facts

Prior to the trial of this case, the parties filed written statements of their claims, known as the pleadings. Statements in the pleadings are not evidence, but simply set forth the facts that the parties claim to exist.

[IF APPLICABLE:]

Before and during the trial of this case the parties entered into certain stipulations or agreements in which they agreed that certain facts could be taken as true without further proof. By this procedure it is often possible to save time.

Since the parties have so agreed, you are to take such facts as true for purposes of this case.

Authority: Adapted from 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions § § 70.03, 70.04 (4th ed. 1987).

Credibility of Witnesses

When I explained the burden of proof a moment ago, you may recall that I said that plaintiff is required to prove certain elements by a preponderance of the *credible* evidence. Credible evidence means believable evidence. You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. That is, you must determine whether and to what extent you believe or do not believe each of the witnesses.

There are, however, various guidelines or factors to consider which may assist you in making these determinations of credibility. You start by using your everyday common sense. You should carefully scrutinize all of the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. You should consider the candor, accuracy of recollection, appearance, background, and demeanor of each witness on the stand, to help you determine his or her frankness or lack of frankness in testifying. You may and should consider whether a witness's testimony is supported by or contradicted by other credible and believable evidence. Consider also the certainty and clarity with which each witness testifies as to given points. Consider any possible motive or lack of motive the various witnesses may have had for testifying in the way they did; any interest or lack of interest in the outcome of the trial which the witnesses may have; and any relation the witness may bear to either side of the case. Consider any inconsistencies between the testimony of the witness and any previous statements that the witness may have made. Consider the

factual probability or improbability of the witness's testimony and consider the witness's opportunity for observation or for acquisition of information with respect to the matter about which the witness has testified. In weighing the effect of any discrepancy, always consider whether the discrepancy pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

Evidence that plaintiff or any witness has been convicted of a crime may be considered in weighing credibility.

Authority: Adapted from 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions §§ 73.01, 73.05 (4th ed. 1987); Federal Rules of Evidence 609.

Impeachment - Inconsistent Statements or Conduct

A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars; and you may reject all the testimony of that witness, or give it such weight as you may think it deserves.

An act or omission is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Authority: 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions § 73.04 (4th ed. 1987).

All Available Evidence Need Not be Produced

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

Authority: 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions § 73.11 (4th ed. 1987).

Elements of a Claim Under Section 1983:

Plaintiff claims a right to recovery under Section 1983 of Title 42 of the United States Code which reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state, subjects any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law.

Plaintiff claims a deprivation of his rights under the First Amendment to the United States Constitution. The First Amendment provides in relevant part that "Congress shall make no law ... abridging the ... right of the people ... to petition the Government for a redress of grievances."

In order to prove this claim, the burden is upon the plaintiff to establish by a preponderance of the evidence the following three propositions:

First, that the conduct complained of was committed by a person acting under color of state law;

Second, that this conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States; and

Third, that the defendants' acts were the proximate cause of the injuries and consequent damages sustained by the plaintiff.

I shall now examine each of the three elements in greater detail.

First Element - Action Under Color of State Law

Acts are done "under color of ... law" of a state not only when state officials act within the bounds or limits of their lawful authority, but also when such officers act without and beyond the bounds of their lawful authority. In order for unlawful acts of an official to be done "under color of any law," however, the unlawful acts must be done while the official is purporting or pretending to act in the performance of his official duties; that is to say, the unlawful acts must consist of an abuse or misuse of power which is possessed by the official only because he is an official; and the unlawful acts must be of such a nature, and be committed under such circumstances, that they would not have occurred but for the fact that the person committing them was an official, purporting to exercise his official powers.

Adapted from: Devitt & Blackmar, § 103.04.

Second Element - Generally

The second element of plaintiff's claim is that he was deprived of his federal rights by one or more of the defendants. In order for plaintiff to establish the second element of his claim, he must prove three things by a preponderance of the evidence: 1) that the defendants committed the acts alleged by plaintiff; 2) that those acts caused the plaintiff to suffer the loss of a federal right; and, 3) that, in performing the alleged acts the defendants acted intentionally.

An act is done intentionally if it is done knowingly, that is if it is done voluntarily and deliberately and not because of mistake, accident, negligence or other innocent reason. In determining whether a defendant acted knowingly or recklessly, you should remember that while witnesses may see and hear and be able to give direct evidence of what a person does or fails to do, there is no way of looking into a person's mind. Therefore, you have to depend on what was done and what the people involved said was in their minds and your belief or disbelief with respect to those facts.

Second Element - First Amendment Retaliation Claim

The First Amendment to the United States Constitution permits all persons, including the plaintiff, to petition the government, without fear of retaliation. A plaintiff asserting a First Amendment retaliation claim must establish: (1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action. In addition, plaintiff must show, by a preponderance of the evidence, that the defendants intentionally committed the alleged acts.

You must first determine whether the plaintiff engaged in protected speech or conduct that entitled him to First Amendment protection. In this case, the plaintiff asserts that the speech consisted of written and verbal complaints he filed with Auburn Correctional Facility staff. If you find that plaintiff's speech did not entitle him to First Amendment protection, then you must find in favor of the defendants and your deliberations are concluded. If you find that plaintiff's speech did entitle him to First Amendment protection, then your deliberations must continue.

If you continue your deliberations, you must next consider whether or not the defendants subjected the plaintiff to an adverse action. In order to establish an adverse action, a plaintiff must prove that the defendants subjected him to "conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights." Otherwise, the retaliatory act is insignificant and not constitutionally protected. If the plaintiff cannot demonstrate a change in his behavior as a

result of the alleged retaliation, he cannot prove a subjective chilling of his constitutional rights and would not be able to recover in this action. In addition, the plaintiff must show, by a preponderance of the evidence, that the alleged actions were in fact taken by the defendants and that the alleged actions were intentionally taken by the defendants.

If you find that the plaintiff was not subjected to an adverse action by the defendants, then you must find for the defendants and cease your deliberations. If you find that one or more of the defendants subjected plaintiff to an adverse action, then your deliberations continue.

If you continue your deliberations, you must next determine whether or not there was a causal connection between the protected conduct and the adverse action. In other words, in order to prove his First Amendment retaliation claim, the plaintiff must show by a preponderance of the evidence, that retaliation for the exercise of the plaintiff's constitutional rights was a substantial or motivating factor in the alleged actions taken by the defendants. If you find that the plaintiff has not show by a preponderance of the evidence that retaliation for the exercise of the plaintiff's constitutional rights was a substantial or motivating factor in the alleged actions taken by the defendants, then you must find for the defendants and cease your deliberations. However, if you find that plaintiff has show by a preponderance of the evidence that retaliation for the exercise of the plaintiff's constitutional rights was a substantial or motivating factor in the alleged actions taken by one or more of the defendants, then your deliberations continue.

Now, <u>if</u> you find that the defendants intentionally acted as plaintiff alleges, and <u>if</u>

you find the plaintiff's complaints were a substantial or motivating factor in the actions taken by the defendants, there is still another factor you must consider - whether the defendants would have taken the same action even in the absence of the plaintiff's constitutionally protected conduct. In other words, even if prison officials such as the defendants actions were based, in part upon and improper retaliatory motive, defendants cannot be held to have violated an inmate's constitutional rights if they can show, by a preponderance of the evidence, that they would have taken the same action even in the absence of the plaintiff's complaints to prison staff. However, it is only after the plaintiff has first proven by a preponderance of the evidence both that defendants intentionally did the acts alleged, and that the complaints were a substantial or motivating factor in the defendants decision to act as plaintiff has alleged. Furthermore, the defendants can defeat a First Amendment claim by showing they would have reached the same result or taken the same action in the absence of the protected conduct.

Therefore, if you find that the defendants would have taken the adverse action even in the absence of the improper retaliatory motive, then you must find for the defendants. However, if you find that the defendants would not have taken the adverse action even in the absence of the improper reason, then you must find for the plaintiff.

Authority: *Dawes v. Coughlin*, 239 F.3d 489, 492 (2d Cir. 2001); *Freeman v. Rideout*, 808 F2d 949, 951 (2d Cir 1986); *Franco v. Kelly*, 854 F2d 584 (2d Cir 1988); *Mt. Healthy City School District Board of Education v. Doyle*, 429 US 274 (1988); *Lowrance v. Actyl*, 20 F3d 529 (2d Cir 1994); *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996); *Lowrance v. Achtyl*, 20 F.3d 529, 535 (2d Cir. 1994).

Third Element - Proximate Cause of Injury

The plaintiff must also show by a preponderance of the evidence that the defendants' acts and conduct were the proximate cause of the plaintiff's alleged injuries.

A proximate cause is one that in a natural course, a continuous sequence, unbroken by any intervening cause, produces the injury, and without which the injury would not have occurred.

Stated another way, before plaintiff may recover damages for any injuries, he must first show by a preponderance of the evidence that such injury would not have come about were it not for a defendant's conduct. But even if he shows that, he must then show by a preponderance of the evidence that the injury in question, although caused by a defendant's conduct, was not also caused by some other intervening conduct other than the defendant's conduct.

An intervening cause is one that constitutes a new and independent source of plaintiff's injury. A new factor of plaintiff's injury which is not foreseeable by defendants is an intervening cause which prevents a defendant from being liable for plaintiff's injury even if the defendant's conduct was one of the causes of these injuries.

If you find that any one of the three elements of plaintiff's claim has not been proven by a preponderance of the evidence, you must return a verdict for the defendants.

Liability

If you determine that any of the defendants deprived the plaintiff of his constitutional rights, your verdict will be in favor of the plaintiff and you will go on to consider the damages to which the plaintiff is entitled. If you determine that the defendants did *not* deprive the plaintiff of his constitutional rights, your verdict will be in favor of the defendants. I remind you that your verdict, either for the plaintiff or for the defendants, must be unanimous.

Qualified Immunity

[In light of the Second Circuit's decision in *Stephenson v. Dingler*, 332 F.3d 68 (2d Cir. 2003), the defendants submit that the issue of qualified immunity is for the Court to decide. In the event the Court disagrees, defendants propose the following language for a qualified immunity charge.]

If you find the plaintiff has sustained his burden of proving all of these elements, you must then consider whether any or all of the defendants have established their affirmative defense of qualified immunity. For even if you find that a defendant's conduct violated plaintiff's rights, the defendants still may not be liable to the plaintiff.

A defendant is entitled to a qualified immunity if, at time he committed the acts and omissions alleged in the complaint, he did not know or could not be expected to know that what he did was in violation of plaintiff's constitutional rights. In other words, two factors must be found to exist. First, the defendant has a qualified immunity if he did not know that what the did was in violation of the plaintiff's constitutional rights and, secondly, if a public official could not have been expected at the time to know that the conduct was in violation of plaintiff's constitutional rights. Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct may violate some administrative regulation.

In deciding whether a defendant either knew or should have known that his conduct violated plaintiff's constitutional rights, you may consider the nature of the defendant's official duties, the character of his official position, the information that was

known to the defendant or not known to him, and the events which confronted him. You should not, however, consider what the defendant's subjective intent was even if you believe it was to harm the plaintiff. You should instead ask yourself what a reasonable official in the defendant's situation would have believed about the legality of his conduct.

If you find that a defendant did not know that his conduct violated plaintiff's constitutional rights and that a reasonable official in the defendant's situation would have believed his conduct to be lawful, then this element will be satisfied. A defendant has the burden of proving that he neither knew nor should have known that his actions violated federal law. If a defendant establishes by a preponderance of the evidence that he neither knew nor should have known that his actions violated plaintiff's constitutional rights, then you must return a verdict for the defendant even though you may have previously found that the defendant violated the plaintiff's rights while acting under color of state law.

Authority: *Stephenson v. Dingler*, 332 F.3d 68 (2d Cir. 2003), *Whitley v. Albers*, 475 U.S. 312 (1986); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied* 414 U.S. 1033 (1973); *Hudson v. McMillian*, 112 S. Ct. 995, 999 (1992); *Martinez v. California*, 444 U.S. 277 (1980); *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977); *Beverly v. Connor*, 330 F. Supp. 18 (S.D. Ga. 1971); *Taylor v. Allis-Chalmers Manufacturing Company*, 320 F. Supp. 1381 (E.D. Pa. 1969), *aff'd*, 436 F.2d 416 (3d Cir. 1970); *Johnson v. Geer*, 477 F.2d 101 (5th Cir. 1973); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 107 S. Ct. 3034 (1987); *Davis v. Scherer*, 468 U.S. 183 (1984).

Damages

If your verdict is in favor of the plaintiff you must go on to consider the damages to which the plaintiff is entitled. If and only if you find that any defendant violated plaintiff's First Amendment rights under the standards I have described to you, then you should proceed to consider the question of damages. The fact that I so instruct you does not mean that I think you should award any damages, and does not mean that you must award any. That is entirely for you to decide under the standards I have described and will describe to you.

You must first consider whether or not the plaintiff has established that any of the defendant's actions caused him a physical injury. If you determine that the defendants' actions did not cause the plaintiff to suffer a physical injury, then you may only award the plaintiff nominal damages in the amount of $1.00. However, if you determine that the plaintiff did suffer a physical injury, then you may go on to calculate the amount of damages to award the plaintiff.

For each claim on which a defendant is liable, plaintiff is entitled to recover an amount that will reasonably compensate him for the *actual* loss and damage which he has proved by a preponderance of the evidence that he has suffered as a *proximate* result of that defendant's unlawful conduct. You are not permitted to award speculative damages.

A plaintiff is not automatically entitled to recover compensatory damages solely by virtue of the fact - if you should find it to be a fact - that his constitutional rights were violated. He must also demonstrate that the constitutional deprivation caused him some

actual injury. A plaintiff in a civil rights action such as this is not permitted to recover damages based upon the abstract value or importance of a constitutional right; rather, such an award may only compensate a plaintiff for an actual injury that he sustained, such as medical expenses (if any) and pain and suffering (if any).

If you find that plaintiff's First Amendment rights were violated, but he did not sustain any actual or compensatory damages as a result, you may then award the plaintiff nominal damages in the amount of $1.00.

You should not award compensatory damages more than once for the same injury. The plaintiff is only entitled to be made whole again, not to recover more than he lost.

You must also be careful to impose damages solely upon the defendant or defendants who you find to be liable on that claim. Although there are five (5) defendants in this case, it does not follow that if one is liable, all are liable as well. Each defendant is entitled to fair, separate and individual consideration of the case without regard to your decision as to the other defendant. If you decide that any of the defendants are jointly liable on a particular claim, then you may simply determine the overall amount of damages for which they are liable, without breaking that figure down into individual percentages.

Authority: Adapted from 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions ch. 85 (4th ed. 1987); *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986); *Carey v. Piphus*, 435 U.S. 247, 253-67 (1978); *Smith v. Coughlin*, 698 F.2d 112 (2d Cir. 1983); *Smith v. Coughlin*, 748 F.2d 783, 789 (2d Cir. 1984) (as to nominal damages); 42 U.S.C. § 1997e(e); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Zehner v. Trigg,* 133 F 3d. 459, 462 (7th Cir. 1997) *affg.* 952 F. Supp 1318 (S.D. Ind. 1997); *Wright v. Dee*, 54 F.Supp.2d 199, 207 (S.D.N.Y 1999); *McFadden v. Sanchez*, 710 F.2d 907, 914 n. 6 (2d. Cir. 1983); *Gannon v. Bell*, 696 F.2d 17, 19, n. 2 (2d Cir. 1982).

Requested Punitive Damage Instruction

[Defendants contend that the evidence does not warrant the submission of the punitive damages issue to the jury. Therefore, the jury should not be charged on punitive damages. In the event the Court rejects this request, defendants propose the following language for a punitive damages charge]

Plaintiff has made a claim for punitive damages in this case. Punitive damages are not favored in law and are to be allowed only with caution and within narrow limits. They are to be awarded in cases brought under § 1983 only if you determine that plaintiff proved, by a preponderance of the evidence, that the conduct of the defendants was motivated by evil motive or intent or where it involved reckless indifference to the constitutionally protected rights of others. Punitive damages may be awarded only to deter or punish violations of constitutional rights. Punitive damages are awarded at the discretion of the jury in order to punish a defendant for extreme or outrageous conduct, or to prevent or deter a defendant or others in his position from engaging in such conduct in the future.

Provocation by plaintiff, while not a defense, may be considered in mitigation of damages, and to negate the award of punitive damages.

If you find that the plaintiff has failed to sustain the burden of showing that punitive damages are appropriate, you should indicate this finding on the verdict from.

If you decide to award punitive damages against either of the defendants in this case, we will reconvene for a further hearing so that you may consider the amount of

personal assets and liabilities of such individual defendant in fixing the amount of punitive damages which you may opt to assess.

Authority: *Zarcone v. Perry*, 572 F.2d 52, 56 (2d Cir. 1978); *McFadden v. Sanchez*, 710 F.2d 907, 912-14 (2d Cir), *cert. denied,* 464 U.S. 961 (1983); *Smith v. Wade*, 461 U.S. 30, 56 (1983); *Carey v. Piphus*, 435 U.S. 247, 257 n. 11 (1978); *Gagne v. Town of Enfield*, 734 F.2d 902 (2d Cir. 1984); 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions §§ 104.07, 105.03 (4th ed. 1987) (adapted).

Dated: July 9, 2007
Syracuse, New York

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