

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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M.M. FARRAKHAN,

*Plaintiff,*

9:03-cv-0928

-against-

(NAM)(DRH)

J. BURGE, Superintendent; M.L. BRADT, Deputy  
Commissioner of Security; C. GUMMERSON, Captain;  
WITHER, Sgt., R. HEWIT, Correctional Officer,

*Defendants.*

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**DEFENDANTS' PROPOSED JURY CHARGES**

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## THE STATUTE

The law to be applied in this case is the federal civil rights law which provides a remedy for individuals who have been deprived of their constitutional rights under color of state law. Section 1983 of Title 42 of the United States Code states:

“Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

## PURPOSE OF THE STATUTE

Section 1983 creates a form of liability in favor of persons who have been deprived of rights, privileges and immunities secured to them by the United States Constitution and federal statutes. Before section 1983 was enacted in 1871, people so injured were not able to sue state officials or persons acting under color of state law for money damages in federal court. In enacting the statute, Congress intended to create a remedy as broad as the protection provided by the Fourteenth Amendment and federal laws.

Section 1983 was enacted to give people a federal remedy enforceable in federal court because it was feared that adequate protection of federal rights might not be available in state courts.

## Authority

**United States Supreme Court:** *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982); *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976); *Mitchum v. Foster*, 407 U.S. 225, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972); *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).

## Source

**Modern Federal Jury Instructions**, Mathew Bender & Co., Inc., Chapter 87.

## **BURDEN OF PROOF**

I shall shortly instruct you on the elements of plaintiff's section 1983 claim, and on the elements of defendant's qualified immunity defense.

The plaintiff has the burden of proving each and every element of his section 1983 claim by a preponderance of the evidence. If you find that any one of the elements of plaintiff's section 1983 claim has not been proven by a preponderance of the evidence, you must return a verdict for the defendant.

The defendant has the burden of proving each element of his affirmative defenses. I shall shortly instruct you on the elements of this defense. If you find that any one of the elements of defendant's defenses have not been proven by a preponderance of the evidence, you must disregard the defense.

### **Authority**

**United States Supreme Court:** *Gomez v. Toledo*, 446 U.S. 635, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980).

### **Source**

**Modern Federal Jury Instructions**, Mathew Bender & Co., Inc., Chapter 87.

## **ELEMENTS OF A SECTION 1983 CLAIM**

To establish a claim under section 1983, plaintiff must establish, by a preponderance of the evidence, each of the following three elements:

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 defendant's 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.

### **Authority**

**United States Supreme Court:** *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981).

**Second Circuit:** *Eagleston v. Guido*, 41 F.3d 865 (2nd Cir. 1994).

### **Source**

**Modern Federal Jury Instructions**, Mathew Bender & Co., Inc., Chapter 87.

## **FIRST ELEMENT - ACTION UNDER COLOR OF STATE LAW**

### **ACTION UNDER COLOR OF STATE LAW - DEFINED**

The first element of the plaintiff's claim is that the defendants acted under color of state law. The phrase "under color of state law" is a shorthand reference to the words of section 1983, which includes within its scope action taken under color of any statute, ordinance, regulation, custom or usage, of any state. The term "state" encompasses any political subdivision of a state, such as a county or city, and also any state agencies or a county or city agency.

Action under color of state law means action that is made possible only because the actor is clothed with the authority of the state. Section 1983 forbids action taken under color of state law where the actor misuses power that he possesses by virtue of state law.

An actor may misuse power that he possesses by virtue of state law even if his acts violate state law; what is important is that the defendant was clothed with the authority of state law, and that the defendant's action was made possible by virtue of state law.

#### **Authority**

**United States Supreme Court:** *American Mfrs. Mut. Ins. Co. v. Sullivan*, -- U.S. --, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999); *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961); *Screws v. United States*, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945); *United States v. Classic*, 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1361 (1941); *Hague v. C.I.O.*, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939); *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278, 33 S. Ct. 312, 57 L. Ed. 510 (1913); *Ex parte Virginia*, 100 U.S. 339, 25 L. Ed. 676 (1880).

#### **Source**

**Modern Federal Jury Instructions**, Mathew Bender & Co., Inc., Chapter 87.

**FIRST ELEMENT - ACTION UNDER COLOR OF STATE LAW**  
**STATE OFFICIAL ACTING UNDER COLOR OF STATE LAW**

The plaintiff claims that the defendants were acting under color of the law of the State of New York when the defendant allegedly deprived the plaintiff of his constitutional right to be free of cruel and unusual punishment by failing to protect him from harm by another inmate.

In order for an act to be under color of state law, the act must be of such nature and committed under such circumstances that it would not have occurred except for the fact that the defendant was clothed with the authority of the state – that is to say, the defendant must have purported or pretended to be lawfully exercising his official power while in reality abusing it.

The act of a state official in pursuit of his personal aims that is not accomplished by virtue of his state authority is not action under color of state law merely because the individual happens to be employed by the New York State Department of Correctional Services.

**Authority**

**United States Supreme Court:** *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976).

**Source**

**Modern Federal Jury Instructions**, Mathew Bender & Co., Inc., Chapter 87.

## SECOND ELEMENT - DEPRIVATION OF RIGHT

### GENERAL INSTRUCTION

The second element of plaintiff's claim is that he was deprived of a federal right by each defendant. In order for the plaintiff to establish the second element against each defendant, he must show these things by a preponderance of the evidence: first, that each defendant committed the acts alleged by plaintiff; second, that those acts caused the plaintiff to suffer the loss of a federal right; and, third, that, in performing the acts alleged, each defendant acted with deliberate indifference to the plaintiff.

#### Authority

**United States Supreme Court:** *Conn v. Gabbert*, 526 U.S. 286, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999 ); *Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980); *Martinez v. California*, 444 U.S. 277, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980); *Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979); *Monell v. Department of Social Servs*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

**Second Circuit:** *Young v. County of Fulton*, 160 F.3d 899 (2d Cir. 1998); *Marshall v. Switzer*, 10 F.3d 925 (2nd Cir. 1993).

#### Source

**Modern Federal Jury Instructions**, Mathew Bender & Co., Inc., Chapter 87.

## **SECOND ELEMENT - DEPRIVATION OF RIGHT**

### **DELIBERATE INDIFFERENCE**

Plaintiff alleges that each defendant was deliberately indifferent to threats against his life that plaintiff claims he made known to the defendants. When prison officials are so deliberately indifferent to the need to protect an inmate from a known threat to his safety as to unnecessarily and wantonly allow pain to be inflicted upon him, they impose cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. The plaintiff must demonstrate by a preponderance of the evidence that each defendant knew of and disregarded a specific threat of an attack on plaintiff – in other words, each defendant must have both been aware of facts from which the inference could be drawn that a substantial risk of serious risk existed, and each also must have drawn such an inference. Mere negligence is not enough, nor is it enough that a reasonable person would have known, or that each defendant should have known, of the serious medical needs.

#### **Authority**

**United States Supreme Court:** *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).

**Second Circuit:** *Hemmings v. Gorczyk*, 134 F.3d 104 (2nd Cir. 1998); *Koehl v. Dalsheim*, 85 F.3d 86 (2nd Cir. 1996); *Hayes v. New York City Dept. of Corrections*, 84 F.3d 614 (2nd Cir. 1996); *Hathaway v. Couglin*, 37 F.3d 63 (2d Cir. 1994), cert. denied sub nom. *Foote v. Hathaway*, 513 U.S. 1154 (1995).

#### **Source**

**Modern Federal Jury Instructions**, Mathew Bender & Co., Inc., Chapter 87.

## **SECOND ELEMENT - DEPRIVATION OF RIGHT**

### **STATE OF MIND - GENERAL**

I instruct you that, to establish a claim under section 1983, the plaintiff must show that each defendant acted intentionally or with reckless disregard of an excessive risk to the plaintiff. If you find that the acts of any defendant were merely negligent, then, even if you find that the plaintiff was injured as a result of those acts, you must return a verdict for that defendant or those defendants.

#### **Authority**

**United States Supreme Court:** *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994); *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986); *Davidson v. Cannon*, 474 U.S. 344, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986).

#### **Source**

**Modern Federal Jury Instructions**, Mathew Bender & Co., Inc., Chapter 87.

## **STATE OF MIND - INTENTIONAL ACTS**

An act is intentional 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 the defendant acted with the requisite knowledge, you should remember that while witnesses may see and hear and so 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.

### **Source**

**Modern Federal Jury Instructions**, Mathew Bender & Co., Inc., Chapter 87.

## **STATE OF MIND - RECKLESS ACTS**

An act is reckless if done in conscious disregard that a known excessive risk is the probable consequence. In determining whether the defendant acted with the requisite recklessness, you should remember that while witnesses may see and hear and so 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.

### **Source**

**Modern Federal Jury Instructions**, Mathew Bender & Co., Inc., Chapter 87.

## **STATE OF MIND - NEGLIGENCE**

An act is negligent if a defendant was under a duty or obligation, recognized by law, that required him to adhere to a certain standard of conduct to protect others against unreasonable risks, and he breached that duty or obligation.

### **Source**

**Modern Federal Jury Instructions**, Mathew Bender & Co., Inc., Chapter 87.

## **THIRD ELEMENT - PROXIMATE CAUSE**

### **PROXIMATE CAUSE - GENERALLY**

The third element which plaintiff must prove against each defendant is that the defendant's acts were a proximate cause of the injuries sustained by the plaintiff. Proximate cause means that there must be a sufficient causal connection between the act or omission of a defendant and any injury or damage sustained by the plaintiff. An act or omission is a proximate cause if it was a substantial factor in bringing about or actually causing injury, that is, if the injury or damage was a reasonably foreseeable consequence of the defendant's act or omission. If an injury was a direct result or a reasonably probable consequence of a defendant's act or omission, it was proximately caused by such act or omission. In other words, if a defendant's act or omission had such an effect in producing the injury that reasonable persons would regard it as being a cause of the injury, then the act or omission is a proximate cause.

In order to recover damages for any injury, the plaintiff must show by a preponderance of the evidence that such injury would not have occurred without the conduct of the defendant. If you find that the defendant has proved, by a preponderance of the evidence, that the plaintiff complains about an injury which would have occurred even in the absence of the defendant's conduct, you must find that the defendant did not proximately cause plaintiff's injury.

A proximate cause need not always be the nearest cause either in time or in space. In addition, there may be more than one proximate cause of an injury or damage. Many factors or the conduct of two or more people may operate at the same time, either independently or together, to cause an injury.

A defendant is not liable if plaintiff's injury was caused by a new or independent source of

an injury which intervenes between the defendant's act or omission and the plaintiff's injury and which produces a result which was not reasonably foreseeable by the defendant.

#### **Authority**

**United States Supreme Court:** *Grivhan v. Western Line Consolidated School District*, 439 U.S. 410, 99 S. Ct. 693, 58 L. Ed. 2d 619 (1979); *Mt. Healthy City School District Board of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).

**Second Circuit:** *Gierlinger v. Gleason*, 160 F.3d 858 (2d Cir. 1998).

#### **Source**

**Modern Federal Jury Instructions**, Mathew Bender & Co., Inc., Chapter 87.

## **PROXIMATE CAUSE - SUPERVISORY OFFICIALS**

If you find that the conduct of a subordinate denied the plaintiff a right guaranteed by federal law, you must consider whether the supervisor caused that conduct. If the supervisor did cause the conduct, then he is liable under section 1983 for the denial of plaintiff's constitutional rights.

The standards for assessing whether the supervisor proximately caused plaintiff's constitutional injury are different from the standards for assessing the subordinate's liability. If the subordinate denied plaintiff a constitutional right, a supervisor is not liable for such a denial simply because of the supervisory relationship.

There are only two circumstances under which you may find that the supervisor has caused plaintiff's injury, and thus is liable for the illegal conduct of the subordinate. These are as follows:

First, if you find that the supervisor has done something affirmative to cause the injury to the plaintiff – for example, by directing the subordinate to do the acts in question – you should find that the supervisor caused the injury.

Second, if you find that the supervisor failed to carry out his duty to oversee the subordinate, knowing that his failure to do so probably would cause a deprivation of the plaintiff's rights by the subordinate, you should find that the supervisor caused the injury.

A finding of either circumstance is enough to establish that the supervisor caused the injury. I will explain each of these in detail.

To find that the supervisor did something affirmative to cause injury to the plaintiff, you must find by a preponderance of the evidence that the supervisor was personally involved in the conduct that caused plaintiff's injury. Personal involvement does not mean only that the defendant supervisor directly, with his own hands, deprived plaintiff of his rights. The law recognizes that the

supervisor can act through others, setting in motion a series of acts by subordinates that the supervisor knows, or reasonably should know, would cause the subordinates to inflict the constitutional injury. Thus, plaintiff meets his burden of proof as to the personal involvement of the supervisor in the subordinate's conduct if he proves by a preponderance of the evidence that the deprivation of his right took place at the supervisor's direction, or with the supervisor's knowledge, acquiescence or consent. The supervisor may give his consent expressly or his consent may be implied because of his knowledge of or acquiescence in the subordinate's unconstitutional conduct.

In the absence of personal involvement, you may still find that the supervisor caused the injury to the plaintiff if you find that he failed to carry out his duty to oversee the subordinate. To make such a finding, you must conclude by a preponderance of the evidence that the supervisor had a duty to oversee the subordinate, that he grossly disregarded that duty, and that a reasonable person in the supervisor's position would have known that his dereliction of duty probably would cause a deprivation of rights.

#### **Authority**

**United States Supreme Court:** *Rizzo v. Goode*, 423 U.S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976).

#### **Source**

**Modern Federal Jury Instructions**, Mathew Bender & Co., Inc., Chapter 87.

## **QUALIFIED IMMUNITY**

At the time of the incidents giving rise to the lawsuit, it was clearly established law that prison officials cannot be deliberately indifferent to conditions posing a substantial risk of serious harm to the inmates in their custody. However, even if you find that any of the defendants were indifferent to such a risk to the plaintiff, those defendants still may not be liable to the plaintiff. This is so because those defendants may be entitled to what is called a qualified immunity. If you find that they are entitled to such an immunity, you may not find them liable.

The defendants will be entitled to a qualified immunity if, at the time of a serious risk of harm to the plaintiff, they neither knew nor should have known that their actions were contrary to federal law. The simple fact that any of the defendants acted in good faith is not enough to bring them within the protection of this qualified immunity. Nor is the fact that the defendants were unaware of the federal law. The defendants are entitled to a qualified immunity only if they did not know that what they did was in violation of federal law.

In deciding what competent officials would have known about the legality of their conduct, you may consider the nature of defendants' official duties, the character of their official positions, the information which was known to them or not known to them, and the events which confronted them. You must ask yourself what a reasonable official in each defendant's situation would have believed about the legality of his conduct. You should not, however, consider what each defendant's subjective intent was, even if you believe it was to harm the plaintiff. You may also use your common sense. If you find that reasonable officials in each defendant's situation would believe his conduct to be lawful, then this element will be satisfied.

The defendants have the burden of proving that they neither knew nor should have known

that their actions violated federal law. If the defendants convince you by a preponderance of the evidence that they neither knew nor should have known that their actions violated federal law, then you must return a verdict for those defendants, even though you may have previously found that those defendants in fact violated the plaintiff's rights under color of state law.

### **Authority**

**United States Supreme Court:** *Richardson v. McKnight*, 521 U.S. 399, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997); *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); *Schuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974).

**Second Circuit:** *LaBounty v. Coughlin*, 137 F.3d 68 (2d Cir. 1998); *Velardi v. Walsh*, 40 F.3d 569 (2d Cir. 1994); *P.C. v. McLaughlin*, 913 F.2d 1033 (2d Cir. 1990); *Gittens v. LeFevre*, 891 F.2d 38 (2d Cir. 1989).

### **Source**

**Modern Federal Jury Instructions**, Mathew Bender & Co., Inc., Chapter 87.

## **DAMAGES**

### **COMPENSATORY DAMAGES**

Just because I am instructing you on how to award damages does not mean that I have any opinion on whether or not the defendants should be held liable.

If you return a verdict for the plaintiff, then you must consider the issue of actual damages.

If you return a verdict for the plaintiff, then you must award him such sum of money as you believe will fairly and justly compensate him for any injury you believe he actually sustained as a direct consequence of the conduct of those defendants you have held to be liable.

You may award actual damages only for those injuries which you find that plaintiff has proven by a preponderance of the evidence. Moreover, you shall award actual damages only for those injuries which you find plaintiff has proven by a preponderance of evidence to have been the direct result of conduct by those defendants you have held liable for a violation of section 1983. That is, you may not simply award actual damages for any injury suffered by plaintiff – you must award actual damages only for those injuries that are a direct result of actions by those defendant you have held liable and that are a direct result of conduct by those defendant who violated plaintiff's federal rights under color of law.

Actual damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial, and only on that evidence.

### **Authority**

**United States Supreme Court:** *Memphis Community School District v. Stachura*, 477 U.S. 299, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986); *Smith v. Wade*, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983); *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978).

**Second Circuit:** *Amato v. City of Saratoga Springs*, 170 F.3d 311 (2d Cir. 1999); *Gibeau v. Nellis*, 18F.3d 107 (2d Cir. 1994).

## Source

**Modern Federal Jury Instructions**, Mathew Bender & Co., Inc., Chapter 87.

## NOMINAL DAMAGES

If you return a verdict for the plaintiff, but find that plaintiff has failed to prove by a preponderance of the evidence that he suffered any actual damages, then you must return an award of damages in some nominal or token amount not to exceed the sum of one dollar.

Nominal damages must be awarded when the plaintiff has been deprived by defendant of a constitutional right but has suffered no actual damage as a natural consequence of that deprivation. The mere fact that a constitutional deprivation occurred is an injury to the person entitled to enjoy that right, even when no actual damages flow from the deprivation. Therefore, if you find that plaintiff has suffered no injury as a result of the defendant's conduct other than the fact of a constitutional deprivation, you must award nominal damages not to exceed one dollar.

### Authority

**United States Supreme Court:** *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978).

**Second Circuit:** *Amato v. City of Saratoga Springs*, 170 F.3d 311 (2d Cir. 1999); *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2d Cir. 1995), cert. denied, -- U.S. --, 116 S. Ct. 2546, 135 L. Ed. 2d 1067 (1996); *Gibeau v. Nellis*, 18 F.3d 107 (2d Cir. 1994).

### Source

**Modern Federal Jury Instructions**, Mathew Bender & Co., Inc., Chapter 87.

## CAUSATION AND DAMAGES

I have said that you may award damages only for those injuries which you find the plaintiff has proven by a preponderance of evidence to have been the direct result of conduct by the defendants in violation of section 1983. You must distinguish between, on the one hand, the existence of a violation of the plaintiff's rights and, on the other hand, the existence of injuries naturally resulting from that violation. Thus, even if you find that the defendant deprived the plaintiff of his rights in violation of section 1983, you must ask whether the plaintiff has proven by a preponderance of evidence that the deprivation caused the damages that he claims to have suffered.

If you find that the damages suffered by the plaintiff were partly the result of conduct by the defendants that was legal and partly the result of conduct by them that was illegal, you must apportion the damages between the legal and illegal conduct – that is, you must assess the relative importance of the legal and the illegal conduct and allocate the damages accordingly.

### Authority

**United States Supreme Court:** *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978); *Mount Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).

**Second Circuit :** *Gentile v. County of Suffolk*, 926 F.2d 142 (2d Cir. 1991).

### Source

**Modern Federal Jury Instructions**, Mathew Bender & Co., Inc., Chapter 87.

## **MITIGATION OF DAMAGES**

If you find that the plaintiff was injured as a natural consequence of conduct by the defendant in violation of section 1983, you must determine whether the plaintiff could thereafter have done something to lessen the harm that he suffered. The burden is on the defendant to prove, by a preponderance of evidence, that the plaintiff could have lessened the harm that was done to him, and that he failed to do so. If the defendant convinces you that the plaintiff could have reduced the harm done to him but failed to do so, the plaintiff is entitled only to damages sufficient to compensate him for the injury that he would have suffered if he had taken appropriate action to reduce the harm done to him.

### **Authority**

**Second Circuit:** *Miller v. Lovett*, 879 F.2d 1066 (2d Cir. 1989).

### **Source**

**Modern Federal Jury Instructions**, Mathew Bender & Co., Inc., Chapter 87.

Dated: Syracuse, New York  
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