UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

WESLEY VAUGHN,

Plaintiff,

-against-

JAMES A. NICHOLS, Deputy Superintendent of Programs (MID-STATE); GLENN S. GOORD, Commissioner (D.O.C.S.); RICHARD PROSSER, Maintenance Supervisor (MID-STATE); MR. ABBIS, Vocational Supervisor (MID-STATE); WILFREDO BATISTA, First Deputy Superintendent (MID-STATE); DONALD SELSKY, Director of Special Housing/Inmate Disciplinary Programs, (D.O.C.S.); in their individual capacities as personnel of the Department of Correctional Services (D.O.C.S.)

Defendants.

02-CV-1512

LES/GJD

DEFENDANTS' PROPOSED JURY INSTRUCTIONS

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General Introduction - Province of Court and Jury

Now that you have heard the evidence and the argument, it is my duty to instruct you about the applicable law. It is your duty to follow the law as I will state it and to apply it to the facts as you find them from the evidence in the case. Do not single out one instruction as stating the law, but consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by me. You must follow and apply the law.

[The lawyers have properly referred to some of the governing rules of law in their arguments. If there is any difference the law stated by the lawyers and as stated in these instructions, you are governed by these instructions.]

Nothing I say in these instructions indicates that I have any opinion about the facts. You, not I, have the duty to determine the facts.

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

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §103.01 (5th Ed., 2000).

State not a defendant

Neither the State of New York, nor the New York State Department of Correctional Services are defendants in this case. The only defendants are those individuals who have been introduced to you as such.

Wilson v. Prasse, 325 F. Supp. 9 (WD Pa. 1971) *affirmed* 463 F.2d 109 (3d Cir. 1972).

Multiple Defendants

Although there is more than one defendant in this action, it does not follow from that fact alone that if one defendant is liable to the plaintiff, all defendants are liable. The law requires that a defendant be personally involved in conduct that deprived plaintiff of his constitutional rights before that defendant may be held liable for such deprivation. Thus, each defendant is entitled to a fair consideration of the evidence, and you may not find a defendant liable for the actions taken by any other person; nor may you award damages, if you reach the question of damages, against a defendant based upon actions taken by another individual. No defendant is to be prejudiced should you find against another defendant. Unless otherwise stated, all instructions I give you govern the case as to each defendant.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §103.14 (5th Ed., 2000); *McKinnon v. Patterson*, 568 F. 2d 930 (2d Cir. 1977) *cert. denied* 434 US 1087 (1978); Devitt, Blackmar and Wolff, *Federal Jury Practice and Instructions*, §§71.03, 71.07 (3d Ed. 1977).

Attorney Objections

When one party asks a question or offers an exhibit into evidence and the other party thinks it is not permitted by the rule of evidence, that party or his lawyer may object. Counsel have not only the right, but the duty to make whatever legal objections there may be to the admission of evidence. If I overrule the objection, the question may be answered or the exhibit received into evidence. If I sustain the objection the question cannot be answered and the exhibit cannot be received into evidence.

If I sustain an objection to a question of the admission of an exhibit, you must ignore the question and must not guess what the answer to the question might have been. In addition, you must not consider evidence that I have ordered stricken from the record.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §101.49 (5th Ed., 2000); Devitt, Blackmar and Wolff, *Federal Jury Practice and Instructions*, §10.13 (3d Ed. 1977).

What is not evidence

In deciding the facts of this case, you are not to consider the following as evidence: statements and arguments of the lawyers, questions and objections of the lawyers, testimony that I instruct you to disregard, and anything you may see or hear when the court is not in session even if what you see or hear is done or said by one of the parties or by on of the witnesses.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §101.44 (5th Ed., 2000).

Evidence in the case

The evidence in the case will consist of the following: (1) the sworn testimony of the witnesses, no matter who called that witness; (2) all exhibits received in evidence, regardless of who may have produced the exhibit; and (3) all facts that may have been judicially noticed and that you must take as true for purposes of this case.

Depositions may also be received in evidence. Depositions contain sworn testimony, with the lawyers for each party being entitled to ask questions. Deposition testimony may be accepted by you, subject to the same instructions that apply to witnesses testifying in open court.

Statements and arguments of the lawyers are not evidence in the case, unless made as an admission or stipulation of fact. A "stipulation" is an agreement between both sides that certain facts are true. When the lawyers on both sides stipulate or agree to the existence of a fact, you must, unless otherwise instructed, accept the stipulation as evidence, and regard that fact as proved.

I may take judicial notice of certain facts or events. When I declare that I will take judicial notice of some fact or event, you must accept that fact as true.

If I sustain an objection to any evidence or if I order evidence stricken, that evidence must be entirely ignored.

Some evidence is admitted for a limited purpose only. When I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and for no other purpose.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the statements of the witnesses. In other words, you are not

limited solely to what you see and hear as the witnesses testified. You may draw from the facts that you find have been proved, such reasonable inferences or conclusions as you feel are justified in light of your experience.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §101.40 (5th Ed., 2000); Devitt, Blackmar and Wolff, *Federal Jury Practice and Instructions*, §72.04 (3d Ed. 1977).

Preponderance of the Evidence

Plaintiff has the burden in a civil action, such as this, to prove every essential element of all claims by a preponderance of the credible evidence. If plaintiff should fail to establish any essential element on a particular claim by a preponderance of the credible evidence, you should find for defendants 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 credible evidence means such evidence as, when considered and compared with the evidence 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 standard does not 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 credible evidence you 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.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §104.01 (5th Ed., 2000).

Direct and Circumstantial Evidence Defined

Generally speaking, there are two types of evidence that are presented during a trial – direct evidence and circumstantial evidence. "Direct evidence" is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. "Indirect or circumstantial" evidence is proof of a chain of facts and circumstances indicating the existence or nonexistence of a fact.

As a general rule, the law makes no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence. You are simply required to find the facts in accordance with the preponderance of all the credible evidence in the case, both direct and circumstantial.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §104.05 (5th Ed., 2000).

<u>Presumption of Regularity</u>

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.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §104.21 (5th Ed., 2000).

Credibility of Witnesses

You are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence contrary to the testimony.

You should carefully examine all the testimony given, the circumstances under which each witness has testified, and every matter in evidence tending to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor or manner while testifying.

Consider the witness' ability to observe the matters as to which the witness has testified, and whether the witness impresses you as having an accurate recollection of these matters. Also, consider any relation each witness may have with either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which the testimony of each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses may or may not cause you to discredit such testimony. Two or more persons seeing an event may see or hear it differently.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, that you may think it deserves. In short, you accept or reject the testimony of any

witness, in whole or in part.

In addition, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or nonexistence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §105.01 (5th Ed., 2000).

Inconsistent Statements/Falsus In Uno Falsus in Omnibus

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, that is inconsistent with the witness' present testimony. If the witness is not a party to this action, such prior inconsistent out-of-court statements may be considered for the sole purpose of judging the witness' credibility; however, it may never be considered as evidence of proof of the truth of such statement.

On the other hand, where the witness is a party to the case, and by such statement or other conduct admits some fact or facts against the witness' interest, then such statement or other conduct if knowingly made or done, may be considered as evidence of the truth of the fact or facts so admitted by such party, as well as for the purpose of judging the credibility of the party as a witness.

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

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

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

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §§105.04, 105.09 (5th Ed., 2000).

Impeachment – Conviction of a Felony

A witness may be discredited or impeached by evidence that the witness has been convicted of a felony, that is, an offense punishable by imprisonment for in excess of one year. If you believe that any witness has been impeached and thus discredited, it is your exclusive responsibility to give the testimony of that witness such credibility, if any, as you think it deserves.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §105.05 (5th Ed., 2000).

All Available Witnesses or 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.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §105.11 (5th Ed., 2000).

Elements of a §1983 Claim

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 that the defendants retaliated against him in two instances for exercising his Constitutional rights and that each instance constituted a separate violation of his Constitutional rights.

In order to prove this claim, the burden is upon the plaintiff to establish by a preponderance of the credible evidence 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 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.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, Chap. 166 pp.662, 676 (5th Ed., 2000).

First Element – Action under Color of State Law

The first element of plaintiff's §1983 claim is that the defendants acted under color of state law. Although the defendants categorically deny plaintiff's allegations, it is not disputed in this case that the defendants, as employees and officials employed by the New York State Department of Correctional Services, acted under color of state law in the routine course of their duties.

Second Element – Deprivation of Rights by Retaliation

Inmates are protected from retaliation for exercising their rights under the United States Constitution. Plaintiff claims he was retaliated in two instances. First, he asserts that defendant Nichols removed him from his law clerk position in the prison law library in retaliation for plaintiff providing authorized legal assistance to other inmates in prison disciplinary proceedings. Second, he asserts that defendants Nichols and Abbis falsely charged plaintiff in a misbehavior report with assaulting another inmate in retaliation for plaintiff having filed grievances about his removal from the law clerk position.

To state a claim for retaliation, plaintiff must prove: (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.

If plaintiff can make this showing, his claims may still be found insufficient if the defendants can show by a preponderance of the evidence that they would have taken the same actions even in the absence of the protected conduct. In other words, if taken for both proper and improper reasons, defendants actions may be upheld if they would have taken the same actions for proper reasons alone.

Finally, since plaintiff's claims arise out being incarcerated in state prison, you are advised that prisoner claims of retaliation are prone to abuse and you should view with them skepticism.

Morales v. Mackalm, 278 F.3d 126, 131 (2d Cir. 2002) (quoting *Dawes v. Walker*, 239 F.3d 489, 492 (2d Cir. 2001)); *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996) (quoting *Mount Healthy Sch. Dist. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568 (1977)); *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir. 1983).

Supervisory Liability

Plaintiff has also charged defendants Batista and Goord with liability for his two claims of retaliation because they were supervisors and plaintiff informed them of the retaliatory acts being committed against him.

You are advised that a supervisory prison official must have some personal involvement in the alleged unlawful conduct to be held liable under section 1983; prison supervisors are not liable simply by virtue of the actions taken by their subordinates. Other than directly participating in the wrongdoing, a supervisor may be deemed to have been personally involved by failing to remedy a wrong after learning of it through a report or appeal, by creating or allowing a policy or practice of unconstitutional activities to continue, or by grossly negligent supervision. However, a supervisor cannot be held liable merely because he or she was in charge at the time. Nor may he or she be held liable under §1983 where there is no underlying constitutional violation.

Of course, a supervisor may not be held liable under §1983 where there is no underlying constitutional violation. Therefore, if you find that plaintiff was not retaliated against for exercising his Constitutional rights, there can be no supervisory liability against defendants Batista and Goord.

Polk County v. Dodson, 454 US 312, 325 (1981); *Goldfine v. Kelly*, 80 F.Supp.2d 153, 162 (SDNY 2000) (*citing, Blyden v. Mancusi*, 186 F.3d 252, 265 [2d Cir.1999]); *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995); *Gill v. Mooney,* 824 F.2d 192, 196 (2d Cir. 1987); *Williams* v. Smith, 781 F.2d 319 (2d Cir. 1986); *McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir. 1977) (*cert. denied*, 434 US 1087 [1978]); *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (*cert denied*, 414 US 1033 [1973]); *Dunbar v. County of Saratoga*, 78 F.Supp.2d 43, 46 (NDNY, 1999); *Pugliese v. Cuomo*, 911 F. Supp. 58, 61 (NDNY1996) (*citing McKinnon v. Patterson*, 568 F.2d 930, 934 [2d Cir. 1977], *cert denied*, 434 US 1087 [1978]).

Third Element – Proximate Cause of Injury

An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage to plaintiff, and that plaintiff's injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

Plaintiff has the burden of proving each and every element of his claim by a preponderance of the credible evidence. If you find that plaintiff has not proved any one of the elements by a preponderance of the credible evidence, you must return a verdict for defendants.

In order to find for plaintiff, you must find that plaintiff's injuries were proximally caused by defendants.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*,§§166.50 (5th Ed., 2000); Plaintiff's complaint paragraph 32.

Qualified Immunity

A government official sued in his individual capacity is entitled to qualified immunity: (1) if the conduct attributed to him is not prohibited by federal law, (2) where that conduct is so prohibited, if the plaintiff's right not to be subjected to such conduct by the defendant was not clearly established at the time of the conduct, or (3) if the defendant's action was objectively legally reasonable in light of the legal rules that were clearly established at the time it was taken.

The right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense, i.e., the contours of the right must have been sufficiently clear that a reasonable official would understand that what he was doing violated that right. Even if the legal right asserted was clearly protected by federal law, the defendant is entitled to immunity if it was not clear at the time that the particular conduct at issue contravened that known legal right. The objective reasonableness test is met--and the defendant is entitled to immunity--if officers of reasonable competence could disagree on the legality of the defendant's actions. If there is a "legitimate question," qualified immunity attaches.

Three factors must be considered to determine whether plaintiff's alleged right was "clearly established": (1) whether the right in question was defined with "reasonable specificity;" (2) whether relevant decisional law supports the existence of the right in question; and (3) whether under preexisting law a reasonable government official would have understood that his actions were unlawful. Defendants have the burden of establishing entitlement to qualified immunity by a preponderance of the credible evidence.

If you find that it was objectively reasonable for defendants to believe that they were not retaliating against plaintiff for exercising his Constitutional rights in light of the circumstances at

the time, defendants are entitled to qualified immunity and, if you so find, you must return a verdict for the defendants.

Saucier v. Katz, 533 US 194 (2001); *Anderson v. Creighton*, 483 US 635, 640 (1987); *Mitchell v. Forsyth*, 472 US 511, 535 n12 (1985); *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 65-66 (2d Cir. 1999); *Danahy v. Buscaglia*, 134 F.3d 1185, 1190 (2nd Cir. 1998); *Lennon v. Miller* 66 F.3d 416,420 (2d Cir. 1995) (*quoting, Malley v. Briggs,* 475 US 335, 340-41 [1986]); *Cartier v. Lussier*, 955 F.2d 841, 844 (2d Cir 1992); *Finnegan v. Fountain*, 915 F.2d 817, 822-23 (2d Cir.1990); *Snow v. Village of Chatham*, 84 F.Supp.2d 322, 328-29 (NDNY 2000); *Abdush-Shahid v. Coughlin*, 933 F.Supp. 168, 185 (NDNY 1996) (*citing, Rodriguez v. Phillips,* 66 F.3d 470, 476 [2d Cir.1995]).

Actual (Compensatory) Damages

If you find in favor of plaintiff, then you must award plaintiff such sum as you find from the preponderance of the credible evidence will fairly and justly compensate plaintiff for any damages you find plaintiff sustained and is reasonably certain to sustain in the future as a direct result of any claim for which you find in plaintiff's favor. The fact that I am instructing you on the question of damages does not mean that I think you should award any damages; that is entirely for you to decide.

A plaintiff is not automatically entitled to recover damages solely by virtue of the fact – if you find it to be a fact – that his constitutional rights were violated. He must also demonstrate that the constitutional deprivation proximately caused actual injury or loss. In determining such actual injury or loss, you may not consider any emotional or psychological injury unless accompanied by physical injury. With regard to any claim of physical injury, you should consider the physical pain plaintiff experienced and is reasonably certain to experience in the future; the nature and extent of the injury, whether the injury is temporary or permanent and whether any resulting disability is partial or total, and any aggravation of a pre-existing condition.

Throughout your deliberations you must not engage in any speculation, guess, or conjecture and you must not award any damages under this instruction by way of punishment or through sympathy.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*,§§166.60 (5th Ed., 2000).

Nominal Damages

If you find in favor of plaintiff under my instructions, but you find that plaintiff's damages have no monetary value, then you must return a verdict for plaintiff in the nominal amount of one dollar.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*,§§166.61 (5th Ed., 2000).

Punitive Damages

(Defendants contend that the evidence does not warrant the submission of punitive damages instruction to the jury. Nevertheless, should the Court issue such a charge, defendants propose the following)

In addition to the damages mentioned in the other instructions, the law permits you to award an injured person punitive damages under certain circumstances in order to punish the defendant for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct. Punitive damages are not favored in law and are to allowed only with caution and within narrow limits.

If you find in favor of plaintiff and against defendants and if you find, further, that defendants' conduct was recklessly and callously indifferent to plaintiff then, in addition to any other damages to which you find the plaintiff is entitled, you may, but are not required to, award plaintiff an additional amount as punitive damages if you find it is appropriate to punish defendants or deter defendants and others from like conduct in the future. Whether to award plaintiff punitive damages and the amount of those damages are within your sound discretion.

If you decide to award punitive damages against any defendant 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 or defendants in fixing the amount of punitive damages you may decided to assess.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*,§§166.62 (5th Ed., 2000); *Smith v. Wade*, 461 US 30, 56 (1983); *Carey v. Piphus*, 435 US 247, 257 n.11 (1978); *Zarcone v. Perry*, 572 F.2d 52, 56 (2d Cir. 1978); *Gagne v. Town of Enfield*, 734 F.2d (2d Cir. 1984); *McFadden v. Sanchez*, 710 F.2d 907, 912-914 (2d Cir. 1983) *cert. denied* 464 US 961 (1983).

Dated: Albany, New York
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