

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND**

RENATO ALARCON,  
*Plaintiff,*

vs.

CITY OF PROVIDENCE AS TO  
PROVIDENCE FIRE DEPARTMENT,  
STEVEN NUNES, JOSEPH FONTAINE,  
CRAIG MARTIN AND JAMES  
LOMBARDI, III  
*Defendants.*

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C.A. No. 1:15-CV-00227

**PRE-TRIAL MEMORANDUM OF  
DEFENDANT CITY OF PROVIDENCE**

Respectfully Submitted  
Defendant,  
CITY OF PROVIDENCE

By its Attorney,

JEFFREY DANA  
CITY SOLICITOR

/s/ Kevin F. McHugh  
Kevin F. McHugh (#3927)  
Senior Assistant City Solicitor

/s/ David Ellison  
David Ellison (#8838)  
Assistant City Solicitor

City of Providence  
City Solicitor's Office  
444 Westminster Street, Suite 220  
Providence, RI 02903  
(401) 680-5333  
Kfmchugh9@gmail.com  
Dellison@providenceri.gov

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**I. DEFENDANTS' EXPECTED PROOF**

**A. PARTIES AND COUNSEL**

Parties

Trial Counsel

Plaintiff: Renato Alarcon

Christopher J. Trombetta, Esq.

Defendant: City of Providence

Kevin F. McHugh, Esq.  
David Ellison

Also, named in the amended complaint is:

Steven Nunes  
Joseph Fontaine  
Craig Martin

They were never served and the Plaintiff has agreed to dismiss them out.

**B. FACTS**

Renato Alarcon graduated from the 46<sup>th</sup> Training Academy of the Providence Fire Department in 2002. He was admitted to that Academy not according to his test score by rank order but under the City's Affirmative Action Plan because he did not score high enough on the list to be admitted. He was specifically selected because of his race, Hispanic. He is still a Providence Firefighter and has worked at a number of stations. He alleges that the Fire Department has discriminated against him because of his race.

In 2011, Alarcon was a Firefighter stationed at the Broad Street Station. He was at Engine 10, Group C.

On or about September 22, 2011, there was a vacancy at Engine Co. 10 Group C. According to the Collective Bargaining contract, Firefighters can bid on a vacancy. The bidding procedure awards the winning bid to the most senior firefighter who submits a bid. When this particular bid came up, Alarcon had let it be known that he wanted his friend, Firefighter Hector

Silvestre, to win the bid. However, based on seniority, Firefighter Craig Martin (“Martin”) won the bid instead. Upon learning that his friend had not won the bid, Alarcon immediately requested a transfer from the station. In the meantime Alarcon became confrontational with his co-workers and insubordinate to his superiors, which created a disruptive work environment.

Not long after the bid was won by Martin, the Broad Street station was assigned a new work-detail. The normal procedure regarding work-details is for the officers to allow the privates to decide how they would like to work the detail. Alarcon was a private and was therefore entitled to vote. The privates’ vote regarding the specifics of the detail, and a majority vote dictates the outcome. On this particular occasion, the topic up for a vote between the six privates (including Alarcon) was whether Engine Co. 10 Group C would share the detail with Ladder 5. The vote ended in a five to one decision (with Alarcon as the only dissenter) in favor of Engine Co. 10-C sharing the detail. Instead of accepting his co-workers’ majority decision, Alarcon refused to work on the detail even though it was his responsibility to do so. This created tension at the station. Due to this insubordination, and the disturbance it caused at the Broad Street station, Deputy Assistant Chief Timothy McDaniel (“McDaniel”) was forced to intervene.

On or about January 9, 2012, McDaniel responded to the Broad Street fire station in an attempt to quell the mounting tensions. McDaniel individually spoke to each of the firefighters who had voted on the detail, including Alarcon. McDaniel’s objective was to determine whether the detail was something that was voted on fairly. After speaking with all six firefighters, McDaniel concluded that all of the firefighters, except Alarcon, had voted for Engine Co. 10 Group C to share the detail with Ladder 5. It was at that time that Alarcon stated, in the presence of McDaniel and the other voting firefighters, that it should be Ladder 5 who does the detail and that he wished to be transferred. McDaniel told Alarcon that his request to be transferred would

be honored. McDaniel also stated, however, that he could not guarantee a transfer to a specific company. McDaniel told Alarcon that the destination of the transfer would be made in the best interest of the Department. At that time Alarcon replied, "Do what you have to do."

In the meantime, Alarcon was given a direct order by McDaniel to comply with the work-detail. Alarcon did so, but not without incident. On one occasion, when asked to go out on his day of detail, Alarcon became angry and blurted out "fucking pussies" and "this is bullshit," and refused to go on the detail. When Firefighter Stephen Rocchio ("Rocchio") attempted to explain to Alarcon that it was Alarcon's turn on the detail, Alarcon threw his shield in the direction of Rocchio and told Rocchio that the shield should be his. Alarcon then yelled at Rocchio for not blocking Firefighter Martin's bid. Alarcon eventually went on his detail, but because of this interaction between Alarcon and Rocchio, Rocchio no longer felt comfortable working with Alarcon and as a result Rocchio asked to be transferred from Ladder 5.

As time passed Alarcon continued to display more disruptive behavior. One of these incidents took place during a "Dinky Fund" meeting. As is custom at the Broad Street station, the firefighters pool their money in what is called a "Dinky Fund" for meals that they eat together while on duty. During a meeting at the station regarding this Dinky Fund, Alarcon demanded that the funds contributed from Engine Co. 10 Group C (which included Alarcon's funds) no longer be comingled or shared with the funds contributed from Ladder 5.

Alarcon's aggressive disposition came to a head later when he and the less senior privates at Company 10 and Ladder 5 were asked if they could allow the Lieutenants to park in a particular area at the fire station. Despite this request being directed at all of the junior firefighters, Alarcon became angry and verbally abusive to the other company members. As a result of this altercation, Firefighter Kristopher Wright reported to Lt. Stephen Nunes ("Nunes")

that because he “had enough [of Alarcon] over the last year and a half” wanted to leave the station.

Another Firefighter at the Broad Street Station, Firefighter Matthew Mowry, also asked to be transferred to a different group at the Broad Street Station, a very unusual request. His reason for the request was his unwillingness to work with Alarcon because of Alarcon’s disruptive behavior.

Lt. Nunes had several meetings with the Firefighters in order to foster a team approach to the job. Alarcon was present at the meetings. However, the meetings did not change Alarcon’s disruptive behavior.

Prior to Lt. Nunes, Lt. Rodrigues was Alarcon’s supervisor. He was going to transfer Alarcon out because of his disruptive behavior, but ended up transferring out himself instead.

In light of Alarcon’s insubordination, violent outbursts, confrontational nature, overall threat to the work environment, and Alarcon’s own request to be transferred out of Company 10, Alarcon was told by Lt. Nunes that he would be transferred. Alarcon told Lt. Nunes that he no longer wanted to be moved. However, for all of the aforementioned reasons, Lt. Nunes felt that the transfer was in the best interest of the Department. Alarcon filed a grievance to go back to Engine 10, Group C., but the union refused to process the grievance. Alarcon is still at the Messer Street Station.

## **II. MEMORANDUM OF LAW**

### **A, Race Discrimination: 42 U.S.C. § 1981 and Rhode Island Fair Employment Practices Act**

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating “against any individual with respect to his compensation, terms, conditions, or privileges of

employment, because of such individual's race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1).

The Rhode Island Fair Employment practices Act states that it shall be an unlawful employment practice “For any employment agency to fail or refuse to properly classify or refer for employment or otherwise discriminate against any individual because of his or her race or color, religion, sex, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin.” R.I. Gen. Laws § 28-5-7(2)(i).

This is a case of disparate treatment, not of disparate impact. In other words, the Plaintiff is alleging that the City of Providence discriminated *against him*, specifically, and not that the City of Providence had a disparate or discriminatory impact upon a protected class of people.

For disparate treatment cases, a plaintiff’s claim is governed by the familiar *McDonnell-Douglas* burden-shifting framework set out by the United States Supreme Court and adopted in Rhode Island. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Newport Shipyard, Inc. v. Rhode Island Comm’n for Human Rights, 484 A.2d 893, 898 (R.I. 1984). “Because the Rhode Island Fair Employment Practices Act is nearly identical in its remedial provision to its federal analog, Title VII, the Rhode Island Supreme Court has applied the analytical framework developed in federal Title VII cases to actions brought pursuant to the Rhode Island statute. Marley v. United Parcel Serv., Inc., 665 F. Supp. 119, 128 (D.R.I. 1987).

“Under the *McDonnell Douglas* three-step analysis, the burdens shift back and forth between the plaintiff and defendant ‘to sharpen the inquiry into the elusive factual question of intentional discrimination.’” Casey v. Town of Portsmouth, 861 A.2d 1032, 1036 (R.I. 2004). Notably, however, “[d]espite these shifting burdens of production, the plaintiff throughout

retains the burden of persuasion.” Conward v. Cambridge Sch. Comm., 171 F.3d 12, 19 (1st Cir. 1999)

The first step requires the plaintiff to establish a prima facie case of discrimination. “The prima facie case requirement embodies a concept, not a mechanical exercise.” Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 719 (1st Cir. 1994) “Though its contours generally follow the McDonnell Douglas model, a prima facie case must be custom-tailored to fit both the particular animus (e.g., age discrimination, sex discrimination, race discrimination) and the particular type of employment decision involved (e.g., failure to hire, failure to promote, failure to retain).” Id. “A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, **reassignment with significantly different responsibilities**, or a decision causing a significant change in benefits.” Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761, (1998) (emphasis added). The United States Supreme Court in Burlington, compared Crady v. Liberty Nat. Bank & Trust Co. of Ind., 993 F.2d 132, 136 (C.A.7 1993), which held “a materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation,” with Flaherty v. Gas Research Institute, 31 F.3d 451, 456 (C.A.7 1994) holding a “bruised ego” is not enough, Kocsis v. Multi-Care Management, Inc., 97 F.3d 876, 887 (C.A.6 1996) finding a demotion without change in pay, benefits, duties, or prestige was insufficient, and Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (C.A.8 1994) holding a reassignment to a more inconvenient job was insufficient. Id.

If the plaintiff establishes a prima facie case, the second step under the *McDonnell Douglas* framework requires the defendant to rebut the plaintiff’s prima facie case by offering a

legitimate, non-discriminatory reason for its action. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Shoucair v. Brown University, 917 A.2d 418, 427 (R.I. 2007); Casey, 861 A.2d at 1036. This is a burden of production rather than persuasion. See Shoucair, 917 A.2d at 427; Casey, 861 A.2d at 1037; see also Lockridge v. The Univ. Of Maine Sys., 597 F.3d 464, 470 (1st Cir. 2010).<sup>1</sup> An “employer need only produce competent evidence, *taken as true*, to enable a rational factfinder to conclude there existed a nondiscriminatory reason for the challenged employment action.” Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 6 (1st Cir. 2000); see also Torrech-Hernandez v. Gen. Elec. Co., 519 F.3d 41, 48 (1st Cir. 2008) (“The employer’s burden is minimal – it ‘need do no more than articulate a reason which, on its face, would justify a conclusion that the plaintiff was let go for a nondiscriminatory motive.’”). This is not a heavy burden because “Title VII was not designed to transform courts into ‘super personnel departments, assessing the merits—or even the rationality—of employer’s nondiscriminatory business decisions.’” Feliciano de la Cruz, 218 F.3d at 8 (internal quotations omitted). Once the defendant produces a legitimate, nondiscriminatory reason for the employment action, “then the presumption created by the prima facie case ‘disappears.’” Casey, 861 A.2d at 1037.

In the third step, the plaintiff “bears the ultimate burden of proof on the issue of discrimination,” id. at 1036, and must show, by a preponderance of the evidence, that the employer’s stated justification is actually a mere pretext for discriminatory action. See Newport Shipyard, Inc., 484 A.2d at 898; Lockridge v. The Univ. Of Maine Sys., 597 F.3d 464, 470 (1st Cir. 2010). See also Hicks, 509 U.S. at 518 (“The ultimate burden of persuading the trier of fact that the defendant intentionally [retaliated] against the plaintiff remains at all times with the

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<sup>1</sup> See Shoucair v. Brown University, 917 A.2d 418, 427 (R.I. 2007) (in construing FEPA, Rhode Island properly looks to the federal courts’ interpretations of Title VII for guidance).

plaintiff.”) (citing Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 253, 256) (internal citations omitted). The plaintiff may establish pretext “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” Newport Shipyard, Inc., 484 A.2d at 898 (citing Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 258 (1981)).

### **B. Retaliation**

A prima facie case for retaliation requires that the plaintiff demonstrate three elements: (i) that he engaged in protected activity, (ii) that he suffered an adverse employment action, and (iii) that the adverse employment action is *causally connected* to the protected activity. Noviello v. City of Boston, 398 F.3d 76, 88 (1st Cir. 2005); see also Fennell v. First Step Designs, Ltd., 83 F.3d 526, 535 (1st Cir. 1996); Shoucair, 917 A.2d at 427. Once a plaintiff has met this “prima facie burden, the defendant carries the burden to demonstrate a legitimate, non-retaliatory reason for the adverse employment action.” Fennell, 83 F.3d at 535. If this burden is met, the plaintiff has the ultimate burden of proving that the defendant’s proffered justification for the adverse employment action is pretextual and that the true reason behind its action is retaliatory animus. Id.; Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 6 (1st Cir. 2000).

To be adverse, an action must materially change the conditions of plaintiffs' employment. Gu v. Boston Police Department, 312 F.3d 6, 14 (1st Cir. 2002) “Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.” Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996). Material changes include "demotions, **disadvantageous transfers** or assignments, refusals to promote, unwarranted negative job

evaluations, and toleration of harassment by other employees." Hernandez-Torres v. Intercontinental Trading, Inc., 158 F.3d 43, 47 (1st Cir. 1998) (emphasis added).

A complainant may prove the causation prong of the prima facie case "by establishing that the employer's *knowledge* of the protected activity was *close in time* to the employer's adverse action." Wyatt v. City of Boston, 35 F.3d 13, 16 (1st Cir. 1994); see Lewis v. Gillette Co., 22 F.3d 22, 24 (1st Cir. 1994) ("[a]t a minimum, there must be competent evidence that the alleged retaliators knew of the plaintiff's protected activity and that a retaliatory motive played a part in the adverse employment actions alleged"). With regards to sufficient proximity between a protected activity and an adverse employment action, courts generally have found that the employment action must occur within less than two months of protected activity in order to create an inference of retaliation. See Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 274 (2001) (per curiam) ("Action taken . . . twenty months later suggests, by itself, no causality at all."); Moron-Barradas v. Dep't of Educ. of Puerto Rico, 488 F.3d 472, 481 (1st Cir. 2007) (finding no evidence of a causal connection where adverse action occurred fifteen months after EEOC charge was filed); Ramirez Rodriquez v. Boehringer Ingelheim Pharms., Inc., 425 F.3d 67, 85-86 (1st Cir. 2005) (finding two month temporal proximity between filing of discrimination complaint and plaintiff's termination *insufficient* to establish a causal connection); Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 25 (1st Cir. 2004) ("Three and four month periods have been held insufficient to establish a causal connection based on temporal proximity."); Sellers v. U.S. Dep't of Def., 654 F. Supp. 2d 61, 109-10 (D.R.I. 2009) (finding that adverse actions occurring six months and twelve months after the filing of an EEO complaint "lack sufficient temporal proximity . . . to permit a reasonable jury to infer that the defendants retaliated against the plaintiff for engaging in protected EEO activity); see also

MacCormack v. Boston Edison Co., 423 Mass. 652, 662 n.11, 672 N.E.2d 1 (1996) (“The mere fact that one event followed another is not sufficient to make out a causal link.”). But see Harrington v. Aggregate Indus. Ne. Region, Inc., 668 F.3d 25, 32 (1st Cir. 2012) (finding a temporal span of 72 hours sufficiently brief to satisfy causation element of *prima facie* retaliation case). Even in cases where temporal proximity exists, in order to establish a causal connection, [a]t a minimum, there must be competent evidence that the alleged retaliators *knew of* the plaintiff’s protected activity and that a retaliatory motive played a part in the adverse employment actions alleged.” Lewis, 22 F.3d at 24 (emphasis added); see Pomales v. Celulares Telefonica, Inc., 447 F.3d 79, 84 (1st Cir. 2006) (even though “[t]emporal proximity can create an inference of causation in the proper case . . . to draw such an inference, there must be proof that the decision maker knew of the plaintiff’s protected conduct when he or she decided to take the adverse employment action”).

### **III. PROBABLE LENGTH OF TRIAL**

It is estimated that this trial will take 5 days. It is estimated that the Defendant’s case will take 3 days.

### **IV. PENDING MATTERS**

Defendant intends to file the following Motions in Limine:

- A. Motion in Limine to exclude any and all evidence of medical treatment and medical records and any medical bills.

### **V. DEFENDANTS’ PROPOSED VOIR DIRE QUESTIONS**

1. Do you know any of the lawyers in this case?
2. If so, how do you know them?
3. Do you know any of the named parties in this case?

4. If so, how do you know them?
5. Do you know any of the following potential witnesses in this case listed below?
  - EEO Officer Olayinka Oredugba
  - Chief James Rattigan (retired)
  - Lt. Steven Nunes
  - Lt. Joseph Fontaine (retired)
  - Chief Timothy McDaniel (retired)
  - Chief Joseph R. Desmarais (retired)
  - Firefighter Steven Rocchio (retired)
  - Firefighter Hector Silvestre
  - Firefighter Kristopher Wright (retired)
  - Firefighter Craig Martin
  - Lt. Arlindo Rodrigues
6. Have you or any immediate family member ever worked for the City of Providence?
7. Have you or any immediate family member ever applied for a position with the City of Providence?
8. Were you unsatisfied with the result?
9. Have you or any immediate family member ever filed a claim or lawsuit against a city or town?
10. Were you unsatisfied with the result?
11. Can you treat the City of Providence fairly, given that it is a corporation rather than an individual?

12. Have you or any family member ever been employed with the Providence Fire Department?
13. Have your or any family member ever applied for employment with the Providence Fire Department?
14. Have you or any immediate family member ever worked for any fire department?
15. Have you or your immediate family member ever been dissatisfied with the Providence Fire Department?
16. Would the fact that you or a family member works for the Providence Fire Department affect your ability to render a fair and impartial verdict?
17. Are you or any family member retired from the Providence Fire Department or City of Providence?
18. If so, would that affect your ability to render a fair and impartial verdict in this case?
19. Do you or any of your immediate family members collect a public pension?
20. If so, would that make it difficult for you to render a fair and impartial verdict?
21. Have you or an immediate family member ever filed a claim for discrimination against anyone?
22. Have you or an immediate family member ever filed a complaint with the Rhode Island Human Rights Commission?
23. Recently there has been a lot of publicity surrounding the Providence Firefighter contract and the schedule changes made to the Providence Fire Department. Are you aware of this?
24. Would that affect your ability to render a fair and impartial verdict in this case?
25. Do you have a negative opinion of Mayor Jorge Elorza?

26. Have any of you ever been accused of discriminating against someone else?
27. Do you already have a favorable or unfavorable opinion of the Providence Fire Department?
28. Does anyone believe that just because the Plaintiff has filed his Complaint against the City of Providence, the City of Providence must have done something wrong?
29. Are you willing to listen to all the evidence and decide this case based upon the evidence you hear and disregard any feelings of sympathy or bias for the plaintiff?
30. Do you feel that you can judge all witnesses impartially based upon their testimony?
31. Does anyone else on the panel feel that they cannot be impartial in this case because they already have a bias or prejudice against any representative from the City of Providence?
32. Is there anything about this case which would prevent any member of the panel from rendering a fair and impartial verdict in this case?
33. Is there anything else that I, the other lawyers or the judge has not mentioned that anyone feels might affect their ability to serve impartially in this case?
34. Is there any reason, aside from those previously addressed by the Court or an attorney here that would make it difficult for you to render a fair and impartial verdict with respect to the City of Providence?
35. If you are Hispanic would that make it difficult for you render a fair and impartial verdict?

## **VI. PROPOSED JURY INSTRUCTIONS**

### ***I. GENERAL INSTRUCTIONS***

#### **A. PROVINCE OF THE COURT AND JURY**

It is your duty as jurors to follow the law as I state it to you and to apply that law to the facts of the case, as you determine those facts to be from the evidence in this case. You are not to be concerned with the wisdom of any rule of law. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Further, nothing I say in these instructions and nothing that I have said or done during the trial is to be taken as an indication that I have any opinion about the facts of the case. I do not. It is not my role to determine the facts, that is your role.

You must perform your duties as jurors without bias or prejudice to any party. The law does not permit you to be governed by sympathy, prejudice, or public opinion. All parties – and the law- 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.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations of life. All parties are entitled to the same fair trial at your hands. All parties stand equal before the law, and are to be dealt with as equals in a court of justice.

#### **B. EVIDENCE IN THE CASE**

In determining the facts of this case, you are to consider only the evidence that has been properly put before you. That evidence consists of the sworn testimony of witnesses and the exhibits that have been received into evidence. Evidence that the court admits is

properly before you for your consideration; evidence that this Court has refused to admit is not a proper subject for your deliberations and you should not consider it when reaching a verdict. Admitted evidence will be available to you in the jury room during your deliberations. The fact that the Court admitted evidence over objection should not influence you in determining the weight you should give such evidence. Nor should statements made by counsel, either for or against the admission of such evidence, influence your determination of the weight you will give the evidence, if the evidence was admitted.

Certain things are not evidence, and you may not consider them in deciding what the facts are.

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements and closing arguments, and at other times, may help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory controls.

2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the Court's ruling on it.

3. Testimony that has been excluded is not evidence and must not be considered.

4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at trial.

### **C. CREDIBILITY OF WITNESSES**

You are the sole judges of the credibility of the witnesses and the weight their testimony deserves. In deciding the facts of this case, you may have to decide which testimony to believe

and which testimony not to believe. In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things that witness testified about;
2. the witness' memory;
3. the witness' manner while testifying;
4. the witness' interest in the outcome of the case and any bias or prejudice the witness may have;
5. whether other evidence contradicted the witness' testimony; and
6. the reasonableness of the witness' testimony in light of all the evidence.

After making your own judgment, you may believe everything a witness says, or part of it, or none of it at all. Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying. You may find that the testimony of a small number of witnesses is more credible than the testimony of a larger number of witnesses.

#### **D. EVIDENCE – DIRECT AND CIRCUMSTANTIAL**

There are two types of evidence. One is direct evidence — such as the testimony of an eyewitness. The other is indirect or circumstantial evidence — that is, 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. You are simply required to find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

In your consideration of the evidence in this case, you are allowed to make reasonable inferences from witnesses' testimony and the admitted exhibits. Inferences are deductions that

reason and common sense lead you to draw from facts that have been established by the evidence in this case. Inferences, however, may not be based on pure speculation or conjecture.

Let me give you an example of a reasonable inference. If your mailbox was empty when you left home this morning, and you find mail in it when you go home tonight, you may infer that the letter carrier delivered the mail. Now, obviously, you didn't see the letter carrier deliver the mail, but from the facts that the mailbox was empty this morning and it is filled tonight, you can properly infer that the letter carrier came by in the interim and delivered the mail. That is all that we mean by an inference.

#### **E. BURDEN OF PROOF: PREPONDERANCE OF THE EVIDENCE**

The burden is on the Plaintiff in a civil action, such as this, to prove every essential element of her claims by a preponderance of the evidence. If the proof should fail to establish any essential element of the Plaintiff's claim by a preponderance of the evidence, then you should find for the Defendant on that claim. The Defendant does not have any obligation to disprove that which the Plaintiff asserts or claims.

To establish by "a preponderance of the evidence" means to prove that something is more probably true than not true. In other words, if you were looking at opposite ends of a scale, the Plaintiff's evidence would have to make one end of the scale tip to its side.

When I say in these instructions that a party has the burden of proof on any proposition, I mean you must be persuaded, considering all the evidence in the case, that the proposition is more probably true than not true. This rule does not, of course, require proof to an absolute certainty or even to a near certainty.

## ***II. CASE-SPECIFIC INSTRUCTIONS***

### **1. DISCRIMINATION**

To prove discrimination, Mr. Alarcon must prove that:

- (1) he is a member of a protected class;
- (2) that he was performing satisfactorily so as to meet the employer's legitimate job-performance expectations;
- (3) that he suffered an adverse employment action;
- (4) that he was treated less favorably than someone outside his protected class

With respect to the first element, I will tell you being Hispanic is being a member of a protected class.

An adverse employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

Keep in mind that antidiscrimination laws were not designed to transform courts into super personnel departments, assessing the merits—or even the rationality—of employers' nondiscriminatory business decisions. An employer may take action against an employee for good reasons, bad reasons, reasons based on erroneous facts, or for no reason at all, so long as its actions are not based on discriminatory purposes. An employer is free to make its employment decisions for any nondiscriminatory reason even if its business judgment seems objectively unwise.

In sum, in order to succeed on the discrimination claim, Mr. Alarcon must persuade you, by a preponderance of the evidence that were it not for racial discrimination, he would not have been transferred by the City of Providence.

## 2. RETALIATION

Mr. Alarcon's second claim is that he was subjected to retaliation by the City of Providence. Employers may not retaliate against employees for having exercised their right to speak out about actual or perceived illegal conduct by their employees. The City of Providence is liable to Mr. Alarcon for retaliation if he proves all three of the following elements by a preponderance of the evidence.

1. That he engaged in protected conduct;
2. That he suffered an adverse employment action;
3. That a causal nexus exists between Mr. Alarcon's protected activity and the adverse employment action.

I will now explain elements of one, two and three, what constitutes protected conduct, an adverse employment action, and a causal nexus in more detail.

First, protected conduct refers to action taken to protest statutorily prohibited discrimination. This can include the filing of formal charges of discrimination, as well as informal protests of discriminatory employment practices. Mr. Alarcon's actions are considered "protected conduct" if they were based on his good-faith and reasonable belief that the City discriminated against him because of his race. To show a good-faith belief, Mr. Alarcon must prove by a preponderance of the evidence that he honestly believed that the City discriminated against him because of his race. To show a reasonable belief, Mr. Alarcon must prove by a preponderance of the evidence that a reasonable person would, under the circumstances, believe that the City discriminated against him because of his race. Mr. Alarcon does not have to prove that the City actually discriminated against him because of his race, but he must prove he had a good-faith and reasonable belief that the City did so.

Second, an adverse employment action is any type of action that would have made a reasonable employee reluctant to make or support a charge of discrimination. Put another way, if a reasonable employee would be less likely to complain about or oppose alleged discrimination because he knew that his employer would engage in the alleged adverse employment action, then the action is an adverse employment action. If the employment action would not make it less likely for a reasonable employee to make complaints about or oppose the alleged discrimination, it is not an adverse employment action.

Third, a causal nexus exists where Mr. Alarcon has established that the protected activity was a motivating factor in the adverse employment action. Such a causal connection may be established by showing the City of Providence's knowledge of the protected activity was close in time to the employer's adverse action. Specifically, Mr. Alarcon must show that he would not have suffered the adverse employment action, but for his exercise of a protected right. If an adverse employment action was taken, the City will not be liable if it can prove by a preponderance of the evidence that the adverse employment action was taken for a legitimate, non-retaliatory reason.

### **3. DAMAGES**

#### **A) COMPENSATORY**

I will now instruct you on the law of damages. The mere fact that I am charging you on the law of damages does not indicate in any respect that I feel you should find in favor of Mr. Alarcon. You must remember that before even deciding the question of damages, you must first decide whether Mr. Alarcon has sustained his burden of proof relative to all of the elements of either, or both of, the offenses with which he has charged the City. Only if you find that he has, should you proceed to consider damages.

Damages are an additional element of Mr. Alarcon's case. That means that he must prove his damages by a preponderance of the evidence. In order to recover compensatory damages, Mr. Alarcon must prove that the City's conduct proximately caused him harm. If you find that the City is liable for discrimination, or retaliation, or both, the next question is whether that conduct caused Mr. Alarcon to suffer an injury. You must determine whether that conduct was the "proximate cause," meaning the direct cause of his injury. An injury or damage is proximately caused by conduct whenever it appears from the evidence that the conduct played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of that conduct.

Damages are defined in law as that amount of money which will compensate an injured party for the harm or loss that she has sustained. The rationale behind compensatory damages is to restore a person to the position that she was in prior to the harm or loss. Compensatory damages, then, are the amount of money that will replace as near as possible the loss or harm caused to Mr. Alarcon.

You may not speculate in awarding damages. If you find in Mr. Alarcon's favor, then you should consider awarding him such a sum as you find by the preponderance of the evidence will fairly and justly compensate him for any damages you find he sustained as a direct result of the City's conduct.

You may also award Mr. Alarcon emotional damages for any pain and suffering he experienced as a result of the City's conduct. Any amount you award for emotional damages should be based upon your consideration of the nature, extent, and duration of his pain and suffering. You may compensate Mr. Alarcon for mental suffering, which

may include nervousness, anxiety, worry, shock, humiliation, embarrassment, or indignity. It is difficult to measure emotional damages in terms of money. Nevertheless, you may not speculate or guess as to what constitutes fair compensation for pain and suffering.

Any award you determine must be based on the evidence and what in your considered judgment constitutes fair, adequate, and just compensation for such injuries and pain and suffering as have been proved. The determination of that amount, if any, is solely for you, the jury, to make. Suggestions of the attorneys as to how that amount might be computed are not binding upon you. You may, however, consider them if you find them helpful.

## **B) NOMINAL**

If you find that Mr. Alarcon is entitled to a verdict because he has proved all the elements of one or both of his claims that I explained above, but do not find that he has proved actual damages, you may return a verdict for Mr. Alarcon in some nominal sum such as one dollar (\$1.00). You may not award Mr. Alarcon both actual and nominal damages. Nominal damages may be awarded only if you find that Mr. Alarcon has suffered a violation, but has not proved that he is entitled to actual damages.

## **VII. PROPOSED WITNESS LIST**

1. Retired Chief James Rattigan – will testify as to the selection process that was used for candidates to the 46<sup>th</sup> Training Academy and that the Plaintiff was selected because of his race under the Fire Department's Affirmative Action Plan. As well as how successful candidates were placed into openings.

2. Olayinka Oredugba – the City's equal Employment Opportunity Officer will testify that the Plaintiff came to her complaining about the way he was being treated at the Fire Department but never said he thought it was because of his race. She will also testify that she investigated his complaint and concluded none of them involved racial discrimination.

3. Retired Chief Joseph Desmarais - will testify as to the bidding procedure for which was in effect in 2011.

4. Retired Chief Timothy McDaniel – Will testify as to his intervention in the dispute between Alarcon and his coworkers.

5. Lt. Steven Nunes – will testify as to the circumstance surrounding Alarcon’s transfer out of the Broad Street Station as well as his refusal to take the detail and his verbal abuse towards the firefighters regarding the dinky.

6. Firefighter Kristopher Wright (retired) – will testify as to Alarcon’s verbal abuse towards him.

7. Lt. Joseph Fontaine (retired) – will testify as to Alarcon’s verbal abuse towards the members of the Broad Street Station.

8. Firefighter Steven Rocchio (retired) – will testify as to Alarcon’s verbal abuse towards him.

9. Lt. Arlindo Rodrigues – will testify as to Alarcon’s disruptive behavior at the Broad Street Station and as to why he transferred out of the Broad Street Station.

10. Firefighter Craig Martin – will testify as to Alarcon’s abusive treatment to him.

The Defendant reserves the right to call other witnesses as the need arises.

## **VIII. EXHIBITS**

- A. Firefighter’s Collective Bargaining Contract.
- B. Plaintiff’s request for transfer out of the Broad Street Station.
- C. General order transferring Plaintiff out of the Broad Street Station.
- D. List of candidates who passed the test for the 46<sup>th</sup> Training Academy.
- E. Providence Fire Department’s Affirmative Action Plan.
- F. The order of Finish of Graduates of the 46<sup>th</sup> Training Academy.
- G. Form 17 from Lt. Arlindo Rodrigues, dated 10-4-11
- H. Form 17 from Lt. Arlindo Rodrigues, date 01-18-12
- I. Form 17 from Lt. Joseph Fontaine, dated 01-18-12
- J. Form 17 from Lt. Steven Nunes, dated 02-03-13



5. If you answered yes to numbers 2 and/or 4, then what amount of damages, if any, do you award the Plaintiff?

\_\_\_\_\_  
Fill in amount

6. If you answered yes to numbers 2 or 4, then enter a verdict for the Plaintiff.

7. If you answered no to numbers 1, 2 and 3, then enter a verdict for the defendant.

Verdict For

\_\_\_\_\_Plaintiff

\_\_\_\_\_Defendant

DEFENDANTS,

By their Attorney,

JEFFREY DANA  
CITY SOLICITOR

/s/Kevin F. McHugh  
Kevin F. McHugh (#3927)  
Senior Assistant City Solicitor

/s/David Ellison  
David Ellison (#8838)  
Assistant City Solicitor

Providence Law Department  
444 Westminster Street, Suite 220  
Providence, RI 02903  
(401) 680-5333  
(401) 680-5520 (Fax)  
kmchugh@providenceri.gov  
[Dellison@providenceri.gov](mailto:Dellison@providenceri.gov)

**CERTIFICATION**

I hereby certify that I have filed the within with the United States District Court on this 31st day of July, 2017 and that a copy is available for viewing and downloading via the ECF system, to the following counsel of record:

Christopher J. Trombetta, Esq.  
190 Chauncy Street, Suite 101  
Mansfield, MA 02048

/s/Kevin F. McHugh