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4 **UNITED STATES DISTRICT COURT**  
5 **NORTHERN DISTRICT OF CALIFORNIA**  
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8 HOSETTA ZERTUCHE,

9 Plaintiff,

10 vs.

11 COUNTY OF SANTA CLARA, *ET AL.*,

12 Defendants.

Case No.: 11-cv-3691 YGR

**ORDER RE: PRETRIAL CONFERENCE**

13 On Jury Instruction No. 21, the parties both propose that the third element in Instruction 21  
14 should read:

15 *3. the defendant took an adverse employment action against the plaintiff*

16 However, the proposed instruction does not take into account the theory of liability against  
17 Defendant Gleason here: that he set in motion an adverse action, ultimately decided by others, and is  
18 liable as a result. *See Gilbrook v. City of Westminster*, 177 F.3d 839, 854 (9th Cir.1999) (although  
19 the ultimate decision maker had a legitimate reason for imposing discipline, the court found that the  
20 retaliatory motives of “two subordinates set in motion the chain of events that led” to the plaintiff’s  
21 adverse employment action); *Ostad v. Oregon Health Sciences Univ.*, 327 F.3d 876, 883 (9th Cir.  
22 2003) (individual supervisor could be held liable for free speech retaliation where there was ample  
23 evidence of his bias and his role in plaintiff’s termination, even if the termination decision was  
24 ultimately made by a hearing committee acting without retaliatory motive). In this respect, the  
25 instruction is potentially confusing to the jury.

26 At the pre-trial conference scheduled for Friday, November 8, 2013, the parties should be  
27 prepared to discuss whether the instruction should be modified to read:

28 *3. Plaintiff Zertuche suffered an adverse employment action*

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OR

3. *Defendant Gleason's acts caused Plaintiff Zertuche to suffer an adverse employment action*

Alternatively, the parties should be prepared to offer other modifications and support for their proposed language.

**IT IS SO ORDERED.**

Dated: November 5, 2013

  
YVONNE GONZALEZ ROGERS  
UNITED STATES DISTRICT COURT JUDGE