

11.13 Age Discrimination—Damages—Back Pay—Mitigation

If you find for the plaintiff [name] [on the plaintiff's ADEA claim], you must determine the plaintiff [name]'s damages. Damages means the amount of money that will reasonably and fairly compensate the plaintiff for any loss of [pay] [wages] [benefits] you find was caused by the discriminatory act of the defendant [name]. You may award the following:

Back Pay:

> 1. Award: Back pay includes any [back wages] [lost pay] [and employee benefits] the plaintiff would have received from the date the defendant [name] [discharged] [failed to hire] [failed to promote] [demoted] [*state other adverse employment action*] the plaintiff [name] to the [date of trial] [date the plaintiff [declined] [accepted] reinstatement]]. The plaintiff [name] has the burden of proving both the existence and the amount of back pay by a preponderance of the evidence.

> 2. Mitigation of Back Pay Award: The plaintiff [name] has a duty to undertake reasonable measures to minimize [his] [her] [*other pronoun*] damages and the defendant [name] is not required to compensate the plaintiff [name] for avoidable damages. Thus, your award of back pay should be reduced by the amount of damages that the plaintiff [name] actually avoided, or could have avoided, if [he] [she] [*other pronoun*] had made reasonable efforts. The defendant [name] has the burden of proving by a preponderance of the evidence that a reduction should be made and the amount by which the award should be reduced.

Therefore:

> a. You must deduct any wages or other earnings that the defendant [name] proved that the plaintiff [name] received from other employment from the date the defendant [name] [discharged] [failed to hire] [failed to promote] [demoted] [*state other adverse employment action*] the plaintiff [name] to the [date of trial] [date the plaintiff [declined] [accepted] reinstatement].

> [b. You must deduct any severance pay [and pension benefits] that the defendant [name] proved the plaintiff [name] received after the discharge.]

> [b.] [c.] If the defendant [name] proves by a preponderance of the evidence either:

> (i) that the plaintiff [name] unjustifiably failed to take a new job of like kind, status, and pay which was available to plaintiff [name], or

> (ii) that the plaintiff [name] failed to make reasonable efforts to find such new job;

> you must subtract from the back pay award the amount of money you find that the plaintiff [name] could have earned from the time the plaintiff [name] could have obtained such

new job [or should have obtained from such new job, had [he] [she] [*other pronoun*] made reasonable efforts to find such new job] to the [date of trial] [date the plaintiff [*name*] [declined] [accepted] reinstatement].]

Comment

On the issue of whether or not front pay is an issue for the court or for the jury, see *Traxler v. Multnomah County*, 596 F.3d 1007, 1012-14 (9th Cir. 2010), and *Cassino v. Reichold Chems.*, 817 F.2d 1338, 1346-47 (9th Cir. 1987). If it is determined that the front pay issue should go to an advisory jury, consider using the following language:

Front Pay:

> a. Award: An award for front pay compensates the plaintiff [*name*] for the loss of future [wages] [pay] [and employee benefits] that have been caused by the defendant [*name*]'s discriminatory act. You should award front pay to the plaintiff [*name*] to compensate for these losses. The plaintiff [*name*] bears the burden of proving these losses by a preponderance of the evidence.

> b. Limit on Front Pay Award: Front pay is intended to be temporary in nature. The plaintiff [*name*] has a duty to make reasonable efforts to obtain a new job of like kind, status, and pay. Thus, you must limit any award of front pay to compensate only for the period of time you find will be necessary for the plaintiff [*name*] to obtain such a job if [he] [she] [*other pronoun*] makes a reasonable effort. The defendant [*name*] has the burden of proving by a preponderance of the evidence that a reduction should be made and the amount by which the award should be reduced.

> c. Reduction to Present Cash Value: Any award of front pay must also be reduced to the present cash value of the award.

Present cash value means the sum of money needed now that, when invested at a reasonable rate of return, would be sufficient to pay the front pay at the time in the future when the money would have been earned by the plaintiff [*name*].

The rate of return to be applied in determining present cash value should be the interest that can reasonably be expected from safe investments that can be made by a person of ordinary prudence, who has ordinary financial experience and skill.

> d. You should also consider decreases in the value of money that may be caused by future inflation.

Unlike a Title VII plaintiff, an ADEA plaintiff has a right to jury trial on the issue of back pay, as well as any mitigation issues. See *Lorillard v. Pons*, 434 U.S. 575, 582-83 (1978) (characterizing this remedy as “legal”); *Tamosaitis v. URS Inc.*, 781 F.3d 468, 485 (9th Cir.

2015) (discussing *Lorillard*); *Cassino*, 817 F.2d at 1346 (9th Cir. 1987) (discussing a jury trial on mitigation).

The remedies provisions of the ADEA incorporate the remedies from the Fair Labor Standards Act (FLSA). *See Lorillard*, 434 U.S. at 578; *see also* 29 U.S.C. § 626(b) (ADEA remedies provision). Thus, like the FLSA, the ADEA provides for the recovery of “unpaid minimum wages or unpaid overtime compensation,” which includes back pay, liquidated damages and equitable relief. *See* 29 U.S.C. § 216 (FLSA remedies provision).

The Ninth Circuit has concluded that “back pay” under various federal statutes, generally includes tips, holiday pay, and overtime pay. *See Local Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1157 (9th Cir. 2001).

An award of back pay is subject to the plaintiff’s duty to mitigate. “An ADEA plaintiff must attempt to mitigate damages by exercising reasonable care and diligence in seeking re-employment after termination. The defendant bears the burden of showing that there were suitable positions available and that the plaintiff failed to use reasonable care in seeking them.” *Cassino*, 817 F.2d at 1345 (citation omitted). The Ninth Circuit has not definitively taken a position on whether a jury should be instructed that, “after a period of looking for work unsuccessfully, [the plaintiff is] obligated to ‘lower his sights’” to procure mitigating employment. *See EEOC v. Pape Lift, Inc.*, 115 F.3d 676, 683 (9th Cir. 1997) (declining to reach issue because the instruction was not requested at trial) (citing *Ford Motor Co. v. EEOC*, 458 U.S. 219, 232 n.16 (1982) (noting, without adopting the principle, that some lower courts have indicated that “after an extended period of time searching for work without success, a claimant must consider taking a lower-paying position”)).

The ADEA does not provide for nonwage compensatory or punitive damages. *Ahlmeier*

v. Nev. Sys. of Higher Educ., 555 F.3d 1051, 1059 (9th Cir. 2009); *Naton v. Bank of Cal.*, 649 F.2d 691, 698-99 (9th Cir. 1981). Thus, a plaintiff cannot recover for emotional distress or pain and suffering under the ADEA. *Id.*; *see also Comm’r v. Schleier*, 515 U.S. 323, 326 (1995) (“[T]he Courts of Appeals have unanimously held . . . that the ADEA does not permit a separate recovery of compensatory damages for pain and suffering or emotional distress.”). Nor were these remedies extended to the ADEA (as they were to Title VII actions) by the Civil Rights Act of 1991. *See Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (holding that while the Civil Rights Act of 1991 “expanded the coverage of Title VII, [it] did not amend the ADEA or speak to the subject of age discrimination”).

See also Instruction 11.14 (Age Discrimination—Damages—Willful Discrimination—Liquidated Damages).

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