

12.14 ADA—Damages

Comment

See Chapter 5 (“Damages”) for damage instructions. See also 42 U.S.C. § 12117(a) (applying powers, remedies, and enforcement provisions of Title VII to any person alleging employment discrimination on basis of disability).

See 42 U.S.C. § 1981a (b) (providing for recovery of compensatory and punitive damages). Indeed,

[a] complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. § 1981a (b)(1). In addition, a district court may award nominal damages in an ADA retaliation claim as equitable relief. *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 874 (9th Cir. 2017).

See 42 U.S.C. § 1981a(b)(3) (limiting the amount of damages recoverable based on a defendant’s employee base). These limits do not apply to back pay or front pay, which are awarded under 42 U.S.C. § 2000e-5(g)(1), not 42 U.S.C. § 1981a. See *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 848 (2001).

See 42 U.S.C. § 1981a(c)(2) (requiring that limits on damages not be disclosed to the jury).

The Ninth Circuit has held in the ADA context that back pay constitutes equitable relief within the discretion of the court, not the jury. See *Lutz v. Glendale Union High Sch.*, 403 F.3d 1061, 1069 (9th Cir. 2005) (holding that under the ADA, “there is no right to have a jury determine the appropriate amount of back pay,” which “remains an equitable remedy to be awarded by the district court in its discretion”). Although the Ninth Circuit has not directly addressed the issue, precedent indicates that front pay is also within the discretion of the court, not the jury. In the ADA context, front pay constitutes equitable relief. See *Bayer*, 861 F.3d at 866 (citing *Pollard*, 532 U.S. at 849-51) (stating in the ADA context that “money damages in the form of front pay are equitable when awarded in lieu of injunctive reinstatement”). Further, in a related context, the Ninth Circuit has indicated that front pay must be decided by the court, not the jury. See *Traxler v. Multnomah County*, 596 F.3d 1007, 1011-12 (9th Cir. 2010) (explaining in the context of an FMLA case that “front pay is an equitable remedy that must be determined by the court, both as to the availability of the remedy and the amount of any award” and that front pay is different from compensatory damages). A court may, however, empanel an advisory jury. See *id.* at 1013; Fed. R. Civ. P. 39(c).

See also Introductory Comment to Chapter 10 (“Civil Rights—Title VII—Employment Discrimination; Harassment; Retaliation”); Introductory Comment to this chapter.

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