

9 PJI 4.4 | FRONT PAY – FOR ADVISORY OR STIPULATED JURY

You may determine separately a monetary amount equal to the present value of any future wages and benefits that [plaintiff] would reasonably have earned from [defendant] had [plaintiff] not [describe adverse employment action] for the period from the date of your verdict through a reasonable period of time in the future. From this figure you must subtract the amount of earnings and benefits [plaintiff] will receive from other employment during that time. [Plaintiff] has the burden of proving these damages by a preponderance of the evidence.

[If you find that [plaintiff] is entitled to recovery of future earnings from [defendant], then you must reduce any award by the amount of the expenses that [plaintiff] would have incurred in making those earnings.]

You must also reduce any award to its present value by considering the interest that [plaintiff] could earn on the amount of the award if [he/she] made a relatively risk-free investment. The reason you must make this reduction is because an award of an amount representing future loss of earnings is more valuable to [plaintiff] if [he/she] receives it today than if it were received at the time in the future when it would have been earned. It is more valuable because [plaintiff] can earn interest on it for the period of time between the date of the award and the date [he/she] would have earned the money. Thus you should decrease the amount of any award for loss of future earnings by the amount of interest that [plaintiff] can earn on that amount in the future.

[Add the following instruction if defendant claims “after-acquired evidence” of misconduct by the plaintiff:

[Defendant] contends that it would have made the same decision to [describe employment decision] [plaintiff] because of conduct that it discovered after it made the employment decision. Specifically, [defendant] claims that when it became aware of the [describe the after-discovered misconduct], it would have made the decision at that point had it not been made previously.

If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [describe employment decision] [plaintiff] because of [describe after-discovered evidence], then you may not award [plaintiff] any amount for wages that would have been received from [defendant] in the future.]



COMMENT

ADA remedies are the same as provided in Title VII. The enforcement provision of the ADA, 42 U.S.C. § 12117, specifically provides for the same recovery in ADA actions as in Title VII actions: "The powers, remedies and procedures set forth in... [42 U.S.C. § 2000e-5, the Title VII remedies provision] shall be the powers, remedies and procedures this title provides to... any person alleging discrimination on the basis of disability in violation of any provision of this Act... concerning employment." Accordingly, this instruction on front pay is substantively identical to that provided for Title VII actions. See Instruction 5.4.4.

There is no right to jury trial under Title VII (or by extension the ADA) for a claim for front pay. See *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001) (holding that front pay under Title VII is not an element of compensatory damages). See also *Marinelli v. City of Erie*, 25 F. Supp. 2d 674, 675 (W.D. Pa. 1998) ("The ADA provides for all remedies available under Title VII, which includes backpay and front pay or reinstatement. [Front pay relief] is equitable in nature, and thus within the sound discretion of the trial court."), judgment vacated on other grounds, 216 F.3d 354 (3d Cir. 2000).

An instruction on front pay is nonetheless included because the parties or the court may wish to empanel an advisory jury – especially given the fact that in most cases the plaintiff will be seeking compensatory damages and the jury will be sitting anyway. See Fed. R. Civ. P. 39(c). Alternatively, the parties may agree to a jury determination on front pay, in which case this instruction would also be appropriate. Instruction 9.4.1, on compensatory damages, instructs the jury in such cases to provide separate awards for compensatory damages, back pay, and front pay.

Front pay is considered a remedy that substitutes for reinstatement, and is awarded when reinstatement is not viable under the circumstances. See *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d 253, 260-61 (3d Cir. 1986) (noting that "when circumstances prevent reinstatement, front pay may be an alternate remedy").

In *Monessen S.R. Co. v. Morgan*, 486 U.S. 330, 339 (1988), the Court held that "damages awarded in suits governed by federal law should be reduced to present value." (Citing *St. Louis Southwestern R. Co. v. Dickerson*, 470 U.S. 409, 412 (1985)). The "self-evident" reason is that "a given sum of money in hand is worth more than



the like sum of money payable in the future." The Court concluded that a "failure to instruct the jury that present value is the proper measure of a damages award is error." *Id.* Accordingly, the instruction requires the jury to reduce the award of front pay to present value. It should be noted that where damages are determined under state law, a present value instruction may not be required under the law of certain states. See, e.g., *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (Pa. 1980) (advocating the "total offset" method, under which no reduction is necessary to determine present value, as the value of future income streams is likely to be offset by inflation).

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