

**2.33 Mitigation of Economic Damages – Back Pay**  
(04/2014)

**(To be provided in conjunction with or following general instructions regarding damages in a wrongful discharge or discrimination case)**

**A. General Mitigation Principles**

1. If, in accordance with the principles of law previously given to you, you find that the defendant is liable to the plaintiff for damages which include back pay, you are to reduce the amount awarded by all income which the plaintiff either earned or could have earned from comparable employment if she/he had used reasonable and diligent efforts to obtain such a position.<sup>1</sup>

2. The back pay damages are to be reduced by earnings that plaintiff either earned or could have earned because the law requires that the plaintiff use reasonable and diligent efforts to mitigate or minimize the amount of damages she/he has sustained.

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<sup>1</sup> *Goodman v. London Metals Exchange, Inc.*, 86 N.J. 19, 34 (1981); *Sandler v. Lawn-A-Mat Chem. and Equip. Corp.*, 141 N.J. Super. 437, 455 (App. Div.), *certif. den.*, 71 N.J. 503 (1976); *Rogozinski v. Airstream by Angell*, 152 N.J. Super. 133, 158 (Law Div. 1977), *modified*, 164 N.J. Super. 465 (App. Div. 1979).

3. In this case, the defendant asserts that the plaintiff failed to mitigate his/her damages by failing to properly (seek/accept) comparable employment. The burden of persuasion on this point is on the defendant. This means that the defendant was required to present credible evidence which leads you to believe that it is more likely than not that the plaintiff failed to mitigate or minimize his/her damages.<sup>2</sup>

4. The defendant may establish this by introducing evidence that (1) plaintiff made no effort or no reasonable effort to secure comparable employment, and (2) other employment opportunities were available that were comparable to the position plaintiff (lost/was denied).<sup>3</sup>

5. The plaintiff may refute the defendant's allegations by showing that (1) she/he used reasonable and diligent efforts and was still unable to secure a comparable job; (2) comparable employment did not exist; or (3) his/her particular circumstances did not justify the acceptance of a dissimilar job.<sup>4</sup>

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<sup>2</sup> *Goodman*, 86 N.J. at 40; *Sandler*, 141 N.J. Super. at 455; *Roselle v. La Fera Contracting Co.*, 18 N.J. Super. 19, 28 (Ch. Div. 1952); *Corbin on Contracts*, Section 1039 at 251 (1964).

<sup>3</sup> *Goodman*, 86 N.J. at 40.

<sup>4</sup> *Goodman*, 86 N.J. at 36.

6. In deciding whether a job is comparable, in general you are to consider the nature of the responsibilities and skills required, the rate of pay, and the location. The plaintiff need not accept employment which is unsuitable and demeaning when compared with the job plaintiff (was denied/lost).<sup>5</sup>

7. In determining whether jobs are comparable, you may consider the following other factors:<sup>6</sup>

- (1) the degree of risk involved to the plaintiff's health and safety;
- (2) the plaintiff's physical fitness and prior training;
- (3) the plaintiff's work experience and prior earnings;
- (4) the plaintiff's length of unemployment;
- (5) the plaintiff's prospects for securing local work in plaintiff's customary occupation; and
- (6) the distance of the available work from plaintiff's residence.<sup>7</sup>

8. Although the back pay award should be reduced by any actual earnings, it should not be reduced by any unemployment benefits or other unearned income the

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<sup>5</sup> *Goodman*, 86 *N.J.* at 37.

<sup>6</sup> Only those factors relevant to the particular fact situation should be charged.

<sup>7</sup> *Goodman*, 86 *N.J.* at 37, citing New Jersey's Unemployment Compensation Law, *N.J.S.A.* 43:21-1 at 43:21-5(c)(1).

plaintiff may have received.<sup>8</sup> This means that the plaintiff had an obligation to use reasonable and diligent efforts to seek other comparable employment, and to accept it, if it were offered.

**B. Lowered Sights Doctrine<sup>9</sup>**

1. You are to bear in mind that the concept of job comparability is not a static or stationary one. Instead, it may change with the passage of time and the state of the job market.<sup>10</sup>

2. This means that if the plaintiff has used diligent efforts over a reasonable period of time and has still been unable to obtain a position which is comparable, then she/he is required to lower his/her sights.<sup>11</sup>

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<sup>8</sup> *Sporn v. Celebrity, Inc.*, 129 *N.J. Super.* 449, 453-60 (Law Div. 1974); *Craig v. Y & Y Snacks, Inc.*, 721 *F. 2d* 77 (3d Cir. 1983).

<sup>9</sup> This has been added as a relevant factor although not directly discussed in *Goodman*, but see discussion, 86 *N.J.* at 41.

<sup>10</sup> *Goodman*, 86 *N.J.* at 38.

<sup>11</sup> *Goodman*, 86 *N.J.* at 38; *N.L.R.B. v. Southern Silk Mills, Inc.*, 242 *F. 2d* 697 (6th Cir.), *cert. den.*, 335 *U.S.* 821 (1957); *De Rose v. Bd. of Review*, 6 *N.J. Super.* 164 (App. Div. 1950); *Worsnop v. Bd. of Review*, 92 *N.J. Super.* 260 (App. Div. 1966).

3. Lowering one's sights means that with the passage of time and the lack of success in finding a comparable job, the plaintiff must begin considering jobs that offer lower pay, or require different types of skills and responsibilities, or are in a more distant location.<sup>12</sup>

4. However, the doctrine of lowering one's sights should not be automatically applied, and, in addition to the passage of time, you should consider the plaintiff's individual circumstances, including, but not limited to: other skills or qualifications of the person; whether the person's family status reasonably justifies enlarging the geographic area wherein work is sought; the amount of salary reduction; the type of alternate employment; and the impact of these factors on the plaintiff's future.<sup>13</sup>

5. If you find that plaintiff has lowered his/her sights and still cannot find a job, no reduction in back pay is warranted.<sup>14</sup>

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<sup>12</sup> *Goodman*, 86 N.J. at 40; *Southern Silk Mills, Inc.*, 242 F. 2d at 700; *De Rose*, 6 N.J. Super. at 166; *Worsnop*, 92 N.J. Super. at 266.

<sup>13</sup> *Goodman*, 86 N.J. at 40; *De Rose*, 6 N.J. Super. at 166; *Worsnop*, 92 N.J. Super. at 266.

<sup>14</sup> *Goodman*, 86 N.J. at 41.

6. If you conclude that the award of back pay to plaintiff should be reduced, the amount of the reduction must be the greater of either (1) plaintiff's actual earnings or (2) the earnings plaintiff should have earned if she/he had obtained employment after lowering his/her sights.<sup>15</sup>

**C. Effect of Voluntary Termination of Subsequent Employment**

1. The evidence in this case reveals that plaintiff obtained subsequent employment. However, plaintiff then quit his/her new employment. The defendant alleges that plaintiff quit that employment without good cause. If you find that the defendant has proven, by a preponderance of the evidence, that plaintiff quit his/her subsequent employment without good cause, you are to deem the plaintiff to have voluntarily incurred the resultant losses. Consequently, any back pay award you make in favor of the plaintiff must be reduced by the wages she/he could have continued to earn in the subsequent employment if she/he had not quit.

2. For purposes of determining whether the plaintiff quit his/her subsequent employment for good cause, you may consider, by way of example, not limitation, the following factors: unsafe or unhealthful working conditions; harassment or discrimination; and any other reason that would warrant a reasonable employee to discontinue

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<sup>15</sup> *Goodman*, 86 N.J. at 43.

his/her employment.<sup>16</sup>

3. If you find that the defendant failed to prove, by a preponderance of the evidence, that plaintiff quit his/her subsequent employment without good cause, you may award plaintiff back pay damages which are reduced only by subsequent wages actually earned. You may not reduce said damages by the amount plaintiff could have earned.

**D. Effect of Unconditional Offer of Employment or Re-employment by Defendant Employer**

***NOTE TO JUDGE***

This charge is to be used in the relatively rare instance where the defendant employer has offered either to (a) hire plaintiff for the position applied for; or (b) reinstate plaintiff to the position from which he/she was terminated.

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<sup>16</sup> *Stonco Elec. Products Co. v. Board of Review*, 106 N.J. Super. 6, 10-12 (App. Div. 1969); *Sanchez v. Board of Review*, 206 N.J. Super. 617, 623-25 (App. Div. 1986); *Doering v. Board of Review*, 203 N.J. Super. 241, 246-48 (App. Div. 1985); *Inside Radio/Radio Only, Inc. v. Board of Review*, 204 N.J. Super. 296, 299-300; *Goodman*, 86 N.J. at 42; *Sandler v. Lawn-A-Mat Chem. & Equip. Corp.*, 141 N.J. Super. 437, 455 (App. Div.), *certif. denied*, 71 N.J. 503 (1976); *Roselle v. La Fera Construction Co.*, 18 N.J. Super. 19, 28 (Ch. Div. 1952); A. Corbin, *Corbin on Contracts* §1039 at 251 (1964); *N.L.R.B. v. Southern Silk Mills*, 242 F. 2d 697, 700 (6th Cir. 1957); N.J.S.A. 43:21-5.

1. The evidence in this case reveals that, subsequent to the defendant's (refusal to hire plaintiff/termination of plaintiff's employment), the defendant then offered to (hire plaintiff for the position sought/reinstate plaintiff to his/her former position). Absent special circumstances, for purposes of determining the period of back pay to which plaintiff is entitled in this matter, such an offer from the defendant employer terminates the running of the back-pay period so long as the offer is unconditional.<sup>17</sup>

2. The offer of (employment/re-employment) need not be accompanied by, *e.g.*, an offer of retroactive seniority or back pay to qualify as an unconditional offer. If, however, the offer from the defendant employer to (hire plaintiff for the position sought/reinstate plaintiff to the position from which he/she was terminated), is subject to the plaintiff's agreement to dismiss or waive continued pursuit of his/her LAD claims, the offer is conditional and does not terminate the running of the back-pay period.<sup>18</sup>

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<sup>17</sup> *Ford Motor Co. v. EEOC*, 458 U.S. 219, 102 S.Ct. 3057, 73 L.Ed.2d. 721 (1982).

<sup>18</sup> *Ford Motor Co.*, *supra*.



**E. Impact of Finding of No Constructive Discharge**

***NOTE TO JUDGE***

This charge is to be given at the end of the general charge regarding constructive discharge.

If you find that plaintiff has failed to prove, by a preponderance of the evidence, that she/he was constructively discharged as the result of intolerable conditions created brought about, or tolerated by the defendant employer, then you must deny plaintiff's claim for damages, and rule in favor of the defendant employer on all causes of action based on such constructive discharge.<sup>19</sup>

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<sup>19</sup> *Muench v. Township of Haddon*, 255 N.J. Super. 288, 302 (App. Div. 1992); *Kass v. Brown Boveri Corp.*, 199 N.J. Super. 42, 56 (App. Div. 1985); *Goss v. Exxon Office Systems Co.*, 747 F. 2d. 885, 887-89 (3d Cir. 1984).