

2.34 MITIGATION OF ECONOMIC DAMAGES - FRONT PAY
(02/2013; revised 04/2014)

[Plaintiff] also seeks to recover earnings that will be lost in the future. He/she has a right to be compensated for any earnings which you find will probably be lost and proximately caused by the injuries brought about by defendant's alleged wrongdoing.¹ This type of damages is called “front pay.”

“Front pay” projects and measures the ongoing economic harm, continuing after the final day of trial, which may be experienced by a plaintiff who has been wrongfully discharged in violation of anti-discrimination laws.²

A plaintiff has the burden to prove all of his/her damages claims by a preponderance of the evidence and that burden extends to front pay. Here, [Plaintiff] must prove, by a preponderance of the evidence, (1) what s/he would have earned had s/he not suffered the wrong allegedly committed by [Defendant], (2) how long s/he would have continued to receive those earnings, and (3) a reasonable likelihood that s/he will not be able to earn that amount in the future, such as through alternative employment.³

As to the first element, what [Plaintiff] would have earned had s/he not suffered the wrong allegedly committed by [Defendant], [Plaintiff] has the

¹ *Coll v. Sherry*, 29 N.J. 166, 175 (1959)

² *Donelson v. DuPont Chambers Works*, 206 N.J. 243, 251 n. 9 (2011); *Quinlan v. Curtiss-Wright Corp.*, 425 N.J. Super. 335, 350 (App. Div. 2012).

³ *Quinlan v. Curtiss-Wright Corp.*, 425 N.J. Super. 335, 364 (App. Div. 2012).

burden to prove, by a preponderance of the evidence, his/her gross income and the probable loss of future earnings.⁴ In deciding what [Plaintiff's] future losses are, the law does not require of you mathematical exactness. The law requires that you must use sound judgment based on reasonable probability.⁵ Any award of front pay, therefore, cannot be based upon speculation.⁶

As to the second element, how long s/he would have continued to receive those earnings, you cannot automatically presume that [Plaintiff] would have worked for [Defendant] for the remainder of his/her life if the alleged discrimination [or other improper conduct] had not occurred, unless there are facts or circumstances to warrant such a presumption. On the other hand, it is equally illogical to presume that [Plaintiff], absent alleged discrimination [or other improper conduct], would not have continued to work for [Defendant] for some period of time after the date of trial, unless there are facts or circumstances to warrant such a presumption.⁷

As to the third element, a reasonable likelihood that s/he will not be able to earn that amount in the future, [Plaintiff] has the burden of proving that the

⁴ *Caldwell v. Haynes*, 136 N.J. 422, 436 (1994).

⁵ By analogy to future income loss in a wrongful death case, see *Tenore v. NuCar Carriers, Inc.*, 67 N.J. 466, 494 -495 (1975). See also *Friedman v. C. S. Car Service*, 108 N.J. 72, 78-79 (1987).

⁶ *Pomerantz Paper Corp. v. New Cmty. Corp.*, 207 N.J. 344, 375 (2011); *Lane v. Oil Delivery, Inc.*, 216 N.J. Super. 413, 420 (App.Div.1987); see also Model Jury Charge (Civil) 1.12(O), "Damages" (1998) ("Damages may not be based on conjecture or speculation").

⁷ *Quinlan v. Curtiss-Wright Corp.*, 425 N.J. Super. 335, 352 (App. Div. 2012).

damages s/he claims were caused by [Defendant's] alleged unlawful discrimination [or other wrongful conduct] are either permanent or will last for a reasonably determinable time. You must take into consideration whether the position with [Defendant] would have ended for an unrelated reason or [Plaintiff] would have left the company on his/her own accord in the absence of discrimination [or other wrongful conduct] or [Plaintiff] could earn more in the future, through more diligent effort, than the earnings that s/he projects.⁸

As part of discharging its burden to prove [Plaintiff's] failure to mitigate his/her damages leading up to the time of trial, [Defendant] must present credible evidence which leads you to believe that it is more likely than not that [Plaintiff] failed to mitigate or minimize his/her damages. [Defendant] may establish this by proving that it is more likely than not that (1) [Plaintiff] failed to make reasonable efforts to secure comparable employment, and (2) other employment opportunities were available that were comparable to the position [Plaintiff] (lost/was denied).⁹ If you determine that [Defendant] has proven that [Plaintiff] failed to undertake reasonable measures to mitigate her alleged back pay damages and that there were comparable employment opportunities available to [Plaintiff], then you should reduce the front pay damages by the amount that you find that [Plaintiff] would have earned if plaintiff had used

⁸ *Quinlan v. Curtiss-Wright Corp.*, 425 N.J. Super. 335 (App. Div. 2012)

⁹ *Goodman v. London Metals Exchange, Inc.*, 86 N.J. 19, 41 (1981); *Wade v. Kessler Inst.*, 343 N.J. Super. 338, 355 (App. Div. 2001); see also Model Civil Jury Charge (Civil) 2.33, "Mitigation of Economic Damages – Back Pay" (2013).

reasonable measures to obtain the available replacement employment.¹⁰

Because the future is uncertain and unknown, neither party must prove that [Plaintiff] will or will not definitively mitigate his/her lost wages in the future.¹¹ [Defendant] does not have the burden to prove the unknown, where the unknown largely turns upon [Plaintiff's] own post-trial decisions and matters substantially within his/her own volition and control.¹² You must, therefore, use your sound judgment to assess all of the evidence to determine the likelihood of such mitigation throughout the future period of time during which [Plaintiff] seeks to recover lost income.

If you decide from the evidence that it is reasonably probable that [Plaintiff] will lose income in the future, because [either] he/she has not been able to return to work, [or] he/she has not been able to keep the same job, [or] he/she will be able to work for a shorter period of time only, then you should include an amount to compensate for those lost earnings. In deciding how much your verdict should be to cover future lost earnings, think about those facts discussed regarding past earning losses, including the nature, extent and duration of injury. Consider [Plaintiff's] age today, the level of [Plaintiff]'s former job with [Defendant], the level of compensation that [Plaintiff] earned from [Defendant], [Plaintiff]'s general state of health before his/her employment with

¹⁰ *Quinlan v. Curtiss-Wright Corp.*, 425 N.J. Super. 335, 369 (App. Div. 2012).

¹¹ *Quinlan v. Curtiss-Wright Corp.*, 425 N.J. Super. 335, 369 (App. Div. 2012).

¹² *Quinlan v. Curtiss-Wright Corp.*, 425 N.J. Super. 335, 362 (App. Div. 2012).

[Defendant] ended, how long you reasonably expect the loss of income to continue, and how much [Plaintiff] can earn in any available job that he/she physically will be able to work. Obviously, the older the plaintiff is, the higher level the plaintiff's job was, and the more the plaintiff earned, the longer it is likely to take the plaintiff to find comparable replacement employment. However, the time period covering [Plaintiff's] future lost earnings cannot go beyond that point when it was expected that he/she would stop working because of retirement, had he/she not been injured.¹³

If you decide from the evidence that [Plaintiff]'s employment with [Defendant] would have ended at some point in the future for reasons other than [Defendant]'s unlawful conduct, you should limit any award for future economic losses to the date on which you find that [Plaintiff] would have stopped working for [Defendant]. Similarly, if you find that by using reasonably diligent measures, [Plaintiff] should have been able to find another job or that [Plaintiff] should have been able to find a job earlier than s/he did or that [Plaintiff] should have been able to find a higher-paying job than the one s/he found, you should reduce any award for future economic losses by the amount

¹³ The collateral source rule (see cases under Model Civil Charge 8.11A applies to loss of earnings as well as to medical and hospital expenses. Plaintiff may recover damages for loss of earnings although having been paid wages or their equivalent by employer pursuant to sick or annual leave benefits or retirement on half salary under a pension contract. *Rusk v. Jeffries*, 110 *N.J.L.* 307, 311 (E. & A. 1933). *P.L.* 1987, c. 326 eliminates the collateral source rule as to causes of action arising on or after December 18, 1987. Deduction of benefits, less premiums, is done by the court, not the jury. See also *N.J.S.A.* 59:9-2(3) for similar effect of New Jersey Tort Claims Act.

that you find that plaintiff would have earned if she had used reasonably diligent measures to find comparable replacement employment.

Consider the probabilities of increases in earnings resulting from raises for productivity or promotion and [Plaintiff's] life expectancy and work life expectancy. Any figures you have heard on life expectancy and work life expectancy are only statistical averages. They are not fixed rules; they are general estimates. Use them with caution. Use your sound judgment in taking them into account.¹⁴

A proper assessment of front pay requires sensitivity to the competing interests of [Plaintiff], on the one hand, in being made whole and [Defendant], on the other hand, in being spared the duty to subsidize a prospective windfall.¹⁵ However, if you are addressing damages, that means that you have found that [Defendant] violated the law. In that regard, any uncertainties regarding the amount of damages should be resolved against [Defendant] as the wrongdoing party.¹⁶

¹⁴ This concept should be charged if there is appropriate evidence received on the subject. See Charge 8.11G regarding life expectancy.

¹⁵ *Quinlan v. Curtiss-Wright Corp.*, 425 N.J. Super. 335, 353 (App. Div. 2012).

¹⁶ *V.A.L. Floors, Inc. v. Westminster Communities, Inc.*, 355 N.J. Super. 416, 427 (App. Div. 2002).