417.10 AFFIRMATIVE DEFENSE — FAILURE TO MITIGATE LOST WAGES

[As a defense to (claimant’s) damages claim for lost wages and benefits, (defendant) claims that (claimant) could have reduced [his] [her] damages by making a reasonable effort to [seek] [retain] comparable employment. Comparable employment means alternative employment similar to (claimant’s) former job in the nature of the work, responsibilities and skills required. (Claimant) need not accept employment that is unsuitable or demeaning when compared with (claimant’s) former job.

If the greater weight of the evidence supports (defendant’s) claim that there was comparable employment available to (claimant) and that (claimant) failed to make a reasonable effort to [seek] [retain] such employment, then you should reduce any lost wages and benefits you award to (claimant) by the amount that (claimant) could have earned from the comparable employment.

If, however, the greater weight of the evidence does not support (defendant’s) claim that there was comparable employment available to (claimant) and that (claimant) failed to make a reasonable effort to [seek] [retain] that employment, then your verdict should be for (claimant) in the total amount of [his] [her] damages for lost wages and benefits.]

NOTES ON USE FOR 417.10

1. This instruction is given only if the defendant raised the affirmative defense of failure to mitigate in a discharge or failure to hire case.

2. As to plaintiff’s “duty to mitigate” damages in cases involving wrongful discharge, see generally Zayre Corp. v. Creech, 497 So. 2d 706, 708 (Fla. 4th DCA 1986); Juvenile Diabetes Research Foundation v. Rierman, 370 So. 2d 33, 36 (Fla. 3d DCA 1979); Punkar v. King Plastic Corp., 290 So. 2d 505, 508 (Fla. 2d DCA 1974). This instruction does not use the term “duty to mitigate” because this is more accurately an application of the doctrine of avoidable consequences. See System Components Corp. v. Fla. Dept. of Transp., 14 So. 3d 967, 982 (Fla. 2009).

3. Failure to Mitigate Lost Wages. With respect to the defendant’s burden on this defense, federal courts have held that if the defendant proves the claimant did not make a reasonable effort to seek out comparable employment, the defendant has met its burden on this defense without the need to prove that comparable employment was available to the claimant. See Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1527–28 (11th Cir. 1991); accord Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 54 (2d Cir. 1998); Sellers v. Delgado Cmty. College, 839 F.2d 1132, 1139 (5th Cir. 1988); NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1319 (D.C. Cir. 1972) (quoting Am. Bottling Co., 116 NLRB 1303, 1307 (1956)). No Florida appellate court has addressed this issue. The committee takes no position on this issue, pending further development in Florida law.