417.9 UNLAWFUL DISCRIMINATION DAMAGES

If you find for (defendant), you will not consider the matter of damages. But if you find for (claimant), you should award (claimant) an amount of money that the greater weight of the evidence shows will fairly and adequately compensate [him] [her] for such damage, including any such damage as (claimant) is reasonably certain to incur in the future. You shall consider the following elements of damages:

[any] [the difference between] lost wages and benefits to the date of trial [and what (claimant) earned during that time].

[any mental anguish] [loss of dignity] and [(describe other intangible injuries)] experienced in the past or to be experienced in the future. There is no exact standard for measuring such damages. The amount should be fair and just in the light of the evidence.

[any punitive damages warranted.] (insert applicable punitive damages instruction).

NOTES ON USE FOR 417.9

1. Lost wages and benefits. The court may issue an order “providing affirmative relief from the effects of the discriminatory practice, including back pay.” F.S. 760.11(5). Under Florida law, back pay is a legal remedy decided by the jury, and front pay is an equitable remedy that does not include a right to jury determination. O’Neal v. Fla. A&M Univ., 989 So. 2d 6 (Fla. 1st DCA 2008) (decided under Florida’s Whistle-blower’s Act). Some federal courts submit front pay issues to the jury for an advisory verdict. See, e.g., Wilson v. S & L Acquisition Co., L.P., 940 F.2d 1429, 1438 (11th Cir. 1991); Hudson v. Chertoff, 473 F. Supp. 2d 1279 (S.D. Fla. 2007); Hill v. Xerox Corp., 998 F. Supp. 1378, 1385 n. 9 (N.D. Fla. 1998); Quitto v. Bay Colony Golf Club, Inc., 2007 WL 4098847, \*1–2 (M.D. Fla. 2007). The Committee takes no position on instructing the jury to determine front pay or on the use of an advisory verdict.

2. Compensatory Damages. The court may award “compensatory damages, including, but not limited to, damages for mental anguish, loss of dignity, and other intangible injuries….” F.S. 760.11(5). Examples of “other intangible injuries” for which damages have been awarded under the FCRA include “emotional distress,” Munoz v. Oceanside Resorts, Inc., 223 F.3d 1340, 1348–49 (11th Cir. 2000); “emotional injury,” City of Hollywood v. Hogan, 986 So. 2d 634, 649–50 (4th DCA 2008); “humiliation and embarrassment,” Melluzzo v. Pub. Advocate, 2006 WL 5159197, at \*3 (M.D. Fla. 2006); “pain and suffering” and “loss of capacity for enjoyment of life experienced in the past or to be experienced in the future,” Moses v. K-Mart Corp., 905 F. Supp. 1054, 1060 n.7 (S.D. Fla. 1995), aff’d 119 F.3d 10 (11th Cir. 1997).

3. Punitive Damages. The court may award punitive damages not to exceed $100,000. F.S. 760.11(5). Pending further development of the law, the committee takes no position as to whether the Florida standard or the heightened federal standard for holding an employer vicariously liable for punitive damages for the conduct of its employee should apply. See Speedway SuperAmerica, LLC v. DuPont, 933 So. 2d 75 (Fla. 5th DCA 2006) (certifying the question of whether the state or federal standard applies), review dismissed 955 So. 2d 533 (Fla. 2007).

“Under Florida law, the purpose of punitive damages is not to further compensate the plaintiff, but to punish the defendant for its wrongful conduct and to deter similar misconduct by it and other actors in the future.” Owens-Corning Fiberglas Corp. v. Ballard, 749 So. 2d 483, 486 (Fla. 1999). However, “it is not clear what the standard is for punitive damages awarded under section 760.10,” DuPont, 933 So. 2d at 89, and the committee takes no position as to the standard for determining whether punitive damages are warranted. The FCRA, unlike Title VII, “simply provides that punitive damages may be awarded,” without any express requirement as to what action is appropriate for punitive damage. Id. at 89–90.

Some federal courts have applied Title VII’s punitive damages standard to claims for punitive damages under the FCRA. See, e.g., Hipp v. Liberty Nat. Life Ins. Co., 65 F. Supp. 2d 1314 (M.D. Fla. 1999), aff’d in part, rev’d in part on other grounds 252 F.3d 1208 (11th Cir. 2001). “To recover punitive damages under Title VII, a plaintiff must prove that defendant has ‘engaged in discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.’” Richardson v. Tricom Pictures & Productions, Inc., 334 F. Supp. 2d 1303, 1319 (S.D. Fla. 2004) (quoting 42 U.S.C. § 1981a(b)(1)). “Malice or reckless indifference is shown when the employer knowingly violates federal law….” Id. at 1319–1320 (citing Kolstad v. Am. Dental Ass’n, 527 U.S. 526, 535, 119 S. Ct. 2118, 144 L. Ed. 2d 494 (1999)). “[A]n employer must at least discriminate in the face of a perceived risk that its actions will violate federal law.” Kolstad, 527 U.S. at 535; Richardson, 334 F. Supp. 2d at 1320.