**24.09B EMPLOYEE’S DAMAGES FOR BREACH OF EMPLOYMENT CONTRACT FOR SPECIFIED TERM**

If you find in favor of [plaintiff/employee], you must then decide how much money, if any, would fairly compensate [him/her] for [defendant/employer's] breach of the employment contract.

# Alternative A

To determine the amount of damages [plaintiff] is entitled to receive, you must first decide the amount of compensation [defendant/employer] would have paid [plaintiff/employee] from [date of employee’s termination] to [date when the employment contract would have terminated]. From this amount, you must subtract [whichever of the following is the greater]:

[[(1)] the amount of any compensation [plaintiff] actually earned during that period which [he/she] would not have earned if [he/she] was still employed by [defendant] [; or]]

[[(2)] the amount of compensation which [[defendant] has shown it is more likely true than not true that [plaintiff] reasonably could have earned during that period through a diligent effort to obtain comparable employment.]

# Alternative B

To determine the amount of damages [plaintiff] is entitled to receive, you must first decide the amount of compensation [defendant/employer] would have paid [plaintiff/employee] from [date of employee’s termination] to [the date of trial]. From this amount, you must subtract [whichever of the following is the greater]:

[[(1)] the amount of any compensation [plaintiff] actually earned between [the date of plaintiff’s termination] and [date of trial] which [plaintiff] would not have earned if [he/she] was still employed by [defendant][; or]]

[[(2)] the amount of compensation which [defendant] has shown it is more likely true than not true that [plaintiff] reasonably could have earned between [the date of plaintiff’s termination] and [date of trial] through a diligent effort to obtain comparable employment.]

You must then decide the amount of compensation [defendant/employer] would have paid [plaintiff/employee] from [date of employee’s termination] to [date when the employment contract would have terminated]. From this amount, you must subtract [whichever of the following is the greater]:

[[(1)] the amount of any compensation [plaintiff] will earn between [date of trial] and [date when the employment contract would have terminated] which [he/she] would not have earned if [he/she] was still employed by [defendant][; or]]

[[(2)] the amount of compensation which [defendant] has shown it is more likely true than not true that [plaintiff] reasonably could be expected to earn between [the date of trial] and [date the employment contract would have terminated] through a diligent effort to obtain comparable employment.]

To determine the amount plaintiff is entitled to receive as damages, add the result of the first computation and the result of the second computation.

*[end of Alternative B]*

[You may not award damages to [plaintiff] for an amount that [defendant] shows that [plaintiff] could have earned by making a diligent effort to obtain comparable employment with another employer. In making a diligent effort to obtain comparable employment, an employee is not required to encounter undue risks, hardships or embarrassment, or pay unreasonable expenses.]

[Plaintiff] is required to establish the amount of [his/her] lost compensation with reasonable certainty. An award of damages for lost compensation must be based on evidence, and not on speculation, guesswork or conjecture.

**Use Note**

This instruction addresses the calculation of an employee’s damages for breach of an employment contract when the contract is for a specified term. If the duration of the contract is at-will or disputed, then Instruction 24.09C should be used.

Use the language "whichever of the following is the greater" if there is an issue as to whether the employee reasonably could have earned more money. Use Alternative A if the contract was to have terminated before the trial date. Use Alternative B if the contract was scheduled to terminate after the trial date.

The employer's liability for damages must be reduced by compensation which the employee actually earned or reasonably could have earned at a comparable job. The employer has the burden of proving both that the employee reasonably could have gotten alternative employment and the amount of compensation that the employee reasonably could have earned. If the employer seeks a reduction of damages on grounds that the employee reasonably could have obtained other employment and/or earned more money, then A(2) or B(2) should be used, along with the bracketed paragraph explaining the law governing the duty to mitigate damages. If this instruction is used, it is not necessary to give a separate mitigation of damages instruction relating to failure to obtain alternative employment.

**Comment**

When an employment contract has a fixed term, damages are limited to the unexpired term of the contract at the time of the wrongful discharge. *Central Bering Sea Fishermen’s Ass’n v. Anderson*, 54 P.3d 271, 278-79 (Alaska 2002).

The normal rule is that a wrongfully discharged employee is entitled to the total amount of the agreed upon salary for the unexpired term of his employment, less what he could earn by making diligent efforts to obtain similar employment.

*Skagway City School Board v. Davis*, 543 P.2d 218, 225 (Alaska 1975). *See also* *Luedtke v. Nabors Alaska Drilling, Inc*., 834 P.2d 1220, 1226 (Alaska 1992).

In *Redman v. Department of Education*, 519 P.2d 760 (Alaska 1974), the court wrote that "where an employee's wrongful discharge frees him to take another job he could not have held had he been retained, the employee can recover as damages only the difference between his actual earnings and the amount he would have earned in his old job." *Id*. at 771; *see also Wien Air Alaska v. Bubbel*, 723 P.2d 627, 632 (Alaska 1986).

Under mitigation of damages principles, an employee must make reasonable efforts to obtain comparable employment, but the employee is not required to encounter undue risk, expense, hardship, or embarrassment. *City of Fairbanks v. Rice*, 20 P.3d 1097, 1111 (Alaska 2000); *Luedtke*, 834 P.2d at 1226; *University of Alaska v. Chauvin*, 521 P.2d 1234,1239-40 (Alaska 1974). The employer has the burden of proof on the employee’s failure to mitigate. *See, e.g., City of Fairbanks*, 20 P.3d at 1111; *University of Alaska*, 521 P.2d at 1240. Where an employee is constructively discharged due to intolerable working conditions, the employee is not required to mitigate losses by accepting reinstatement to a position where the employee will encounter the same conditions. *Pyramid Printing Co. v. Alaska State Comm’n for Human Rights*, 153 P.3d 994, 998-99 (Alaska 2007).

Plaintiff is required to establish the amount of lost compensation with reasonable certainty. Such damages cannot be based on speculation or conjecture. *Central Bering Sea,* 54 P.3d at 279 n.20.

The principles of *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145, (1854), certainty and foreseeability, prohibit injury to reputation as a basis for damages for breach of employment contract. *Skagway*, 543 P.2d at 225‑28. These principles do not foreclose an action for defamation*. See, e.g.,* *City of Fairbanks*, 20 P.3d at 1111.