UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD ZARDA,

Plaintiff,

– against –

ALTITUDE EXPRESS, INC., d/b/a SKYDIVE LONG ISLAND, and RAY MAYNARD,

Defendants.

Case No.: 10-cv-4334 (JFB) (AYS)

DEFENDANTS' JURY INSTRUCTION REQUEST

Defendants, by and through their attorneys, respectfully submit the following Jury Instructions pursuant to Federal Rules of Civil Procedure 51 and the Individual Rules of the Honorable Joseph F. Bianco:

Introduction to Jury

Members of the jury, we are about to start the trial of this case, about which you have heard some details during jury selection. Before the trial begins, however, there are certain instructions you should have in order to understand what you will hear and see and how you should conduct yourself during the trial.

Source: N.Y. Pattern Jury Instr.--Civil 1:1

Parties

The party who brings a lawsuit is called Plaintiff. In this action the Plaintiff is the estate of Donald Zarda, it is suing to recover for alleged employment

discrimination. The parties against whom the suit is brought are called Defendants. In this action, Defendants are Skydive Long Island, Inc. and Raymond Maynard.

Source: N.Y. Pattern Jury Instr.--Civil 1:2

Openings and Evidence

When I have completed these opening instructions to you, the attorneys will make opening statements to you in which each will outline for you what he expects to prove. The purpose of such opening statements is to tell you about each party's claims so that you will have a better understanding of the evidence as it is introduced. What is said in such opening statements is not evidence. The evidence upon which you will base your decision will come from the testimony of witnesses here in court or in examinations before trial, or in the form of photographs, documents, or other exhibits introduced into evidence. Plaintiff makes an opening statement first, and is followed by Defendant. After the opening statements, Plaintiff will introduce evidence in support of its claim. Normally a Plaintiff must produce all of its witnesses and complete its entire case before Defendant introduces any evidence, although exceptions are sometimes made to that rule in order to accommodate a witness. After Plaintiff has completed the introduction of all of its evidence, Defendant may present witnesses and exhibits. If they do so, Plaintiff may be permitted to offer additional evidence for the purpose of rebutting Defendant's evidence. Each witness is first examined by the party who calls that

witness to testify, and then the opposing party is permitted to question the witness. Additional examination and questioning of a witness may occur.

Source: N.Y. Pattern Jury Instr.--Civil 1:3

Objections, Motions, Exceptions

At times during the trial, an attorney may object to a question or to the introduction of an exhibit or make motions concerning legal questions that apply to this case. Arguments in connection with such objections or motions are sometimes made out of the presence of the jury. Any ruling upon such objections or motions will be based solely upon the law and therefore you must not conclude from any such ruling or from anything I say during the course of the trial that I favor either party to this lawsuit. After such a ruling, you may hear one of the attorneys taking what we call an exception to it. Exceptions have nothing to do with your role in this case and I mention the procedure to you so that you will not be confused if you hear the word during the trial.

Source: N.Y. Pattern Jury Instr.--Civil 1:4

Summations

Upon completion of the introduction of evidence, the attorneys will again speak to you in a closing statement or summation. In summing up, the lawyers will point out what they believe the evidence has shown, what inferences or conclusions they believe you should draw from the evidence and what conclusions they believe you

should reach as your verdict. What is said by the attorneys in summation, like what is said by them in their opening statements, or in the making of objections or motions during the trial, is not evidence. Summations are intended to present the arguments of the parties based on the evidence. Under our system, the Defendant sums up first, followed by the Plaintiff.

Source: N.Y. Pattern Jury Instr.--Civil 1:5

Function of Court and Jury

After the summations, I will instruct you on the rules of law applicable to the case and you will then retire for your deliberations. Your function as jurors is to decide what has or has not been proved and apply the rules of law that I give you to the facts as you find them to be. The decision you reach will be your verdict. Your decision will be based on the testimony that you hear and the exhibits that will be received in evidence during the trial. You are the sole and exclusive judges of the facts and nothing I say or do should be taken by you as any indication of my opinion as to the facts. As to the facts, neither I nor anyone else may invade your province. I will preside impartially and not express any opinion concerning the facts. Any opinions of mine on the facts would, in any event, be totally irrelevant because the facts are for you to decide. On the other hand, and with equal emphasis, I instruct you that in accordance with the oath you took as jurors you are required to accept the rules of law that I give you whether you agree with them or not. You are not to

ask anyone else about the law. You should not consider or accept any advice about the law from anyone else but me.

Source: N.Y. Pattern Jury Instr.--Civil 1:6

Consider Only Competent Evidence

As the sole judges of the facts, you must decide which of the witnesses you believe, what portion of their testimony you accept and what weight you give to it. At times during the trial I may sustain objections to questions and you may hear no answer, or, where an answer has been made, I may instruct that it be stricken or removed from the record and that you disregard it and dismiss it from your minds. You may not draw any inference or conclusion from an unanswered question nor may you consider testimony which has been stricken or removed from the record in reaching your decision. The law requires that your decision be made solely upon the evidence before you. Such items as I exclude from your consideration will be excluded because they are not legally admissible.

Source: N.Y. Pattern Jury Instr.--Civil 1:7

Weighing Testimony

The law does not, however, require you to accept all of the evidence I shall admit. In deciding what evidence you will accept you must make your own evaluation of the testimony given by each of the witnesses, and decide how much weight you choose to give to that testimony. The testimony of a witness may not conform to the facts

as they occurred because he or she is intentionally lying, because the witness did not accurately see or hear what he or she is testifying about, because the witness' recollection is faulty, or because the witness has not expressed himself or herself clearly in testifying. There is no magical formula by which you evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you decide for yourselves the reliability or unreliability of things people tell you. The same tests that you use in your everyday dealings are the tests which you apply in your deliberations. The interest or lack of interest of any witness in the outcome of this case, the bias or prejudice of a witness, if there be any, the age, the appearance, the manner in which the witness gives testimony on the stand, the opportunity that the witness had to observe the facts about which he or she testifies, the probability or improbability of the witness' testimony when considered in the light of all of the other evidence in the case, are all items to be considered by you in deciding how much weight, if any, you will give to that witness' testimony. If it appears that there is a conflict in the evidence, you will have to consider whether the apparent conflict can be reconciled by fitting the different versions together. If, however, that is not possible, you will have to decide which of the conflicting versions you will accept.

Source: N.Y. Pattern Jury Instr.--Civil 1:8

Conduct During Recess

The purpose of the rules I have outlined for you is to make sure that a just result is reached when you decide the case. For the same purpose, you should keep in mind several rules governing your own conduct during any recess.

Source: N.Y. Pattern Jury Instr.--Civil 1:9

Discussion with Others—Independent Research

In fairness to the parties to this lawsuit, it is very important that you keep an open mind throughout the trial. Then, after you have heard both sides fully, you will reach your verdict only on the evidence as it is presented to you in this courtroom, and only in this courtroom, and then only after you have heard the summations of each of the attorneys and my instructions to you on the law. You will then have an opportunity to exchange views with each member of the jury during your deliberations to reach your verdict.

Please do not discuss this case either among yourselves or with anyone else during the course of the trial. Do not do any independent research on any topic you might hear about in the testimony or see in the exhibits, whether by consulting others, reading books or magazines or conducting an internet search of any kind. All electronic devices including any cell phones, smartphones, laptops or any other personal electronic devices must be turned off while you are in the courtroom and while you are deliberating after I have given you the law applicable to this case.

It is important to remember that you may not use any internet services or social media, including Google, Facebook, and Twitter, to individually or collectively

give or get information about the case or to research topics concerning the trial. Some of the topics you are not to research or discuss through the use of your computers or personal electronic devices are the law, information about any of the issues in the case, the parties, the lawyers or the court. After you have rendered your verdict and have been discharged, you will be free to do any research you choose, or to share your experiences, either directly, or through your favorite electronic means.

For now, be careful to remember these rules whenever you use a computer or other personal electronic device during the time you are serving as a juror but you are not in the courtroom.

While this instruction may seem unduly restrictive, it is vital that you carefully follow these directions. The reason is simple. The law requires that you consider only the testimony and evidence you hear and see in this courtroom. Not only does our law mandate it, but the parties depend on you to fairly and impartially consider only the admitted evidence. To do otherwise, by allowing outside information to affect your judgment, is unfair and prejudicial to the parties and could lead to this case having to be retried.

Accordingly, I expect that you will seriously and faithfully abide by this instruction.

Source: N.Y. Pattern Jury Instr.--Civil 1:11

Discussion by Others

Please do not permit any person who is not a juror to discuss this case in your presence, and if anyone does so despite your telling the person not to, report that to

me as soon as you are able. You should not, however, discuss with your fellow jurors either that fact or any other fact you feel necessary to bring to my attention.

Source: N.Y. Pattern Jury Instr.--Civil 1:12

Conversation With Parties or Attorneys

Although it is a normal human tendency to talk to people with whom one comes in contact, please do not, during the time you serve on this jury, talk, whether in or out of the courtroom, with any of the parties or their attorneys or any witness. By this I mean not only do not talk about the case, but do not talk to them at all, even to pass the time of day. In no other way can all parties be assured of the absolute impartiality they are entitled to expect from you as jurors.

Source: N.Y. Pattern Jury Instr.--Civil 1:13

Alternate Jurors

Under the law only six jurors will deliberate on this case when it is submitted for consideration.

We have selected additional jurors. Alternate jurors are selected to serve because a regular juror may be prevented from continuing to serve by some emergency such as a serious illness or death. Although this seldom happens during a trial, there are cases where we do call on the services of alternates. Alternates are required to pay the same careful attention to the trial as the regular jurors, so that if needed they will be fully familiar with the case.

The fact that there are alternate jurors does not mean that any regular juror is free to excuse himself or herself from the case. As a duly chosen juror it is your obligation to be available throughout the trial.

Source: N.Y. Pattern Jury Instr.--Civil 1:13A

Conclusion Prior to Opening Statements

The description of trial procedure, the rules governing your conduct and the legal principles I have discussed with you will, I believe, make it easier for you to understand the trial as it goes on and to reach a just result at its conclusion.

Source: N.Y. Pattern Jury Instr.--Civil 1:14

Instruction after Summations

Members of the jury, we come now to that portion of the trial when you are instructed on the law applicable to the case and after which you will retire for your final deliberations. You have now heard all the evidence introduced by the parties and through arguments of their attorneys you have learned the conclusions which each party believes should be drawn from the evidence presented to you.

Source: N.Y. Pattern Jury Instr.--Civil 1:20

Review Principles Stated

You will recall that at the beginning of the trial I stated for you certain principles so that you could have them in mind as the trial progressed. Briefly, they were that you are bound to accept the law as I give it to you, whether or not you

agree with it. You are not to ask anyone else about the law. You should not consider or accept any advice about the law from anyone else but me. Furthermore, you must not conclude from my rulings or anything I have said during the trial that I favor any party to this lawsuit. Furthermore, you may not draw any inference from an unanswered question nor consider testimony, which has been stricken from the record in reaching your decision. Finally, in deciding how much weight you choose to give to the testimony of any particular witness, there is no magical formula, which can be used. The tests used in your everyday affairs to decide the reliability or unreliability of statements made to you by others are the tests you will apply in your deliberations. The items to be taken into consideration in determining the weight you will give to the testimony of a witness include the interest or lack of interest of the witness in the outcome of the case, the bias or prejudice of the witness, if there be any, the age, the appearance, the manner of the witness as the witness testified, the opportunity that the witness had to observe the facts about which he or she testified, the probability or improbability of the witness' testimony when considered in the light of all the other evidence in the case. If it appears that there is a conflict in the evidence, you will have to consider whether the apparent conflict can be reconciled by fitting the different versions together. If, however, that is not possible, you will then have to decide which of the conflicting versions you will accept.

Source: N.Y. Pattern Jury Instr.--Civil 1:21

Circumstantial Evidence

Facts must be proved by evidence. Evidence includes the testimony of a witness concerning what the witness saw, heard or did. Evidence also includes writings, photographs, or other physical objects, which may be considered as proof of a fact. Evidence can be either direct or circumstantial. Facts may be proved either by direct or circumstantial evidence or by a combination of both. You may give circumstantial evidence less weight, more weight, or the same weight as direct evidence.

Direct evidence is evidence of what a witness saw, heard, or did which, if believed by you, proves a fact. For example, let us suppose that a fact in dispute is whether I knocked over this water glass near the witness chair. If someone testifies that he saw me knock over the glass that is direct evidence that I knocked over the glass.

Circumstantial evidence is evidence of a fact which does not directly prove a fact in dispute but which permits a reasonable inference or conclusion that the fact exists. For example, a witness testifies that he saw this water glass on the bench. The witness states that, while he was looking the other way, he heard the breaking of glass, looked up, and saw me wiping water from my clothes and from the papers on the bench. This testimony is not direct evidence that I knocked over the glass; it is circumstantial evidence from which you could reasonably infer that I knocked over the glass.

Those facts that form the basis of an inference must be proved and the inference to be drawn must be one that may be reasonably drawn. In the example, even though the witness did not see me knock over the glass, if you believe (his, her) testimony, you could conclude that I did. Therefore, the circumstantial evidence, if accepted by you, allows you to conclude that the fact in dispute has been proved.

In reaching your conclusion you may not guess or speculate. Suppose, for example, the witness testifies that the water glass was located equally distant from the court clerk and me. The witness states that he heard the breaking of glass and looked up to see both the court clerk and me brushing water from our clothes. If you believe that testimony, you still could not decide on that evidence alone who knocked over the water glass. Where these are the only proved facts, it would be only a guess as to who did it. But, if the witness also testifies that he heard the court clerk say "I am sorry," this additional evidence would allow you to decide who knocked over the water glass.

Source: N.Y. Pattern Jury Instr.--Civil 1:70

Interested Witnesses

The Plaintiff and the Defendant both testified before you. As parties to the action, both are interested witnesses.

An interested witness is not necessarily less believable than a disinterested witness. The fact that the party is interested in the outcome of the case does not mean that he/she has not told the truth. It is for you to decide from the demeanor of

the witness on the stand and such other tests as your experience dictates whether or not the testimony has been influenced either intentionally or unintentionally. You may, if you consider it proper under all of the circumstances, not believe the testimony of such a witness, even though it is not otherwise challenged or contradicted. However, you are not required to reject the testimony of such a witness, and may accept all or such part of his or her testimony as you find reliable and reject such part as you find unworthy of acceptance.

Source: N.Y. Pattern Jury Instr.--Civil 1:91; based on *Coleman v. New York City Transit Authority*, 37 NY2d 137, 371 NYS2d 663, 332 NE2d 850 (1975); *Noseworthy v. New York*, 298 NY 76, 80 NE2d 744 (1948); *People v. Gerdvine*, 210 NY 184, 104 NE 129 (1914); *Wohlfahrt v. Beckert*, 92 NY 490 (1883); *People v. Viscio*, 241 App. Div. 499, 272 NYS 213 (3d Dep't 1934); *Hoes v. Third Ave. R. Co.*, 5 App Div.151, 39 N.Y.S. 40 (1st Dep't 1896).

Falsus in Uno

If you find that any witness has willfully testified falsely as to any material fact, that is as to an important matter, the law permits you to disregard completely the entire testimony of that witness upon the principle that one who testifies falsely about one material fact is likely to testify falsely about everything. You are not required, however, to consider such a witness as totally "unbelievable." You may accept so much of his or her testimony as you deem true and disregard what you feel is false. By the processes which I have just described to you, you, as the sole judges of the facts, decide which of the witnesses you will believe, what portion of their testimony you accept and what weight you will give to it.

Source: N.Y. Pattern Jury Instr.--Civil 1:22; based on *Deering v. Metcalf*, 74 NY 501 (1878); *Petrovski v. Fornes*, 125 AD2d 972 (4th Dep't 1986) (citing PJI); *Accardi v.New York*, 121 AD2d 489, 503 NYS2d 818 (2d Dep't 1986) (citing PJI); *Cibulski v. Hutton*, 47 App Div.107 (3d Dep't 1900).

Burden of Proof

The burden of proof rests on the Plaintiff. That means that it must be established by a fair preponderance of the credible evidence that the claim Plaintiff makes is true. The credible evidence means the testimony or exhibits that you find to be worthy to be believed. A preponderance of the evidence means the greater part of such evidence. That does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase refers to the quality of the evidence, that is, its convincing quality, the weight and the effect that it has on your minds. The law requires that in order for the Plaintiff to prevail on a claim, the evidence that supports (his, her) claim must appeal to you as more nearly representing what took place than the evidence opposed to (his, her) claim. If it does not, or if it weighs so evenly that you are unable to say that there is a preponderance on either side, then you must decide the question in favor of the Defendant. It is only if the evidence favoring the Plaintiff's claim outweighs the evidence opposed to it that you can find in favor of Plaintiff.

Source: N.Y. Pattern Jury Instr.--Civil 1:23

Return to Courtroom

If, in the course of your deliberations, your recollection of any part of the testimony should fail, or you have any question about my instructions to you on the

law, you have the right to return to the courtroom for the purpose of having such testimony read to you or have such question answered.

Source: N.Y. Pattern Jury Instr.--Civil 1:24: *People v. Pena*, 50 NY2d 400, 429 NYS2d 410 (1980) ("Any judicial concern that the procedure may be abused is not to be manifested by discouraging the jury from employing it") (citing PJI); *see also Bloch v.New York*, 68 AD2d 932, 414 NYS2d 592 (2d Dep't 1979) (denial of jury's request to rehear testimony of three witnesses was prejudicial error).

Consider Only Testimony and Exhibits

In deciding this case, you may consider only the exhibits, which have been admitted in evidence and the testimony of the witnesses as you have heard it in this courtroom (or as there has been read to you testimony given on examination before trial. Under our rules of practice an examination before trial is taken under oath and is entitled to equal consideration by you notwithstanding the fact that it was taken before the trial and outside the courtroom). However, arguments, remarks, and summation of the attorneys are not evidence nor is anything that I now say or may have said with regard to the facts, evidence.

Source: N.Y. Pattern Jury Instr.--Civil 1:25

Exclude Sympathy

In reaching your verdict you are not to be affected by sympathy for any of the parties, what the reaction of the parties or of the public to your verdict may be, whether it will please or displease anyone, be popular or unpopular or, indeed, any consideration outside the case as it has been presented to you in this courtroom. You should consider only the evidence—both the testimony and the exhibits—find

the facts from what you consider to be the believable evidence, and apply the law as I now give it to you. Your verdict will be determined by the conclusion you reach, no matter whom the verdict helps or hurts.

Source: N.Y. Pattern Jury Instr.--Civil 1:27

Employment Discrimination - Introduction

Plaintiff brings this claim under the New York State Human Rights Law. The New York State Human Rights Law (Executive Law § 296) defines and prohibits unlawful discriminatory practices by private and public employers.

Source: N.Y. Pattern Jury Instr.--Civil Division 9 I Intro. 1; *State Div. of Human Rights on Complaint of Cottongim v. Onondaga Sheriff's Dep't.*, 71 NY2d 623, 528 NYS2d 802, 524 NE2d 123 (1988); *Board of Higher Ed. of City of New York v. Carter*, 14 NY2d 138 (1964); *Scopelliti v. New Castle*, 210 AD2d 339, 620 NYS2d 407 (2d Dep't 1994).

Executive Law § 296(1)(a) makes it an unlawful discriminatory practice for an employer to discriminate because of the sexual orientation in the terms, conditions or privileges of employment of any individual.

Source: N.Y. Pattern Jury Instr.--Civil Division 9 I Intro. 1; Executive Law § 300; *Aurecchione v. New York State Div. of Human Rights*, 98 NY2d 21, 744 NYS2d 349, 771 NE2d 231 (2002); *New York State Dep't. of Correctional Services v. State Div. of Human Rights*, 215 AD2d 908(3d Dep't 1995).

Actionable Employment Discrimination

In general, the primary focus in an employment discrimination claim is whether the employer has treated the employee less favorably than similarly

situated employees for an impermissible reason. Such discrimination can be established by demonstrating disparate treatment.

Source: N.Y. Pattern Jury Instr.--Civil Division 9 I Intro. 1; *see Jackson v. Buffalo Municipal Housing Authority*, 81 AD3d 1271 (4th Dep't 2011); *Castro v.New York University*, 5 AD3d 135, 773 NYS2d 29 (1st Dep't 2004); *Furnco Const. Corp. v. Waters*, 438 US 567, 98 S. Ct. 2943 (1978); *Kump v. Xyvision, Inc.*, 733 F. Supp. 554 (E.D.N.Y. 1990).

Disparate Treatment Claims

Disparate treatment claims are based on less favorable treatment due to Plaintiff's membership in a protected group. A disparate-treatment claim has two elements: an employment practice and a discriminatory intent.

Source: N.Y. Pattern Jury Instr.--Civil Division 9 I Intro. 1; *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007).

Disparate treatment claims require proof of intentional discrimination, which can sometimes be inferred through circumstantial evidence. There are three basic methodologies for establishing unlawful disparate treatment. The first is employed in cases involving discrimination that can be proved by direct evidence. The second is employed where the discrimination is demonstrated by circumstantial evidence. The third is employed in "mixed motive" cases.

Source: N.Y. Pattern Jury Instr.--Civil Division 9 I Intro. 1; *Mete v.New York State Office of Mental Retardation and Developmental Disabilities*, 21 AD3d 288 (1st Dep't 2005); *see Jackson v. Buffalo Municipal Housing Authority*, 81 AD3d 1271 (4th Dep't 2011); *Short v. Deutsche Bank Securities, Inc.*, 79 AD3d 503 (1st Dep't 2010).

However, as jurors you are not to act as a super-human resources department. A company is entitled to make bad employment decisions. Therefore, even if you believe Zarda's conduct did not warrant his termination, Defendants are entitled to determine that his termination was proper as long as it was not done based on the fact that he is a gay male.

Source: *Giovelli v. LA Fitness*, No. 10-CV-298 (JS) (AKT), 2010 WL 415289, at *2 (E.D.N.Y. Jan. 28, 2010); *Lewis v. Two's Co.*, No. 06-CV-4775, 2008 WL 6192169, *5 (S.D.N.Y. March 16, 2008); *Zucker v. Five Towns College, et al.*, No. 09-CV-4884 (JS) (AKT), 2010 WL 3310698, at * 3 (E.D.N.Y. Aug. 18, 2010).

Employment Discrimination - Evidence

As you have heard, this is an action to recover damages for employment discrimination. The law prohibits employment discrimination based on sexual orientation. In this case, Plaintiff claims that Defendants terminated Mr. Zarda because he was gay.

In order for Plaintiff to recover, it must prove by a preponderance of the evidence that Mr. Zarda's sexual orientation was a determining factor in Defendants decision to terminate him. There can be more than one determining factor in any decision. Therefore Mr. Zarda's estate need not prove that his sexual orientation was the only reason for Mr. Maynard's decision. Mr. Zarda's sexual orientation is a determining factor, if he would have continued to work for Skydive Long Island and Mr. Maynard, except for the fact that he was gay. In other words, sexual orientation is a determining factor if it made a difference in whether or not Mr. Zarda would have continued working for Defendants.

Mr. Zarda's estate is not required to produce direct evidence that Defendants discriminated against him on the basis of his sexual orientation. Discrimination is not always admitted and may be inferred from the existence of other facts.

In deciding whether the fact that Mr. Zarda was gay was a determining factor in Mr. Maynard's decision, you must first consider whether Mr. Zarda's estate has established the following facts by a preponderance of the evidence.

First, Plaintiff must prove that Mr. Zarda was qualified for the tandem skydive instructor position. Second, the estate must prove that Mr. Zarda was terminated. Third, Plaintiff must prove that the termination occurred under circumstances giving rise to an inference of discrimination.

If you find that the estate failed to prove any one of these facts, you will find for Defendants. If you find that the estate proved all of these facts, then you must proceed to consider the reason Defendants have given for terminating Mr. Zarda.

Defendants have produced evidence that Mr. Zarda was terminated based upon a customer complaint. Plaintiff claims that this is not the real reason. The estate has the burden of establishing by a preponderance of the evidence that the reason offered by Defendants was not really the reason Mr. Zarda was terminated and that Mr. Zarda's sexual orientation was a determining factor in the decision.

If you find that the estate has failed to prove that the reason offered by Defendants was not really the reason Mr. Zarda was terminated, then you will find for Defendants. If you find that Plaintiff has proved that the reason offered by

Defendants was an excuse for discrimination, then you will find for Plaintiff and you should proceed to determine the amount of damages.

I am going to provide you with a written verdict form.

Source: N.Y. Pattern Jury Instr.--Civil 9:1; *McDonnell Douglas Corp. v. Green*, 411 US 792 (1973); *Consolidated Edison Co. of New York, Inc. v.New York State Div. of Human Rights on Complaint of Easton*, 77 NY2d 411 (1991) (sex and race); *State Div. of Human Rights on Complaint of Cottongim v. Onondaga County Sheriff's Dep't.*, 71 NY2d 623 (race and sex).

Remedies

Executive Law § 297(9) authorizes a court to award "damages and such other remedies as may be appropriate."

Source: N.Y. Pattern Jury Instr.--Civil Division 9 I Intro. 1

Compensation for Monetary Loss

In discharge cases, damages for lost earnings are calculated by the difference between what the claimant would have earned had the claimant remained employed by the Defendant and what the claimant actually earned.

Source: N.Y. Pattern Jury Instr.--Civil Division 9 I Intro. 1; *Gleason v. Callanan Industries Inc.*, 203 AD2d 750, 610 NYS2d 671 (3d Dep't 1994); *see New York State Tug Hill Com'n v.New York State Div. of Human Rights*, 52 AD3d 1169 (4th Dep't 2008) (employer not entitled to offsets or deductions from back pay award based upon pension benefits received by complainant after termination); *Bell v.New York State Div. of Human Rights*, 36 AD3d 1129 (3d Dep't 2007) (back pay calculation should have taken into consideration additional income from stipends available to petitioner).

A complainant has a duty to mitigate damages by making reasonable efforts to obtain comparable employment.

Source: N.Y. Pattern Jury Instr.--Civil Division 9 I Intro. 1; *Rio Mar Restaurant v.New York State Div. of Human Rights*, 270 AD2d 47 (1st Dep't 2000); *Palmblad v. Gibson*, 63 AD3d 844 (2d Dep't 2009) (award of back pay improper where employee failed to diligently seek employment), but the employer has the burden of proving that the complainant failed to make a diligent effort, *Goldberg v.New York State Div. of Human Rights*, 85 AD3d 1166 (2d Dep't 2011); *State Division of Human Rights v. North Queensview Homes, Inc.*, 75 AD2d 819 (2d Dep't 1980).

Compensation for Mental Anguish

Compensatory damages are not limited to out-of-pocket losses but can include compensation for humiliation and mental anguish.

Source: *see Lutheran Soc. Services of Upper New York, Inc. v. State Div. of Human Rights*, 74 NY2d 824 (1989); *Cullen v. Nassau County Civil Service Commission*, 53 NY2d 492 (1981); *Father Belle Community Center v.New York State Div. of Human Rights on Complaint of King*, 221 AD2d 44 (4th Dep't 1996); *New York State Dep't. of Correctional Services v. State Div. of Human Rights*, 215 AD2d 908 (3d Dep't 1995); *Board of Educ. of Plainedge Union Free School Dist. v. McCall*, 108 AD2d 855 (2d Dep't 1985).

However, any award for mental anguish must be based on emotional injuries actually suffered as a result of discrimination, and care must be taken to insure that the award is not punitive.

Source: *New York State Dep't. of Correctional Services v. New York State Div. of Human Rights*, 53 AD3d 823 (3d Dep't 2008); *New York State Dep't. of Correctional Services v. New York State Div. of Human Rights*, 225 AD2d 856 (3d Dep't 1996).

An award of compensatory damages for mental anguish may be based solely on the complainant's testimony.

Source: N.Y. Pattern Jury Instr.--Civil Division 9 I Intro. 1; *Argyle Realty Associates v. New York State Div. of Human Rights*, 65 AD3d 273(2d Dep't 2009); *State v. New York State Div. of Human Rights*, 284 AD2d 882 (3d Dep't 2001); *Father Belle Community Center v.New York State Div. of Human Rights on Complaint of King*, 221 AD2d 44 (4th Dep't 1996); *Marcus Garvey Nursing Home, Inc. v. New York State Div. of Human Rights*, 209 AD2d 619 (2d Dep't 1994); *Gleason v. Callanan Industries Inc.*, 203 AD2d 750 (3d Dep't 1994).

In order to sustain an award of damages for mental anguish, there must be some evidence of the magnitude of the injury and that it was caused by the discriminatory practice.

Source: N.Y. Pattern Jury Instr.--Civil Division 9 I Intro. 1; *Suffolk County Community College v.New York State Div. of Human Rights*, 75 AD3d 513 (2d Dep't 2010); *A.S.A.P. Personnel Services, Inc. v. Rosa*, 219 AD2d 648 (2d Dep't 1995); *see 300 Gramatan Ave. Associates v. State Division of Human Rights*, 45 NY2d 176,(1978); *New York State Tug Hill Com'n v. New York State Div. of Human Rights*, 52 AD3d 1169 (4th Dep't 2008).

Conclusion

I have now outlined for you the rules of law that apply to this case and the processes by which you weigh the evidence and decide the facts. In a few minutes you will retire to the jury room for your deliberations. (Traditionally, Juror No. 1 acts as foreperson. Your first order of business when you are in the jury room will be the election of a foreperson.) In order that your deliberations may proceed in an orderly fashion, you must have a foreperson, but of course, his or her vote is entitled to no greater weight than that of any other juror. Your function—to reach a fair decision from the law and the evidence—is an important one. When you are in the jury room, listen to each other, and discuss the evidence and issues in the case

among yourselves. It is the duty of each of you, as jurors, to consult with one another, and to deliberate with a view of reaching agreement on a verdict, if you can do so without violating your individual judgment and your conscience. While you should not surrender conscientious convictions of what the truth is and of the weight and effect of the evidence and while each of you must decide the case for yourself and not merely consent to the decision of your fellow jurors, you should examine the issues and the evidence before you with candor and frankness, and with proper respect and regard for the opinions of each other. Remember in your deliberations that the dispute between the parties is, for them, a very important matter. They and the court rely upon you to give full and conscientious deliberation and consideration to the issues and evidence before you. By so doing, you carry out to the fullest your oaths as jurors to truly try the issues of this case and render a true verdict.

Source: N.Y. Pattern Jury Instr.--Civil 1:28

Dated: October 6, 2015
Bohemia, New York

ZABELL & ASSOCIATES, P.C.
Attorneys for Defendants

By: _____

Saul D. Zabell, Esq.
Zabell & Associates, P.C.
1 Corporate Drive, Suite 103
Bohemia, New York 11716
Tel.: (631) 589-7242
Fax: (631) 563-7475
szabell@laborlawsny.com