CHAPTER TWENTY ONE

WRONGFUL DISCHARGE

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**Instruction No. 21.1**

**EMPLOYMENT AT WILL**

The general rule is that an employment contract is terminable at will, which means that either the employer or the employee has the right to terminate the employment at any time for any reason or no reason at all without liability to the other for doing so.

**Notes on Use**

This Instruction should be used to introduce the Instructions in Part A of this Chapter, which deal with wrongful discharge in violation of public policy and breach of employment contracts.

**Comments**

This Instruction is a statement of the traditional employment at will doctrine. See *Burk v. K-Mart Corp.*, 1989 OK 22, ¶ 5, 770 P.2d 24, 26 ("This Court has long recognized the basic principle that an employment contract of indefinite duration may be terminated without cause at any time without incurring liability for breach of contract."). The Oklahoma Supreme Court noted in the *Burk* case that the employment at will doctrine is subject to various statutory exceptions as well as a case law exception based on public policy. *Id.* ¶¶ 6, 17, 19, 770 P.2d at 26, 28, 29. In addition, the Supreme Court has stated that the parties to an employment contract may restrict the employer's power to discharge an employee at will through either their express or implied agreement. *Hinson v. Cameron*, 1987 OK 49, ¶ 14, 742 P.2d 549, 554. The Oklahoma Supreme Court stated in the *Hinson* case that various factors, including statements in employer handbooks and an employee's detrimental reliance on the employer's past practices, may be considered to determine whether an implied contract right to job security exists. *Id.* ¶ 14, 742 P.2d at 554-55. It has also held, though, that an implied obligation of good faith and fair dealing is not applicable to the termination of employment contracts. *Burk v. K-Mart Corp.*, 1989 OK 22, ¶ 22, 770 P.2d at 29. The following Instructions are concerned with these exceptions to the employment at will doctrine.

*(2014 Supp.)*

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**Instruction No. 21.2**

**WRONGFUL DISCHARGE --- PUBLIC POLICY EXCEPTION --- REFUSAL TO VIOLATE PUBLIC POLICY**

There is an exception to the general rule that an employment contract is terminable at will, if an employee is discharged for refusing to act in violation of an
established and well-defined public policy. [Plaintiff] claims to have been wrongfully discharged by [Defendant] in retaliation for refusing to [set out the nature of the act that the plaintiff claims violated public policy]. In order to prevail on the claim of wrongful discharge in violation of public policy, [Plaintiff] must show by the weight of the evidence that:

1. [Plaintiff] was discharged from [his/her] employment with [Defendant];

2. During the course of [Plaintiff]'s employment with [Defendant], [Plaintiff] refused to [set out the nature of the act that the plaintiff claims violated public policy];

3. A significant factor in the decision to discharge [Plaintiff] was retaliation for Plaintiff’s refusal to [set out the nature of the act that the plaintiff claims violated public policy]; and

4. [Plaintiff] was damaged as a result of the discharge.

Notes on Use

This Instruction should be used with Instruction Nos. 21.1, 21.6, 21.9, and 21.11 in cases where the plaintiff is relying on the public policy exception to the employment at will doctrine and claiming that the discharge was in retaliation for plaintiff’s refusal to act in violation of an established and well-defined public policy. For an Instruction where the plaintiff’s claim is that the discharge was in retaliation for plaintiff’s performing an act consistent with a clear and compelling public policy. See Instruction No. 21.3, infra.

Comments

This Instruction is based on the public policy exception to the employment at will doctrine that was recognized in Vannerson v. Board of Regents of the Univ of Oklahoma, 1989 OK 125, 784 P.2d 1053; Burk v. K-Mart Corp., 1989 OK 22, ¶¶ 17-20, 770 P.2d 24, 28-29; and Hinson v. Cameron, 1987 OK 49, ¶ 10, 742 P.2d 549, 552-53.

The Instruction covers those cases where the plaintiff claims the discharge was in retaliation for the plaintiff's refusal to act in violation of a public policy. Accordingly, it does not include bad faith or malice as a separate element. See generally Gilmore v. Enogex, Inc., 1994 OK 76, ¶ 11, 878 P.2d 360, 364 (public policy exception requires that the employer was motivated by either bad faith, malice, or retaliation).

(2014 Supp.)
Instruction No. 21.3

WRONGFUL DISCHARGE --- PUBLIC POLICY EXCEPTION --- ACT CONSISTANT WITH PUBLIC POLICY

There is an exception to the general rule that an employment contract is terminable at will, if an employee is discharged for performing an act consistent with a clear and compelling public policy. [Plaintiff] claims to have been wrongfully discharged by [Defendant] in retaliation for [set out the nature of the act that the plaintiff claims is protected]. In order to prevail on the claim of wrongful discharge in violation of public policy, [Plaintiff] must show by the weight of the evidence that:

1. [Plaintiff] was discharged from [his/her] employment with [Defendant];
2. During the course of [Plaintiff]'s employment with Defendant, [Plaintiff] [set out the nature of the act that the plaintiff claims is protected].
3. A significant factor in the decision to discharge [Plaintiff] was retaliation for Plaintiff’s [set out the nature of the act that the plaintiff claims is protected], and
4. [Plaintiff] was damaged as a result of the discharge.

Notes on Use

This Instruction should be used with Instruction Nos. 21.1, 21.6, 21.9, and 21.11 in cases where the plaintiff is relying on the public policy exception to the employment at will doctrine and claiming that the discharge was in retaliation for plaintiff’s performing an act consistent with a clear and compelling public policy. For an Instruction where the plaintiff’s claim is that the discharge was in retaliation for plaintiff's refusal to act in violation of an established and well-defined public policy, see Instruction No. 21.2, supra.

(2014 Supp.)
WRONGFUL DISCHARGE --- PUBLIC POLICY EXCEPTION --- EMPLOYMENT DISCRIMINATION

There is an exception to the general rule that an employment contract is terminable at will, if an employee is discharged in violation of the public policy against unlawful employment discrimination. [Plaintiff] claims to have been wrongfully discharged by [Defendant] because of [his/her] [set out Plaintiffs protected status]. In order to prevail on the claim of wrongful discharge in violation of public policy, [Plaintiff] must show by the weight of the evidence that:

1. [Plaintiff] was discharged from [his/her] employment with [Employer];
2. [Plaintiff] is [set out Plaintiffs protected status].
3. A significant factor in [Defendant]'s discharge of [Plaintiff] was unlawful employment discrimination against [him/her] because of [his/her] [set out Plaintiffs protected status]; and
4. [Plaintiff] was damaged as a result of the discharge.

Notes on Use

This Instruction should only be given if a cause of action accrued prior to the effective date of 25 O.S. Supp. 2011 § 1350 (eff. November 1, 2011).

This Instruction should be used with Instruction Nos. 21.1, 21.7, 21.9, and 21.11 in cases where the plaintiff is relying on the public policy exception to the employment at will doctrine and claiming that the discharge was on account of employment discrimination. For an Instruction where the plaintiff's claim is that the discharge was in retaliation for plaintiff's refusal to act in violation of an established and well-defined public policy, see Instruction No. 21.2, supra. For an Instruction where the plaintiff's claim is that the discharge was in retaliation for plaintiff's performing an act consistent with a clear and compelling public policy, see Instruction No. 21.3, supra.

Comments

In Tate v. Browning-Ferris, Inc., 1992 OK 72, ¶ 10, 833 P.2d 1218, 1225, the Oklahoma Supreme Court held that the public policy exception was applicable to a racially motivated discharge or one in retaliation for an employee's filing a racial discrimination complaint. Later, in Kruchowski v. The Weyerhauser Co., 2008 OK 105, ¶ 23, 202 P.3d 144, and Shirazi v. Childtime Learning Center, 2009 OK 13, ¶ 12, 204 P.3d 75, the Supreme Court decided that the public policy exception also applied to victims of unlawful discrimination, because victims of all forms of employment discrimination,
including race, color, religion, sex, national origin, age and handicap, must receive evenhanded treatment under art. 5, § 46 of the Oklahoma Constitution.

(2014Supp.)

Instruction No. 21.5

EMPLOYEE DISCHARGED FOR REFUSING TO VIOLATE PUBLIC POLICY

In order to win on the claim of wrongful discharge [Plaintiff] must show that [Defendant] required [him/her] to commit an act that was contrary to a clear statement of public policy of Oklahoma [or the United States]. You are instructed that the following acts are forbidden by law [or the Constitution or a statute]:

Notes on Use

The trial court should inform the jury of the nature of the activities that are against public policy so that the jury can determine whether the defendant instructed or required the plaintiff to perform any of them as part of the employment.

Comments

The trial court has the responsibility for determining public policy, and "it is then the jury's duty to examine the facts and decide if the public policy was violated." Pearson v. Hope Lumber & Supply Co., Inc., 1991 OK 112, ¶ 4, 820 P.2d 443, 444.

(2014 Supp.)

Instruction No. 21.6

EMPLOYEE DISCHARGED FOR PERFORMING ACT CONSISTENT WITH PUBLIC POLICY

In order to win on the claim of wrongful discharge [Plaintiff] must show that [Defendant] discharged [him/her] for performing an act that was consistent with a clear and compelling public policy of Oklahoma [or the United States]. You are instructed that [describe the act] is such an act [or the following are such acts:].
Comments

The Oklahoma Supreme Court held in *Smith v. Farmers Coop. Ass'n of Butler*, 1992 OK 11, ¶¶ 13-15, 825 P.2d 1323, 1326-27, that the public policy exception applied to the discharge of an at will employee, who was also a city mayor, in retaliation for his voting to deny his employer's request for a zoning variance. Similarly, the Supreme Court determined in *Groce v. Foster*, 1994 OK 88 ¶ 1, 880 P.2d 902, 903, that an employee's right to file a negligence action against a third party employee for on the job injuries was protected under the public policy exception. In contrast, in *Vannerson v. Board of Regents of the Univ. of Oklahoma*, 1989 OK 12, ¶ 10, 784 P.2d 1053, 1055, the Supreme Court held that a violation of a University of Oklahoma internal policy on maintaining accurate records did not "rise to the level of a constitutional, statutory or decisional statement of public policy of the State of Oklahoma." Accordingly, it reversed a plaintiff's judgment on a wrongful discharge claim that was based on the public policy exception. In addition, in *Gilmore v. Enogex, Inc.*, 1994 OK 76, ¶¶ 14, 17, 21, 878 P.2d 360, 365-68, the Supreme Court decided that an employee's discharge for refusal to submit to a random drug test did not come within the public policy exception. See also *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 360-61 (1995) (after-acquired evidence of employee wrongdoing is not complete bar to recovery, but it may be taken into account in determining the appropriate remedy); *Mosley v. Truckstops Corp. of Am.*, 1993 OK 79, ¶ 21, 891 P.2d 577, 585 ("A jury instruction which relieves an employer of liability for terminating an employee engaged in misconduct discovered after the employee was terminated is inopposite [sic] to Oklahoma law and giving the instruction is reversible error") (emphasis in original).

(2014 Supp.)

Instruction No. 21.7

**EMPLOYEE DISCHARGED BECAUSE OF DISCRIMINATION**

In order to prevail on the claim of wrongful discharge [*Plaintiff*] must show that [*Defendant*] discharged [*him/her*] because of [*his/her*] [*set out the protected status*]. You are instructed that under [*federal and/or Oklahoma*] law an employee may not be discharged because of [*his/her*] [*set out the protected status*].

Notes on Use

This Instruction should only be given if a cause of action accrued prior to the effective date of 25 O.S. Supp. 2011 § 1350.
Included among the typical categories of protected status under federal and Oklahoma law are race, color, national origin, religion, gender, disability, and age. Additional categories may be protected under constitutional, statutory, and decisional law. The judge has the responsibility of determining whether the plaintiff has a protected status.

Comments

The Oklahoma Supreme Court held in *Tate v. Browning-Ferris, Inc.*, 1992 OK 72, ¶ 10, 833 P.2d 1218, 1225, that the public policy exception was applicable to a racially motivated discharge. Later, in *Kruchowski v. The Weyerhauser Co.*, 2008 OK 105, ¶ 23, 202 P.3d 144, and *Shirazi v. Childtime Learning Center*, 2009 OK 13, ¶ 12, 204 P.3d 75, the Supreme Court decided that the public policy exception also applied to victims of unlawful discrimination, because victims of all forms of employment discrimination must receive evenhanded treatment under art. 5, § 46 of the Oklahoma Constitution.

*(2014 Supp.)*

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**Instruction No. 21.8**

**CONSTRUCTIVE DISCHARGE**

An employer is considered to have discharged an employee if the employer either knew or should have known that the employee's working conditions were so intolerable that a reasonable person in the employee's situation would feel that [he/she] had no choice but to quit. You should consider whether the employer physically threatened or humiliated the employee, how often the employer did so, and whether the employer unreasonably interfered with the employee’s work performance.

**Notes on Use**

This Instruction is intended for cases where there is a jury issue concerning constructive discharge of an employee.

**Comments**

This Instruction is derived from the test for constructive discharge set out in *Collier v. Insignia Financial Group*, 1999 OK 49, ¶ 10, 981 P.2d 321, 324.
Instruction No. 21.9

SIGNIFICANT FACTOR FOR DISCHARGE

The evidence may show that [Plaintiff] was discharged for more than one reason. Although [Plaintiff] need not prove that [set out what plaintiff claims violated public policy] was the only reason [he/she] was discharged, [Plaintiff] must prove that the [set out what plaintiff claims violated public policy] was a significant factor in the decision of [Defendant] to discharge [him/her]. In order for you to decide that [set out what plaintiff claims violated public policy] was a significant factor, you must determine whether [Defendant] would have discharged [Plaintiff] even if [Plaintiff] had [not] [set out the act that Plaintiff either performed or refused to perform], and everything else remained the same.

Notes on Use
This Instruction should be given only if there is evidence offered of more than one reason for the employee's discharge, and one reason was contrary to public policy and the other was not.

Comments
This Instruction is drafted in light of the decision of the Tenth Circuit Court of Appeals in White v. American Airlines, Inc., 915 F.2d 1414 (10th Cir. 1990). Applying Oklahoma law, the Tenth Circuit reversed a judgment for an employee on a jury verdict in a wrongful discharge case because the trial court failed to instruct the jury that the employer should be liable only if the discharge of the employee was "significantly motivated" by the employee's refusal to commit perjury. 915 F.2d at 1421. See also Estrada v. Port City Properties, Inc., 2011 OK 30, n. 20, 258 P.3d 495, 502 ("[I]f retaliation motivations comprise a significant factor in an employer’s decision to terminate an employee, even though other legitimate reasons exist to justify the termination, the discharge violated the intent of [85 O.S. 2001,] § 5."); Vasek v. Board of County Commissioners, 2008 OK 35, ¶ 14, 186 P.3d 928, 932 (wrongful discharge claim must allege discharge of employee “in significant part for a reason that violates an Oklahoma public policy goal”). The last sentence of the Instruction is based on Judge Easterbrook's suggested instruction in Gehring v. Case Corp., 43 F.3d 340, 344 (7th Cir. 1994).
Instruction No. 21.10

**CONTRACTUAL LIMITATIONS ON DISCHARGE**

One of the exceptions to the general rule that an employment contract is terminable at will arises when an employer and an employee agree that an employer can only discharge an employee [Specify Substantive Restrictions on Discharge, e.g., (for certain reasons), (under certain conditions), or (after a certain amount of time)].

Sometimes this agreement is expressed directly in the form of a written contract which specifically states when, how, or why an employee may be discharged.

Other times, this agreement may be implied from things the employer has said to the employee, [orally or in writing], such as [statements in an employer's handbook], [statements in an employer's policy manuals], [oral promises made by the employer to the employee regarding the employment relationship], [the employer's past practices in dealing with employees].

In this case, [Plaintiff] has alleged that [he/she] had an [express/implied] agreement, or contract, with [his/her] employer that [he/she] would not be discharged except for [Specify Reasons, Conditions, Time Limitations, etc.] and that the [Defendant] breached this agreement, or contract, when [Defendant] discharged [him/her].

In order for [Plaintiff] to prevail, [he/she] must prove that:

1. [Defendant] made an offer to [Plaintiff] to accept [or continue] [his/her] employment;

2. [Defendant]'s offer included either express or implied terms that [Plaintiff] would be discharged only [Specify Reasons, Conditions, Time Limitations, etc.];

3. These terms were definite and of the sort that a reasonable person would justifiably rely upon;

4. [Plaintiff] relied upon these terms when [he/she] accepted the offer by starting to work for [Defendant] [or continuing to work for] [Defendant] if the offer was made during the course of [Plaintiff]'s employment with [Defendant];

5. [Defendant] discharged [Plaintiff] [(for a reason(s) other than those)/(under conditions other than those)/(prior to the time)] contained in the express or implied terms agreed upon by the [Plaintiff] and the [Defendant]; and
6. [Plaintiff] suffered damages as a direct result of the discharge.

Notes on Use

This Instruction should be used along with Instruction Nos. 21.1 and 21.12 in cases where the plaintiff claims that a contract with the employer limits the employer's power to discharge the employee at will.

Comments

The Oklahoma Supreme Court recognized in Hinson v. Cameron, 1987 OK 49, ¶ 14, 742 P.2d 549, 554, that implied contractual provisions may restrict an employer's freedom to discharge an at will employee. The implied contractual provisions may arise from a variety of sources, including employee manuals, oral assurances, and company policies, which may be construed as offers for unilateral contracts that are accepted by employees either entering employment or continuing employment. See generally Johnson v. Nasca, 1990 OK CIV APP 87, ¶ 6, 802 P.2d 1294, 1296 ("[A] handbook alone may constitute an offer of a unilateral contract"); Langdon v. Saga Corp., 1976 OK CIV APP 65, ¶ 10, 569 P.2d 524, 528 ("We thus conceive personnel policies extending benefits as unilateral offers which are accepted by continued performance"); Jackson v. Integra, Inc., 952 F.2d 1260, 1261 (10th Cir. 1991) (concluding that Oklahoma law would allow an employee manual to create an implied contract in appropriate circumstances); Carnes v. Parker, 922 F.2d 1506, 1510-11 (10th Cir. 1991) (under Oklahoma law, employment at will relationship was altered by personnel manual); Williams v. Maremont Corp., 875 F.2d 1476, 1484 (10th Cir. 1989) (in order for statements in employee handbook to alter employment at will contract there must be a showing that they induced acceptance or continuation of employment).

The Oklahoma Supreme Court has also held that for an employer's promises to restrict its power to discharge an employee, they must be in definite terms, rather than vague assurances. Hayes v. Eateries, Inc., 1995 OK 108, ¶ 12, 905 P.2d 778, 783; Gilmore v. Enogex, Inc., 1994 OK 76, ¶ 25, 878 P.2d 360, 368. See also Avey v. Hillcrest Medical Ctr., 1991 OK CIV APP 48, ¶ 10, 815 P.2d 1215, 1217 (neither employee handbook nor policy and procedure manual gave assurances of job security to at will employees); Dupree v. United Parcel Serv., Inc., 956 F.2d 219, 222-23 (10th Cir. 1992) (statements in policy manuals and oral statements were too vague to create an implied contract). In addition, an employee's reliance on the employer's promises "must be reasonable under an objective standard, not merely the subjective belief of the employee." Hayes, supra, 1995 OK 108, ¶ 17, 905 P.2d at 784.
Instruction No. 21.11

**WRONGFUL DISCHARGE --- DAMAGES**

If you find in favor of [Plaintiff] on the issue of liability, then you must determine the amount that will reasonably and fairly compensate [him/her] for the damages [he/she] suffered as a direct result of the discharge. In fixing the amount of damages, you may consider the following elements:

A. The difference between the amount that [Plaintiff] was entitled to under the employment contract with [Defendant] and what [Plaintiff] has earned since the discharge [or could have earned using reasonable diligence in finding employment of comparable quality as the employment with [Defendant]]; [and]

[B. The loss of earnings in the future that [Plaintiff] would be reasonably likely to suffer as a direct result of the discharge, if [he/she] used reasonable diligence in finding employment of comparable quality as the employment with [Defendant];] and

C. Any physical or mental distress or anguish that [Plaintiff] suffered as a result of the discharge.

**Notes on Use**

This Instruction should be used if the plaintiff is seeking recovery in tort under the public policy exception to the employment at will doctrine (Instruction Nos. 21.2-21.9). Instruction No. 21.12, *infra*, should be used if the plaintiff is relying on a breach of contract theory (Instruction No. 21.10). Paragraph B is bracketed because the Oklahoma law is unclear whether future earnings are recoverable under a tort theory

*(2014 Supp.)*

Instruction No. 21.12

**BREACH OF EMPLOYMENT CONTRACT --- DAMAGES**

If you find in favor of [Plaintiff] on the issue of liability, then you must determine the amount of [his/her] damages. This is the amount of money that is needed
to put [him/her] in as good a position as [he/she] would have been if the contract had not been breached. In this case, the amount of damages should be determined as follows:

A. The difference between the amount that [Plaintiff] was entitled to under the employment contract with [Defendant] and what [Plaintiff] has earned since the discharge [or could have earned using reasonable diligence in finding employment of comparable quality as the employment with [Defendant]]; [and]

[B. The loss of earnings during the remaining term of the contract that [Plaintiff] would be reasonably likely to suffer as a direct result of the discharge, if [he/she] used reasonable diligence in finding employment of comparable quality as the employment with [Defendant].]

Notes on Use

This Instruction should be used if the plaintiff is relying on a breach of contract theory (Instruction No. 21.10). Instruction No. 21.11, supra, should be used if the plaintiff is seeking recovery in tort under the public policy exception to the employment at will doctrine (Instruction Nos. 21.2-21.9). Paragraph B should be included only if the term of the contract extended beyond the date of trial.

Comments

See Seidenbach's, Inc. v. Williams, 1961 OK 77, ¶ 9, 361 P.2d 185, 187-88 (no recovery for mental anguish for breach of contract that did not cause physical injury).

(2014 Supp.)

Instruction No. 21.13

**DUTY TO MITIGATE DAMAGES**

An employee who was damaged as a result of a [(wrongful discharge)/(breach of an employment contract by the employer)] has the duty to take steps to make reasonable efforts to find comparable employment and minimize the damages.

[Therefore, any amount that [Plaintiff] has earned since [his/her] discharge must be deducted from any damages awarded to [him/her]]. [Therefore, if you find that through reasonable efforts, [Plaintiff] could have found comparable employment, any amount that [he/she] could have earned in comparable employment must be deducted from the amount of damages awarded to [him/her]].
The [Defendant] must prove that the [Plaintiff] failed to mitigate [his/her] damages.

Notes on Use

This Instruction should be used when at issue in either a wrongful discharge or breach of employment contract case. The trial court should select the appropriate sentence in the second paragraph.

(2014 Supp.)

Instruction No. 21.21

EMPLOYMENT BASED DISCRIMINATION – ELEMENTS

[Plaintiff] claims that [Defendant] discriminated against [him/her] because of [his/her] [set out Plaintiff’s protected status] by [specify adverse employment action such as terminating his/her employment, or failing to hire or promote him/her]. In order to prevail on the claim of employment based discrimination, [Plaintiff] must show by the weight of the evidence that:

1. [Plaintiff] is [set out Plaintiff’s protected status].

2. [Defendant] discriminated against [him/her] because of [his/her] [set out Plaintiff’s protected status] by [specify adverse employment action]; and

3. [Plaintiff] was damaged as a result of the discrimination.

Notes on Use

This Instruction should be used in cases involving claims for employment based discrimination under 25 O.S.Supp. 2013, § 1350 along with Instruction No. 21.23, infra. The Statute provides a cause of action for discrimination arising from an employment related matter based on race, color, religion, sex, national origin, age, disability, genetic information with respect to the employee, or retaliation. If the claim involves retaliation related to employment discrimination, Instruction No. 21.22, infra, should be used instead of this Instruction. Instruction Nos. 21.8 and 21.9 may also be used as appropriate along with this and other Instructions dealing with employment based discrimination.

Comments

Prior to 2011, The Oklahoma Supreme Court recognized common law claims for wrongful discharge for employment discrimination based on the disparities of remedies

The remedies provided by § 1350 are injunctive relief, backpay, and an additional amount of backpay as liquidated damages.

(2014 Supp.)

Instruction No. 21.22

EMPLOYMENT BASED DISCRIMINATION – RETALIATION

[Plaintiff] claims that [Defendant] discriminated against [him/her] because of [his/her] [set out the protected activity relating to discrimination that Plaintiff engaged in] by [specify adverse employment action such as terminating his/her employment, or failing to hire or promote him/her]. In order to prevail on the claim of retaliation, [Plaintiff] must show by the weight of the evidence that:

1. [Plaintiff] is [set out the protected activity that Plaintiff engaged in].
2. [Defendant] retaliated against [him/her] because of [his/her] [set out the protected activity] by [specify adverse employment action]; and
3. [Plaintiff] was damaged as a result of the retaliation.

Notes on Use

This Instruction should be used in cases involving claims for retaliation for protected activities involving discrimination under 25 O.S.Supp. 2013, § 1350 along with Instruction No. 21.23, infra.

(2014 Supp.)
Instruction No. 21.23

EMPLOYMENT BASED DISCRIMINATION – DAMAGES

If you find in favor of [Plaintiff] on the issue of liability, then you must determine the amount of backpay to award [Plaintiff] on account of the [specify adverse employment action]. The amount of backpay is equal to the [additional] wages and fringe benefits [Plaintiff] would have earned if [specify adverse employment action] had not occurred. [The amount of Plaintiff’s earnings since termination of employment or amounts earnable with reasonable diligence must be deducted from the amount of backpay.] In addition, you may also award an additional amount as liquidated damages.

Notes on Use

The bracketed word “additional” should be included in the sentence if the case did not involve termination of employment. The third sentence in brackets should be used if the case involved termination of employment.

Comments

The remedies available under 25 O.S.Supp. 2013, § 1350 for employment based discrimination are injunctive relief, backpay, and an additional amount as liquidated damages. The statute does not specify how the liquidated damages are to be determined. In appropriate situations the trial judge may provide an instruction which defines liquidated damages and specifies the manner of calculating liquidated damages. See McDonald v. Corporate Integris Health, 2014 OK 10, – P.3d – (C.J. Colbert concurring).