

640.32 EMPLOYMENT RELATIONSHIP - MITIGATION OF DAMAGES.

This issue reads:

"By what amount, if any, should the plaintiff's actual damages be reduced?"

You are to answer this issue only if you have awarded the plaintiff actual damages in the preceding issue.

On this issue the burden of proof is on the defendant.¹ This means that the defendant must prove, by the greater weight of the evidence, by what amount, if any, the plaintiff's actual damages should be reduced.

[The plaintiff's actual damages must be reduced by the amount *he* [has earned] [will earn] from substitute employment (during the unexpired term of *his* employment agreement).² Substitute employment is new or additional employment that becomes available to the plaintiff as the result of being terminated.³ Actual damages may not be reduced on account of income the plaintiff [has earned] [will earn] from a source already available to *him* and in addition to *his* employment with the defendant.⁴]

[The plaintiff's actual damages must (also) be reduced by the amount *he* [has received] [will receive] from [unemployment benefits] [severance pay] [unearned benefits retained] [(*state other benefits*).]

[The plaintiff's actual damages must (also) be reduced by the amount which the plaintiff, with reasonable diligence, could have earned from similar employment in the same locality (during the unexpired term of *his* employment agreement).⁵ Reasonable diligence does not require that an employee seek or accept just any available employment. Rather, reasonable diligence requires that an employee seek and accept similar employment in the same locality.⁶]

Finally, as to this issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the plaintiff's

actual damages should be reduced under the rules I have explained to you, then you will answer this issue in favor of the defendant by writing the amount of that reduction in the blank space provided.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue in favor of the plaintiff by writing the word "None" in the blank space provided.

1 *Smith v. Lumber Co.*, 142 N.C. 26, 37, 54 S.E. 788, 792 (1906), *overruled on other grounds* in *Freeman v. Hardee's Food Systems*, 267 N.C. 56, 147 S.E.2d 590 (1966); *see also* 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 3.9, at 381 (2d ed. 1993).

2 *Thomas v. Catawba College*, 248 N.C. 609, 615, 104 S.E.2d 175, 179 (1958).

3 Where the plaintiff has not been medically cleared to return to work or seek new employment, the plaintiff does not act unreasonably so long as he does "everything he was asked to do by his [treating] doctor." *See Lloyd v. Norfolk S. Ry. Co.*, ___ N.C. App. ___, ___, 752 S.E.2d 704, 706 (2013).

4 *See generally* Dobbs, *supra* note 1, at 382 (explaining that reduction of actual damages is proper only if it is "possible to trace the [income] to the loss of the old job").

5 *Thomas, supra*, 240 N.C. at 615, 104 S.E.2d at 179; *Bennett v. Eastern Rebuilders*, 52 N.C. App. 579, 583, 279 S.E.2d 46, 49 (1981).

6 Dobbs, *supra* note 1, at 382.