**24.09C EMPLOYEE’S DAMAGES FOR BREACH OF EMPLOYMENT** **CONTRACT FOR UNSPECIFIED 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 determine the amount that [plaintiff] would have received from [defendant] as compensation from [date of breach/termination] until the date when [plaintiff] would have been likely to end [his her] employment with [defendant] if [defendant] had not terminated [plaintiff’s] employment. From the expected compensation amount, you must subtract [whichever of the following is the greater]:

[[(1)] the amount of any compensation [plaintiff] actually earned during that period which the plaintiff would not have earned if employed by the [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 through a diligent effort to obtain comparable employment.]

Alternative B

To determine the amount of damages [plaintiff] is entitled to receive, you must first determine the amount that [plaintiff] would have received from [defendant] as compensation from [the date of the breach/termination] to [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 the breach/termination] and [the 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 the breach] and [the date of trial] through a diligent effort to obtain comparable employment.]

You must then determine the amount that [plaintiff] would have received from [defendant] as compensation from [date of trial] until the likely end of [plaintiff’s] employment by [defendant]. From this amount, you must subtract [whichever of the following is the greater]:

[[(1)] the amount of any compensation the plaintiff will earn between the date of trial and the date on which the contract reasonably could be expected to terminate which the plaintiff would not have earned if employed by the 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 [date of trial] and the date until the likely end of [plaintiff’s] employment by [defendant] 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.

[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 primary calculation of damages when the contract at issue is for an unspecified term. If the contract is for a specified term which is not disputed, then Article 24.09B 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 earned more money, then A(2) or B(2) should be used. If this instruction is used, it would not be proper to give a separate mitigation of damages instruction relating to failure to obtain alternative employment.

**Comment**

When an at-will employee is wrongfully discharged, the damages are measured by the likely duration of the employee’s employment if the wrongful discharge had not occurred. *Reust v. Alaska Petroleum Contractors, Inc.*, 127 P.3d 807, 812 (Alaska 2005).

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).

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 Fishermen’s Ass’n v. Anderson,* 54 P.3d 271, 279 n.20 (Alaska 2002).

In *Redman v. Department of Education*, 519 P.2d 760, 771 (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).

*See also Long v. Newby*, 488 P.2d 719, 724 (Alaska 1971) (in an action for damages for third person's wrongful inducement of breach of employment contract, the court found the proper measure of damages to be "the difference between what would have been earned if the employment had not been wrongfully terminated and the amount which actually was, or reasonably should have been earned").

There is some inconsistency inthe words the Alaska Supreme Court uses to indicate how much effort a plaintiff must make to obtain a new job similar to the one from which the employee was discharged. In *Long v.* *Newby*, the court stated the plaintiff must make "reasonable" attempts to find new employment. 488 P.2d at 724. Consistent with *Long v. Newby* is the court's statement in *University of Alaska v. Chauvin*, 521 P.2d 1234 (Alaska 1974) (suit for damages for termination of tenured employee), that "a wronged party must use reasonable efforts to avoid the consequences of injury done by another." *Id*. at 1239. However, in *Skagway City School Board*, the court held the plaintiff to the standard of "diligent effort." 543 P.2d at 225. This statement was cited with approval by the court in *Luedtke*, 834 P. 2d at 1226. This instruction uses the term "diligent effort." However, nothing ineither *Skagway* or *Luedtke* indicates that "diligent effort" is a different standard than "reasonable effort."

In determining "reasonable efforts," the Alaska Supreme Court has stated that an employee is not obligated to accept alternative employment offered by the employer where acceptance might compromise the employee's claim in a suit for wrongful discharge. *Redman*, 519 P.2d at 769; *Chauvin*, 521 P.2d at 1239‑40.

The twin 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.