

1 **13-2310. Damages for wrongful discharge.**

2 If you should decide in favor of [\_\_\_\_\_ (*plaintiff*) ~~on~~] [any of]  
3 [~~his~~][~~her~~] \_\_\_\_\_ (*plaintiff's*) claim[s] for discharge [~~because~~] that [~~he~~  
4 [~~she~~] \_\_\_\_\_ (*plaintiff*) was discharged because \_\_\_\_\_  
5 (*insert conduct court has determined to be a violation of public policy*)] [in violation of [an implied  
6 contract], [or] [a statute]], then you must fix the amount of money damages that will reasonably  
7 and fairly compensate [~~him~~][~~her~~] \_\_\_\_\_ (*plaintiff*) for any of the  
8 following elements of damages proved by [~~him~~][~~her~~] \_\_\_\_\_ (*plaintiff*)  
9 to have resulted from the wrongful conduct of the defendant[s]:

10 (*NOTE: Here include the proper elements of damages.*)

11 [In addition, if you should decide in favor of [\_\_\_\_\_ (*plaintiff*) ~~on~~] [~~his~~  
12 [~~her~~] \_\_\_\_\_ (*plaintiff's*) claim [for discharge because [~~he~~][~~she~~]  
13 \_\_\_\_\_ (*plaintiff*) \_\_\_\_\_ (*insert conduct court has*  
14 *determined to be a violation of public policy*)] [or] [for discharge in violation of a statute],  
15 \_\_\_\_\_ (*plaintiff*) is entitled to recover an amount of money that will  
16 reasonably and fairly compensate [~~him~~][~~her~~] \_\_\_\_\_ (*plaintiff*) for any  
17 emotional distress caused by the violation.]

18 [Any damages for \_\_\_\_\_ (*list elements of special damages subject*  
19 *to this paragraph*) awarded on the claim for breach of an implied agreement must be damages  
20 which were reasonably foreseeable as a consequence of any breach.]

21 Whether any of these elements of damages has been proved by the evidence is for you to  
22 determine. Your verdict must be based upon proof, and not upon speculation, guess or conjecture.

1 Further, sympathy for a person, or prejudice against any party, should not affect your  
2 verdict and is not a proper basis for determining damages.

3 USE NOTES

4 This is the basic form of damages instruction for wrongful discharge claims. It must be  
5 completed by inserting appropriate elements of general and/or special damages as supported by  
6 the law and the evidence. *See* UJI 13-2311 NMRA et seq. The second paragraph should be included  
7 where a claim is based on retaliatory discharge or violation of the New Mexico Human Rights Act  
8 ~~[[28-1-1 NMSA 1978]]~~, NMSA 1978, §§ 28-1-1 to -15 (1968, as amended through 2024), and  
9 emotional distress damages are sought. The third paragraph should be included where a claim is  
10 based on breach of an implied employment agreement and special damages are sought. The trial  
11 court must determine what elements of damages are subject to the rule expressed in that paragraph,  
12 and those elements of damages should be inserted in the space indicated. *See* committee  
13 commentary.

14 In appropriate cases, additional instructions such as an instruction on mitigation of  
15 damages, *see* UJI 13-860 NMRA, UJI 13-1811 NMRA; *see also* UJI 13-851 NMRA, or  
16 instructions relating to damages arising in the future, *see* UJI 13-1821 NMRA and UJI 13-1822  
17 NMRA, should be given with this instruction.

18 [Approved, effective January 1, 1999; as amended by Supreme Court Order No. 08-8300-012,  
19 effective June 13, 2008; as amended by Supreme Court Order No. S-1-RCR-2025-00126, effective  
20 for all cases pending or filed on or after December 31, 2025.]

21 **Committee commentary.** — The New Mexico Human Rights Act permits recovery of "actual  
22 damages." Section 28-1-13 NMSA 1978. The term "is synonymous with compensatory damages."  
23 *Behrmann v. Phototron Corp.*, 110 N.M. 323, 328, 795 P.2d 1015, 1020 (1990). Recovery may

1 include past and future lost earnings. *Id.*; *see also Smith v. FDC Corp.*, 109 N.M. 514, 787 P.2d  
2 433 (1990).

3 Damages for emotional distress are ordinarily not recoverable in actions based on breach of an  
4 implied employment contract. *See Silva*, 106 N.M. at 20, 738 P.2d at 514 (holding, in accord with  
5 general contract principles, that such damages "are not recoverable ... in the absence of a showing  
6 that the parties contemplated such damages at the time the contract was made"). Emotional distress  
7 damages are recoverable under a retaliatory discharge claim. *Chavez v. Manville Prods.* In *Silva*,  
8 the Supreme Court approved a jury instruction stating that the jury could find either breach of  
9 contract or retaliatory discharge but not both, because "if an employee is protected from wrongful  
10 discharge by an employment contract, the intended protection afforded by the retaliatory discharge  
11 action is unnecessary and inapplicable." 106 N.M. at 21, 738 P.2d at 515. *See also Salazar v.*  
12 *Furr's, Inc.*, 629 F. Supp. at 1408 (retaliatory discharge claim "does not extend to cases for which  
13 another remedy is provided by law"). In *McGinnis v. Honeywell, Inc.*, 110 N.M. 1, 791 P.2d 452  
14 (1990), however, the Court indicated that there would be reason to allow the jury to pass on both  
15 claims in an appropriate case because emotional distress damages are available for retaliatory  
16 discharge but not for breach of contract. In cases where both breach of contract and retaliatory  
17 discharge claims are submitted and emotional distress damages are sought, the jury should be  
18 instructed in a way that avoids double recovery on those elements of damages common to both  
19 claims and that prevents the jury from awarding emotional distress damages under the contract  
20 claim. A special verdict form may be used to guide the jury's approach in such cases. *See UJI 13-*  
21 *2320.*

1 Mitigation of damages applies to wrongful discharge cases. *McGinnis*. The burden of proof is on  
2 the defendant, "to prove by substantial evidence that [plaintiff's] damages would be alleviated by  
3 future employment opportunities." *McGinnis*, 110 N.M. at 7, 791 P.2d at 458.

4 As in other contract and tort cases, punitive damages can be awarded for breach of an implied  
5 employment contract or retaliatory discharge where supported by the evidence. *See Vigil v. Arzola;*  
6 *McGinnis v. Honeywell, Inc.* *See* UJI 13-861 and UJI 13-1827. Punitive damages may be awarded  
7 only where there is bad faith during the course of employment or in the discharge. *Bourgeois v.*  
8 *Horizon Healthcare Corp.*, 117 N.M. 434, 872 P.2d 852 (1994). Punitive damages are available in  
9 all retaliatory discharge cases. *Rhein v. ADT Automotive*, 1996-NMSC-066, 122 N.M. 646, 930  
10 P.2d 783. Violation of the Human Rights Act does not support an award of punitive damages.  
11 *Behrmann v. Phototron Corp., supra.*

12 [Approved, effective January 1, 1999.]