

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

Case No.: 9:14-cv-80218-BLOOM/VALLE

JILL WILE,	:
	:
Plaintiff,	:
	:
v.	:
	:
FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.,	:
	:
Defendant.	:
-----	X

COURT’S INSTRUCTIONS TO THE JURY

Members of the jury:

It’s my duty to instruct you on the rules of law that you must use in deciding this case.

When I have finished you will go to the jury room and begin your discussions, sometimes called deliberations.

The Duty to Follow Instructions – Corporate Party Involved

Your decision must be based only on the evidence presented here. You must not be influenced in any way by either sympathy for or prejudice against anyone.

You must follow the law as I explain it – even if you do not agree with the law – and you must follow all of my instructions as a whole. You must not single out or disregard any of the instructions on the law.

The fact that a corporation is involved as a party must not affect your decision in any way. A corporation and all other persons stand equal before the law and must be dealt with as equals in a court of justice. When a corporation is involved, of course, it may act only through people as its employees; and, in general, a corporation is responsible under the law for the acts and statements of its employees that are made within the scope of their duties as employees of the company.

**Consideration of Direct and Circumstantial Evidence;
Argument of Counsel; Comments by the Court**

As I said before, you must consider only the evidence that I have admitted in the case. Evidence includes the testimony of witnesses and the exhibits admitted. But, anything the lawyers say is not evidence and isn't binding on you.

You should not assume from anything I have said that I have any opinion about any factual issue in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision about the facts.

Your own recollection and interpretation of the evidence is what matters.

In considering the evidence you may use reasoning and common sense to make deductions and reach conclusions. You shouldn't be concerned about whether the evidence is direct or circumstantial.

"Direct evidence" is the testimony of a person who asserts that he or she has actual knowledge of a fact, such as an eyewitness.

"Circumstantial evidence" is proof of a chain of facts and circumstances that tend to prove or disprove a fact. There's no legal difference in the weight you may give to either direct or circumstantial evidence.

Impeachment of Witnesses Because of Inconsistent Statements

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact. And ask whether there was evidence that at some other time a witness said or did something, or didn't say or do something, that was different from the testimony the witness gave during this trial.

But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So, if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of your decision may depend on whether the misstatement is about an important fact or about an unimportant detail.

Credibility of Witnesses

When I say you must consider all the evidence, I do not mean that you must accept all the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. The number of witnesses testifying concerning a particular point doesn't necessarily matter.

To decide whether you believe any witness I suggest that you ask yourself a few questions:

- Did the witness impress you as one who was telling the truth?
- Did the witness have any particular reason not to tell the truth?

- Did the witness have a personal interest in the outcome of the case?
- Did the witness seem to have a good memory?
- Did the witness have the opportunity and ability to accurately observe the things he or she testified about?
- Did the witness appear to understand the questions clearly and answer them directly?
- Did the witness's testimony differ from other testimony or other evidence?

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Note-Taking

You've been permitted to take notes during the trial. Most of you – perhaps all of you – have taken advantage of that opportunity.

You must use your notes only as a memory aid during deliberations. You must not give your notes priority over your independent recollection of the evidence. And you must not allow yourself to be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than your memories or impressions about the testimony.

Responsibility for Proof – Preponderance of the Evidence

In this case it is the responsibility of Wile to prove every essential part of her claims by a “preponderance of the evidence.” This is sometimes called the “burden of proof” or the “burden of persuasion.”

A “preponderance of the evidence” simply means an amount of evidence that is enough to persuade you that the Plaintiff’s claim is more likely true than not true.

If the proof fails to establish any essential part of a claim or contention by a preponderance of the evidence, you should find against Wile.

When more than one claim is involved, you should consider each claim separately.

In deciding whether any fact has been proved by a preponderance of the evidence, you may consider the testimony of all of the witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them.

If the proof fails to establish any essential part of Wile's claims by a preponderance of the evidence, you should find for FINRA as to that claim.

Retaliation – Title VII, ADEA, ADA, FCRA

In this case, Wile claims that FINRA retaliated against her because she took steps to enforce her lawful rights under federal and state statutes prohibiting discrimination on the basis of sex, age, and disability. In this case, these steps include the four written complaints of discrimination and retaliation that have been admitted into evidence as Plaintiff's Exhibits 27, 33, 38 and 74.

These laws prohibiting discrimination in the workplace also prohibit an employer from taking retaliatory action against an employee because the employee has asserted rights or made complaints under those laws.

An employee may make a discrimination complaint as a means to enforce what she believed in good faith to be her lawful rights. The employee cannot be penalized in retaliation for having made such a complaint if you find that the employee made the complaint as a means of seeking to enforce what the employee believed in good faith to be her lawful rights, irrespective of the merits of such complaints, which is not an issue for your determination.

To establish "good faith," however, it is insufficient for Wile merely to allege that her belief in this regard was honest and bona fide; the allegations and the record must also establish that her belief was objectively reasonable.

Again, whether or not Wile was in fact discriminated against is not a question for you to determine. The issue for your determination is whether or not her employment was terminated in retaliation because she made her complaints of discrimination.

Wile claims that FINRA terminated her employment in retaliation because she complained of discrimination on the basis of her sex, age, and disability. FINRA denies Wile's claim and asserts that her position was eliminated as part of a company-wide reduction in staff.

To succeed on her retaliation claim, Wile must prove each of the following facts by a preponderance of the evidence:

- First: That she engaged in a protected activity;
- Second: That FINRA then took an adverse employment action against her; and
- Third: That FINRA took the adverse employment action because of Wile's protected activity.

For the first element, Wile claims that she engaged in protected activity when she complained that she was the victim of unlawful discrimination. Such a complaint is "protected activity" if it was based on Wile's good-faith, reasonable belief that FINRA discriminated against her because of her sex, age, or disability. Wile has a "good faith" belief if she honestly believed that FINRA discriminated against her because of her sex, age, or disability. Wile had a "reasonable" belief if a reasonable person would, under the circumstances, believe that FINRA discriminated against her because of her sex, age, or disability. Wile does not have to prove that

FINRA actually discriminated against her because of her sex, age, or disability. But she must prove that she had a good-faith, reasonable belief that FINRA did so.

With respect to the second element, I instruct you as a matter of law that Defendant FINRA's termination of Plaintiff Wile's employment in 2013 was an adverse employment action.

For the third element, if you find that Wile engaged in protected activity, you must decide whether FINRA terminated Wile's employment because of her protected activity. Put another way, you must decide whether Wile's protected activity was the main reason for FINRA's decision.

To determine that FINRA took an adverse employment action because of Wile's protected activity, you must decide that FINRA would not have terminated her employment had Wile not engaged in the protected activity but everything else had been the same.

FINRA claims that it did not terminate Wile's employment because of her complaints of discrimination and that it took that action due to declining case volume. An employer may not take an adverse action against an employee because of the employee's protected activity, but an employer may lay off an employee for any other reason, good or bad, fair or unfair. If you believe FINRA's reason for its decision, and you find that FINRA did not make its decision because of Wile's protected activity, you must not second guess that decision, and you must not substitute your own judgment for FINRA's judgment – even if you do not agree with it.

As I have explained, Wile has the burden to prove that FINRA's decision to terminate her employment was because of Wile's internal complaints of discrimination. I have explained to you that evidence can be direct or circumstantial. To decide whether FINRA's termination of Wile's employment was because of her protected activity, you may consider the circumstances of FINRA's decision. For example, you may consider whether you believe the reason that FINRA gave for the decision. If you do not believe the reason that it gave for the decision, you may consider whether the reason was so unbelievable that it was a cover-up to hide the true retaliatory reasons for the decision.

Compensatory Damages

If you find that FINRA did not retaliate against Wile, you will not consider the matter of damages. However, if you find that FINRA did retaliate against Wile, you must decide whether FINRA's acts were the proximate cause of damages that Wile sustained. Put another way, you must decide, if FINRA had not eliminated Wile's position and laid her off, whether these damages would have occurred.

If you find that FINRA's acts were the proximate cause of damages that Wile sustained, you must determine the amount of damages.

When considering the issue of Wile's compensatory damages, you should determine what amount, if any, has been proven by Wile by a preponderance of the evidence as full, just and reasonable compensation for all of Wile's damages as a result of the adverse employment action, no more and no less. Compensatory damages are not allowed as a punishment and must not be

imposed or increased to penalize FINRA. Also compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damages, to the extent you find that Wile has proven them by a preponderance of the evidence, and no others:

- (a) net lost wages and benefits from the date of the adverse employment action to the date of your verdict,
- (b) future lost compensation;
- (c) emotional pain and mental anguish; and
- (d) injury to character and reputation.

To determine the amount of Wile's net lost wages and benefits, you should consider evidence of the actual wages she lost and the monetary value of any benefits she lost.

To determine whether and how much Wile should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury—tangible and intangible. Wile does not have to introduce evidence of a monetary value for intangible things like mental anguish. You will determine what amount fairly compensates her for her claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

If FINRA knew that the adverse employment action violated the law, or acted in reckless disregard of that fact, then its conduct was willful. If FINRA did not know, or knew only that the law was potentially applicable, and did not act in reckless disregard about whether the law prohibited its conduct, its conduct was not willful.

Mitigation of Damages

You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to “mitigate” those damages. For purposes of this case, the duty to mitigate damages requires Wile to be reasonably diligent in seeking substantially equivalent employment to the position she held with FINRA. To prove Wile failed to mitigate damages, FINRA has the burden of proving by a preponderance of the evidence that: (1) work comparable to the position Wile held with FINRA was available, and (2) Wile did not make reasonably diligent efforts to obtain it. If, however, FINRA shows that Wile did not make reasonable efforts to obtain any work, then FINRA does not have to prove that comparable work was available.

If you find that FINRA proved by a preponderance of the evidence that Wile failed to mitigate damages, then you should reduce the amount of Wile’s damages by the amount that could have been reasonably realized if Wile had taken advantage of an opportunity for substantially equivalent employment.

Willful Violation

Wile also claims that FINRA willfully violated the ADEA. If FINRA knew that its termination of Wile’s employment in retaliation for her complaints of discrimination violated the law, or acted in reckless disregard of that fact, then its conduct was willful. If FINRA did not know, or knew only that the law was potentially applicable, and did not act in reckless disregard about whether the law prohibited its conduct, its conduct was not willful.

Punitive Damages

Wile also seeks an award of punitive damages. The purpose of punitive damages is not to compensate Wile but, instead, to punish FINRA for wrongful conduct and to deter similar wrongful conduct.

To be entitled to an award of punitive damages, Wile must prove by a preponderance of the evidence that FINRA acted with either malice or with reckless indifference toward Wile's federally protected rights. Specifically, Wile must show that an employee of FINRA, acting in a managerial capacity, either acted with malice or with reckless indifference to Wile's federally protected rights.

There is no bright-line rule about which employees act in a managerial capacity. You must determine whether an employee acted in a "managerial capacity" based upon the type of authority FINRA gave the employee and the amount of discretion that the employee has in what is done and how it is accomplished.

To show that FINRA acted with malice, Wile must show that an employee acting in a managerial capacity knew that federal law prohibits retaliation and retaliated against Wile anyway. To show that FINRA acted with reckless indifference to Wile's federally protected rights, Wile must show that an employee acting in a managerial capacity acted with serious disregard for whether the conduct violated federal law. Either malice or reckless indifference is sufficient to entitle Wile to an award of punitive damages; Wile need not prove both.

An employer may not be held liable for punitive damages because of retaliatory acts on the part of its managerial employees where the managerial employees' acts are contrary to the employer's good faith efforts to comply with the law by implementing policies and programs designed to prevent unlawful retaliation in the workplace. However, the mere existence of policies prohibiting retaliation does not preclude punitive damages if the policies are ineffective.

There is no single factor that determines whether FINRA acted with malice or with reckless indifference to Wile's federally protected rights. In determining whether to award punitive damages, you may consider factors such as 1. Whether FINRA acted spitefully or malevolently; 2. Whether FINRA showed a blatant disregard for civil violations; 3. Whether FINRA failed to investigate reports of discrimination; 4. Whether FINRA failed to investigate reports of discrimination; 5. Whether FINRA failed to take corrective action concerning discriminatory acts or comments by its employees; and 6. Whether the person accused of discrimination was included in the employer's decision making process concerning Wiles's discharge.

You are instructed that economic reasons are a legitimate reason for an employer to conduct a staff reduction in force. An employer is free to choose whatever means it wants, so long as it is not retaliatory, in responding to bad economic conditions. It is up to you to decide, based on the evidence presented, whether the FINRA's decision to eliminate Jill Wile's position was the result of financial conditions or was a pretext for retaliation.

When an employer reduces its workforce for economic reasons, it incurs no obligation to transfer laid-off employees to other positions within the company. Nor does the law require that

employees who do not fall into protected categories be fired so that employees within protected categories can be retained.

Duty to Deliberate

Of course, the fact that I have given you instructions concerning the issue of Plaintiff's damages should not be interpreted in any way as an indication that I believe that the Plaintiff should, or should not, prevail in this case.

Your verdict must be unanimous – in other words, you must all agree. Your deliberations are secret, and you'll never have to explain your verdict to anyone.

Each of you must decide the case for yourself, but only after fully considering the evidence with the other jurors. So you must discuss the case with one another and try to reach an agreement. While you're discussing the case, don't hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But don't give up your honest beliefs just because others think differently or because you simply want to get the case over with.

Remember that, in a very real way, you're judges – judges of the facts. Your only interest is to seek the truth from the evidence in the case.

Election of Foreperson; Explanation of Verdict Form

When you get to the jury room, choose one of your members to act as foreperson. The foreperson will direct your deliberations and speak for you in court.

A verdict form has been prepared for your convenience.

[Explain verdict form]

Take the verdict form with you to the jury room. When you've all agreed on the verdict, your foreperson must fill in the form, sign it and date it. Then you'll return it to the courtroom.

If you wish to communicate with me at any time, please write down your message or question and give it to the court security officer. The court security officer will bring it to me, and I'll respond as promptly as possible – either in writing or by talking to you in the courtroom. Please understand that I may have to talk to the lawyers and the parties before I respond to your question or message, so you should be patient as you await my response. But I caution you not to tell me how many jurors have voted one way or the other at that time. That type of information should remain in the jury room and not be shared with anyone, including me, in your note or question.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

Case No.: 9:14-cv-80218-BLOOM/VALLE

JILL WILE,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.,	:	
	:	
Defendant.	:	
-----X		

We, the jury, unanimously find the following by a preponderance of the evidence:

1. Did Jill Wile engage in protected activity?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to Question 2.

2. Did FINRA terminate Wile’s employment because of her protected activity?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to Question 3.

3. Should Jill Wile be awarded damages to compensate for a net loss of wages and benefits from the date her employment with FINRA ended to the date of your verdict?

Answer Yes or No _____

If your answer is "Yes, in what amount? \$ _____

4. Should Jill Wile be awarded damages to compensate for a net loss of wages and benefits from the date of your verdict to the date in the future that you find her employment with FINRA would have ended or she obtained comparable employment?

Answer Yes or No _____

If your answer is "Yes, in what amount? \$ _____

5. Should Jill Wile be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is "Yes," in what amount? \$ _____

6. Should Jill Wile be awarded damages to compensate for injury to character and reputation?

Answer Yes or No _____

If your answer is "Yes," in what amount? \$ _____

If you did not award damages in response to any of Questions 3, 4, 5, or 6 above, this ends your deliberations, and your foreperson should go to the end of this verdict form to sign and

date it. If you awarded damages under any of Questions 3, 4, 5, or 6 above (or all), answer Questions 7 and 8.

7. Did Jill Wile prove that FINRA acted with either malice or reckless indifference towards her?

Answer Yes or No _____

If your answer is "Yes", should punitive damages be assessed against FINRA?

Answer Yes or No _____

If your answer is Yes, in what amount? \$ _____

8. Did FINRA "willfully" violate the ADEA law?

Answer Yes or No _____

SO SAY WE ALL.

Foreperson's Signature

Date: _____