

CHAPTER 31

WRONGFUL DISCHARGE

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A. BREACH OF CONTRACT CLAIMS

31:1 BREACH OF EMPLOYMENT CONTRACT FOR A DEFINITE PERIOD OF TIME — ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim for breach of an employment contract for a definite period of time, you must find that all of the following have been proved by a preponderance of the evidence:

1. The plaintiff and the defendant entered into a contract of employment;
2. The contract provided that the employment would continue for a definite period of time;
3. The defendant (constructively) discharged the plaintiff before the end of that period of time;
4. Before the plaintiff was discharged, (he) (she) ([substantially] performed [his] [her] part of the contract) (had some justification for not performing [his] [her] part of the contract); and
5. The plaintiff had (injuries) (damages) (losses) as a result of the (constructive) discharge.

If you find that any of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

Notes on Use

1. Use whichever parenthesized words or phrases are appropriate.
2. Where the defendant raises issues regarding the existence of the employment contract itself, additional instructions relating to the formation of contracts may be necessary. See instructions in Chapter 30. Also see Chapter 30 for instructions relating to affirmative defenses to a breach of contract claim. To instruct as to what constitutes an employment relationship,

Instruction 7:6, appropriately modified, may be used. Where the plaintiff asserts justification for nonperformance, additional instructions may be necessary. See, e.g., Instruction 31.12.

3. If there is a factual dispute as to whether the employment contract was for a definite period of time, see Notes on Use to Instruction 31:5. See **Pickell v. Arizona Components Co.**, 931 P.2d 1184 (Colo. 1997); **Dorman v. Petrol Aspen, Inc.**, 914 P.2d 909 (Colo. 1996).

Source and Authority

1. This instruction is supported by **Western Distributing Co. v. Diodosio**, 841 P.2d 1053 (Colo. 1992); **Nelson v. Centennial Casualty Co.**, 130 Colo. 66, 273 P.2d 121 (1954); **Saxonia Mining & Reduction Co. v. Cook**, 7 Colo. 569, 4 P. 1111 (1884); **Pittman v. Larson Distributing Co.**, 724 P.2d 1379 (Colo. App.), *cert. denied* (1986).

2. Good or just cause for the discharge is an affirmative defense that must be raised and proved by the employer. **Western Distrib. Co. v. Diodosio**, 841 P.2d 1053 (Colo. 1992); **Pittman v. Larson Distrib. Co.**, 724 P.2d 1379 (Colo. App.), *cert. denied* (1986). For a discussion of good or just cause, see Instruction 31:6.

3. Where an employer discovers a misrepresentation on an employment application or résumé after the employee has been terminated for other reasons, such “after-acquired evidence” is a complete defense to a claim for wrongful discharge predicated on breach of contract or promissory estoppel, if the employer shows that the employee’s misrepresentation was material and that “a reasonable, objective employer would not have hired the employee if it had discovered the misrepresentation at the outset.” **Crawford Rehab. Servs., Inc. v. Weissman**, 938 P.2d 540, 549 (Colo. 1997). See Instruction 31:11.

4. A breach of a covenant of good faith and fair dealing in an employment contract does not give rise to a tort claim. **Decker v. Browning-Ferris Indus., Inc.**, 931 P.2d 436 (Colo. 1997); **Decker v. Browning-Ferris Indus., Inc.**, 947 P.2d 937 (Colo. 1997). Moreover, to be judicially enforceable, such a covenant must be “sufficiently specific to allow a court to determine whether a breach has occurred and to adopt an appropriate remedy for any breach.” **Valdez v. Cantor**, 994 P.2d 483, 487 (Colo. App. 1999). *Accord Hoyt v. Target Stores*, 981 P.2d 188 (Colo. App. 1998), *cert. denied* (1999) (vague assurances of fair treatment are unenforceable).

**31:2 EMPLOYMENT CONTRACT PROVIDING FOR FIXED TERM SALARY —
CAUTIONARY INSTRUCTION**

A determination that a contract of employment was for a definite period of time may not be based solely on evidence that the contract provided for an annual salary (or similar fixed term rate of pay). However, you may consider such evidence, together with all the other evidence in the case, in determining whether the employment contract was for a definite period of time.

Notes on Use

1. This instruction should be given with Instruction 31:1 when there is a factual dispute as to whether the contract of employment was for a definite term and there is evidence that the contract provided for an annual salary or similar fixed term rate of pay. *See, e.g., Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909 (Colo. 1996) (where provisions in employment contract created ambiguities regarding term of employment, trial court erred in granting summary judgment in favor of employer on basis that employment was at-will employment).

Source and Authority

This instruction is based on **Justice v. Stanley Aviation Corp.**, 35 Colo. App. 1, 530 P.2d 984 (1974), *cert. denied* (1975). *See also Lee v. Great Empire Broad., Inc.*, 794 P.2d 1032 (Colo. App. 1989) (agreement to guarantee an employee a certain sum during a particular period of time did not necessarily constitute an agreement or guarantee that the employment relationship was to continue for such period).

31:3 BREACH OF EMPLOYMENT CONTRACT FOR AN INDEFINITE PERIOD OF TIME REQUIRING GOOD OR JUST CAUSE FOR TERMINATION — ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim for breach of an employment contract for an indefinite period of time, you must find that all of the following have been proved by a preponderance of the evidence:

- 1. The plaintiff and the defendant entered into a contract of employment;**
- 2. The contract provided that the plaintiff would not be discharged without good or just cause;**
- 3. The plaintiff was (constructively) discharged by the defendant;**
- 4. Before the plaintiff was discharged, (he)(she) ([substantially] performed [his] [her] part of the contract) (had some justification for not performing [his] [her] part of the contract); and**
- 5. The plaintiff had (injuries) (damages) (losses) as a result of the (constructive) discharge.**

If you find that any of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant’s affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff’s claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

Notes on Use

1. Use whichever parenthesized and bracketed words and phrases are appropriate.
2. If the defendant raises issues regarding the existence of the employment contract itself, additional instructions relating to the formation of contracts may be necessary. See instructions in Chapter 30. Also see Chapter 30 for instructions relating to affirmative defenses to a breach of contract claim. To instruct as to what constitutes an “employment relationship,” Instruction 7:6, appropriately modified, may be used.

3. If there is a factual dispute as to whether the employment contract provided that plaintiff would not be discharged without cause, see Notes on Use to Instruction 31:5.

4. If the employee's breach of contract claim is based on the employer's personnel policies or procedures, Instruction 31:4 should be used rather than this instruction.

Source and Authority

1. This instruction is supported by **Western Distrib. Co. v. Diodosio**, 841 P.2d 1053 (Colo. 1992); **Nelson v. Centennial Cas. Co.**, 130 Colo. 66, 273 P.2d 121 (1954); **Saxonia Mining & Reduction Co. v. Cook**, 7 Colo. 569, 4 P. 1111 (1884); **Pittman v. Larson Distrib. Co.**, 724 P.2d 1379 (Colo. App.), *cert. denied* (1986).

2. Good or just cause for the discharge is an affirmative defense that must be raised and proved by the employer. **Western Distrib. Co. v. Diodosio**, 841 P.2d 1053 (Colo. 1992); **Pittman v. Larson Distrib. Co.**, 724 P.2d 1379 (Colo. App.), *cert. denied* (1986). For a discussion of good or just cause, see Instruction 31:6.

31:4 BREACH OF IMPLIED CONTRACT BASED ON VIOLATION OF EMPLOYER’S TERMINATION POLICIES OR PROCEDURES — ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim for breach of an employment contract, you must find that all of the following have been proved by a preponderance of the evidence:

1. The defendant had a (*insert description of appropriate document, e.g., “employee handbook, personnel manual,” etc.*) which was in effect at the time the plaintiff was (constructively) discharged by the defendant;

2. The (*employee handbook, personnel manual, etc.*) set forth (policies) (and) (or) (procedures) regarding the discharge of the defendant’s employees, such as the plaintiff;

3. The defendant demonstrated to such employees a willingness to be bound by such (policies) (and) (or) (procedures);

4. The plaintiff was aware of the existence of the (*employee handbook, personnel manual, etc.*) before (he) (she) was discharged by the defendant;

5. The plaintiff reasonably understood that the defendant was offering the (*employee handbook, personnel manual, etc.*) as part of the terms and conditions of (his) (her) employment, and, with that understanding, the plaintiff (began) (continued) (his) (her) employment with the defendant;

6. The defendant (constructively) discharged the plaintiff without complying with the termination (policies) (procedures) set forth in its (*employee handbook, personnel manual, etc.*); and

7. Until discharged, the plaintiff (substantially) performed (his) (her) part of the contract(or the plaintiff had some justification for nonperformance) .

If you find that any of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant’s affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff’s claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

Notes on Use

1. Use whichever parenthesized and bracketed words and phrases are appropriate.
2. Where the defendant raises issues regarding the existence of the employment contract itself, additional instructions relating to the formation of contracts may be necessary. See instructions in Chapter 30. Also see Chapter 30 for instructions relating to affirmative defenses to a breach of contract claim. To instruct as to what constitutes an “employment relationship,” Instruction 7:6, appropriately modified, may be used. Where the plaintiff asserts justification for nonperformance, additional instructions may be necessary. See, e.g., Instruction 31.12.
3. This instruction should be used where an employee seeks recovery for breach of contract on the theory that a personnel manual, employee handbook, or other such document, unilaterally published by the employer, constitutes part of the terms of an employment contract that would otherwise be terminable at will. See, e.g., **Continental Air Lines, Inc. v. Keenan**, 731 P.2d 708 (Colo. 1987).
4. In cases involving claims against public entities, this instruction may have to be modified, and in some cases it may not be applicable at all. See, e.g., **Adams County Sch. Dist. No. 50 v. Dickey**, 791 P.2d 688 (Colo. 1990); **Department of Health v. Donahue**, 690 P.2d 243 (Colo. 1984); **Seeley v. Board of County Comm’rs**, 791 P.2d 696 (Colo. 1990) (sheriff prohibited by statute from adopting manual restricting his statutory authority to discharge deputy sheriff); **Shaw v. Sargent Sch. Dist. No. 33-J**, 21 P.3d 446 (Colo. App. 2001) (school district’s promise concerning early retirement policy was conditional on the availability of appropriated funds); **Ness v. Glasscock**, 781 P.2d 137 (Colo. App.), *cert. denied* (1989). See also **Kuta**, 799 P.2d 379; **Chellsen v. Pena**, 857 P.2d 472 (Colo. App. 1992), *cert. denied* (1993) (where city charter provided that probationary employees were terminable at will, probationary firefighters remained terminable at will regardless of any express or implied statements to the contrary by city officials).
5. If the employee manual or handbook requires cause for termination, see Instruction 31:6. For a discussion regarding the burden of proof on cause for termination, see Notes on Use to Instructions 31:1 and 31:3.

Source and Authority

1. This instruction is supported by **Dorman v. Petrol Aspen, Inc.**, 914 P.2d 909 (Colo. 1996) (offer letter susceptible to the interpretation that it provided for employment of a specific term); **Cherry v. A-P-A**; **Continental Air Lines, Inc. v. Keenan**, 731 P.2d 708 (Colo. 1987); **Churchey v. Adolph Coors Co.**, 759 P.2d 1336 (Colo. 1988); **Crawford Rehab. Servs., Inc. v. Weissman**, 938 P.2d 540 (Colo. 1997).
2. The Colorado Supreme Court first recognized the implied-contract exception to the employment-at-will doctrine in **Continental Airlines v. Keenan**, *supra*. Under this theory, the employee must show that the employer’s promulgation of termination policies or procedures was an offer and that the employee’s initial or continued employment constituted an acceptance of

that offer. *See also Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). Further, for such an offer to be effective, it must be communicated to the employee. *Kuta v. Joint Dist. No. 50(J)*, 799 P.2d 379 (Colo. 1990). *See also Watson v. Public Serv. Co.*, 207 P.3d 860 (Colo. App. 2008), *cert. denied* (2009) (most advertisements are mere notices and solicitations for offers and create no power of acceptance in the recipient).

3. In *Churchey*, 759 P.2d 1336, 1348-49, the court, in reference to a breach of contract theory of recovery, quoted with approval the following language from *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880, 892 (1980):

While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "instinct with an obligation".

4. For assistance in determining whether the language of an employee handbook or manual is sufficiently clear or specific to constitute an offer, see *Tuttle v. ANR Freight Systems, Inc.*, 797 P.2d 825 (Colo. App. 1990); *Cronk v. Intermountain Rural Electric Ass'n*, 765 P.2d 619 (Colo. App.), *cert. denied* (1988). *See also Soderlun v. Public Serv. Co.*, 944 P.2d 616 (Colo. App.), *cert. denied* (1997) (discussing whether oral and written statements of employer were sufficiently definite to constitute legally enforceable promise or commitment).

5. Whether an employer and an employee have entered into a contract based upon an employee handbook or manual is generally a question of fact. *Tuttle*, 797 P.2d 825; *DeRubis v. Broadmoor Hotel, Inc.*, 772 P.2d 681 (Colo. App. 1989); *Cronk*, 765 P.2d 619.

6. There may be situations where the employee's initial or continued employment does not constitute an acceptance of the employer's offer. *See, e.g., Kuta*, 799 P.2d 379 (where employees were merely fulfilling preexisting contractual obligations by continuing their employment, such continued employment did not constitute acceptance of offer or necessary consideration to modify contract).

7. Even though an employer does not expressly reserve the right to modify termination policies or procedures set forth in an employee handbook, reservation of such a right is presumed. *Ferrera v. Nielsen*, 799 P.2d 458 (Colo. App. 1990). *Accord Jaynes*, 148 P.3d 241 (claim of wrongful discharge cannot be based on employee handbook that has been superseded). Consequently, an employee is not entitled to rely on termination procedures in a handbook when the termination procedures are changed by the employer before the employee is discharged,

provided that the employer has given the affected employee reasonable notice of the change. *Id.* Further, if the employer has clearly and conspicuously disclaimed any intent to be contractually bound by the termination procedures of an employee handbook, the existence of a contract may be negated as a matter of law. *Id.* See also **Jaynes v. Centura Health Corp.**, 148 P.3d 241 (Colo. App.), *cert. denied* (2006) (where there is a clear disclaimer, termination procedures in an employee handbook does not create any contractual rights); **Axtell v. Park Sch. Dist. R-3**, 962 P.2d 319 (Colo. App.), *cert. denied* (1998) (no implied contract where there was a clear disclaimer of contractual rights); **Middlemist v. BDO Seidman, LLP**, 958 P.2d 486 (Colo. App. 1997), *cert. denied* (1998) (where employer clearly and conspicuously disclaimed intent to limit right to discharge, summary judgment was appropriate on claim based on employee handbook); **George v. Ute Water Conservancy Dist.**, 950 P.2d 1195 (Colo. App. 1997) (no implied contract where handbook contained clear, conspicuous disclaimers); **Mariani v. Rocky Mtn. Hosp. & Med. Serv.**, 902 P.2d 429 (Colo. App. 1994), *aff'd on other grounds*, 916 P.2d 519 (Colo. 1996) (employee failed to establish implied contract where manual contained express disclaimer); **Schur v. Storage Tech. Corp.**, 878 P.2d 51 (Colo. App.), *cert. denied* (1994); **Holland v. Board of County Comm'rs**, 883 P.2d 500 (Colo. App.), *cert. denied* (1994) (summary judgment proper where express contract stated employment was "at-will"); **Watson**, 207 P.3d 860 (clear and conspicuous disclaimers in handbook precluded existence of implied contract); **Therrien v. United Air Lines, Inc.**, 670 F. Supp. 1517 (D. Colo. 1987) (summary judgment denying claims based on an employee handbook is appropriate if the employer has clearly and conspicuously disclaimed intent to enter into a contract limiting the right to discharge employees). *But see Fair v. Red Lion Inn*, 920 P.2d 820 (Colo. App. 1995), *aff'd on other grounds*, 943 P.2d 431 (Colo. 1997) (although employee manual contained conspicuous disclaimer to the effect that provisions in manual were not intended to create binding contractual obligations, evidence was sufficient to sustain jury determination that employer, by words or conduct, had modified at-will employment and breached employment contract by discharging employee).

8. However, even if the employer has disclaimed any intent to be bound by the provisions of an employee handbook, there may be other provisions in the handbook or other documents which are inconsistent with a disclaimer and raise factual issues for the jury to determine regarding whether the employer was contractually bound by such provisions, thus precluding the entry of summary judgment for the employer. See, e.g., **Evenson v. Colorado Farm Bureau Mut. Ins. Co.**, 879 P.2d 402 (Colo. App. 1993), *cert. denied* (1994); **Allabashi v. Lincoln Nat'l Sales Corp.**, 824 P.2d 1 (Colo. App. 1991) (reasonable jury could have found existence of employment contract where evidence showed that, although employee handbook contained a disclaimer providing that employment was at-will, other documents given to employee contained policies requiring just cause for involuntary termination and mandating specific procedures for dismissal); **Cronk**, 765 P.2d 619.

9. Termination procedures or policies set forth in personnel manuals can also be enforced by an employee under a promissory estoppel theory if, as stated in **Continental Air Lines v. Keenan**, 731 P.2d 708, 712 (Colo. 1987) the employee can show that:

[T]he employer should reasonably have expected the employee to consider the employee manual as a commitment from the employer to follow the termination procedures, that

the employee reasonably relied on the termination procedures to his detriment, and that injustice can be avoided only by enforcement of the termination procedures.

See also Source and Authority to Instruction 30:7.

10. Since promissory estoppel is an equitable claim under C.R.C.P. 38(a), **Shoemaker v. Mountain States Telephone & Telegraph Co.**, 38 Colo. App. 321, 559 P.2d 721 (1976), there is no right to a jury trial with respect to such claim. **Snow Basin, Ltd. v. Boettcher & Co., Inc.**, 805 P.2d 1151 (Colo. App. 1990), *cert. denied* (1991). *See also* **Mariani**, 902 P.2d 429 (employee's promissory estoppel claim was properly resolved by the court and not submitted to the jury); **Pickell v. Arizona Components Co.**, 902 P.2d 392 (Colo. App. 1994), *rev'd on other grounds*, 931 P.2d 1184 (Colo. 1997) (employee's claim of promissory estoppel could not be predicated on representations of employer that did not affect material terms of contract for at-will employment); **Watson**, 207 P.3d 860 (employer's statement must be specific and definite to form basis for a promissory estoppel claim).

11. Where an employee discovers a misrepresentation on an employment application or résumé after the employee has been terminated for other reasons, such "after acquired evidence" is a complete defense to a claim for wrongful discharge predicated on breach of contract or promissory estoppel, if the employer shows that the employee's misrepresentation was material and that "a reasonable, objective employer would not have hired the employee if it had discovered the misrepresentation at the outset." **Crawford Rehab. Servs., Inc. v. Weissman**, 938 P.2d 540 (Colo. 1997). *See* Instruction 31:11.

12. An employee disciplinary procedure adopted by a private employer is not subject to the requirements of the Fourteenth Amendment and, therefore, need not comply with traditional notions of procedural due process. **Floyd v. Coors Brewing Co.**, 952 P.2d 797 (Colo. App. 1997), *rev'd on other grounds*, 978 P.2d 663 (Colo. 1999). And if an employee relies on an employee handbook or other written policy as the basis for an implied contract or promissory estoppel claim, the employee must accept the entire policy and may not accept only those parts of the policy that are favorable to the employee's claim. *Id.* **Accord Collins v. Colorado Mtn. Coll.**, 56 P.3d 1132 (Colo. App.), *cert. denied* (2002) (grievance procedures contained in college's policy manual did not create implied contract with instructor whose employment was at-will where policy manual expressly stated that grievance procedures did not apply to temporary employees).

13. In **Lucht's Concrete Pumping, Inc. v. Horner**, 255 P.3d 1058 (Colo. 2011), the Colorado Supreme Court determined that continuing the employment of an existing at-will employee is adequate consideration to support a noncompetition agreement signed by the employee during an existing employment relationship: "Because an employer may terminate an at-will employee at any time during the employment relationship as a matter of right, its forbearance from terminating that employee is the forbearance of a legal right. As such, . . . forbearance constitutes adequate consideration to support a noncompetition agreement with an existing at-will employee." **Lucht's Concrete**, 255 P.3d at 1061.

31:5 AT-WILL EMPLOYMENT — DEFINED

An at-will employment exists when an employee is hired for an indefinite period of time and there is no agreement limiting the employer's right to discharge the employee. An at-will employment may be terminated at any time by either the employer or the employee without notice or cause.

Notes on Use

1. This instruction may be used with Instructions 31:1, 31:3, or 31:4 where an employee is asserting a claim for wrongful discharge based on breach of an employment contract and there is a factual question as to whether the employment was at-will.

2. This instruction should not be given if plaintiff is asserting a tort rather than a contract claim for wrongful discharge. If plaintiff is asserting both contract and tort claims for wrongful discharge and this instruction is given, the jury should be advised that the existence of an at-will employment relationship does not preclude the plaintiff from recovering in tort.

Source and Authority

1. This instruction is supported by **Continental Air Lines, Inc. v. Keenan**, 731 P.2d 708 (Colo. 1987); **Churchey v. Adolph Coors Co.**, 759 P.2d 1336 (Colo. 1988); **Crawford Rehab. Servs., Inc. v. Weissman**, 938 P.2d 540 (Colo. 1997).

2. Generally, when an employee is hired for an indefinite period of time, in the absence of special consideration or an agreement to the contrary, there is an at-will employment relationship which may be terminated at any time either by the employer or by the employee without notice or cause, and the termination of such an employment relationship does not give rise to any liability for breach of contract. **Crawford Rehab. Servs., Inc. v. Weissman**, 938 P.2d 540 (Colo. 1997); **Pickell v. Arizona Components Co.**, 931 P.2d 1184 (Colo. 1997); **Adams County Sch. Dist. No. 50 v. Dickey**, 791 P.2d 688 (Colo. 1990); **Churchey v. Adolph Coors Co.**, 759 P.2d 1336 (Colo. 1988); **Continental Air Lines, Inc. v. Keenan**, 731 P.2d 708 (Colo. 1987); **Jaynes v. Centura Health Corp.**, 148 P.3d 241 (Colo. App.), *cert. denied* (2006); **Wisehart v. Meganck**, 66 P.3d 124 (Colo. App. 2002), *cert. denied* (2003); **Collins v. Colorado Mtn. Coll.**, 56 P.3d 1132 (Colo. App.), *cert. denied* (2002); **Herrera v. San Luis C.R.R.**, 997 P.2d 1238 (Colo. App. 1999), *cert. denied* (2000); **Middlemist v. BDO Seidman, LLP**, 958 P.2d 486 (Colo. App. 1997), *cert. denied* (1998); **Mariani v. Rocky Mtn. Hosp. & Med. Serv.**, 902 P.2d 429 (Colo. App. 1994), *aff'd on other grounds*, 916 P.2d 519 (Colo. 1996); **Holland v. Board of County Comm'rs**, 883 P.2d 500 (Colo. App.), *cert. denied* (1994); **Evenson v. Colorado Farm Bureau Mut. Ins. Co.**, 879 P.2d 402 (Colo. App. 1993), *cert. denied* (1994); **Cronk v. Intermtn. Rural Elec. Ass'n**, 765 P.2d 619 (Colo. App.), *cert. denied* (1988); **Hoff v. Amalgamated Transit Union**, 758 P.2d 674 (Colo. App. 1987); **Pittman v. Larson Distrib. Co.**, 724 P.2d 1379 (Colo. App.), *cert. denied* (1986); **Hughes v. Mountain States Tel. & Tel. Co.**, 686 P.2d 814 (Colo. App. 1984); **Lampe v. Presbyterian Med. Ctr.**, 41 Colo. App. 465, 590 P.2d 513 (1978); **Justice v. Stanley Av. Corp.**, 35 Colo. App. 1, 530 P.2d 984 (1974). Contractual liability can arise from the discharge of an otherwise terminable at-will employee

only where there is an express or implied contract limiting or restricting the employer's right to terminate the relationship. **Hoff v. Amalgamated Transit Union**, 758 P.2d 674 (Colo. App. 1987).

3. The "at-will" doctrine applicable to employment for an indefinite period of time is a substantive rule of law and not an evidentiary presumption. **Schur v. Storage Tech. Corp.**, 878 P.2d 51 (Colo. App.), *cert. denied* (1994) (employee may establish exception to "at-will" doctrine by establishing that (1) terms of employment agreement restricted employer's right to discharge employee, (2) policy statements of the employer restricting the employer's right to discharge were accepted as part of the employment contract or relied upon by the employee under circumstances giving rise to a promissory estoppel, or (3) the discharge violated public policy). See Instructions 31:3, 31:4, 31:12, and 31:13. However, an employee who is hired without an express contract has the burden of pleading and proving an exception to the existence of an at-will employment relationship. **Jaynes**, 148 P.3d 241.

4. In the absence of special consideration or an agreement to the contrary, a contract for permanent employment is no more than an indefinite general hiring terminable at the will of either party. **Justice**, 35 Colo. App. 1, 530 P.2d 984. *See also* **Schur**, 878 P.2d 51 (employee's expertise in job that he was hired to perform did not constitute "special consideration"). In **Pittman**, 724 P.2d 1379, the court held that if there is evidence of "special consideration," it is ordinarily for the jury to determine the meaning of "permanent," when used in an oral contract of employment, in light of all of the circumstances surrounding the making of the agreement. *See also* **Pickell**, 931 P.2d 1184.

5. Also, unless the circumstances indicate otherwise, a contract which sets forth an annual salary rate, but states no definite term of employment, is considered to be an indefinite general hiring, terminable at the will of either party. **Justice**, 35 Colo. App. 1, 530 P.2d 984. *See also* **Lee v. Great Empire Broad., Inc.**, 794 P.2d 1032 (Colo. App. 1989) (an agreement to "guarantee" an employee a certain sum during a particular period of time did not necessarily constitute an agreement that the employment relationship was to continue for that period).

6. In **Wisheart v. Meganck**, 66 P.3d 124 (Colo. App. 2002), *cert. denied* (2003), the court declined to recognize an exception to the at-will employment doctrine where the employer allegedly used fraud or deception to justify terminating an at-will employee. The court concluded that since all of the employee's claimed damages arose from the termination of his employment, his fraud claims were barred by the employment at-will doctrine. *Id.*

7. In **Lucht's Concrete Pumping, Inc. v. Horner**, 255 P.3d 1058 (Colo. 2011), the Colorado Supreme Court determined that continuing the employment of an existing at-will employee is adequate consideration to support a noncompetition agreement signed by the employee during an existing employment relationship: "Because an employer may terminate an at-will employee at any time during the employment relationship as a matter of right, its forbearance from terminating that employee is the forbearance of a legal right. As such, . . . forbearance constitutes adequate consideration to support a noncompetition agreement with an existing at-will employee." **Lucht's Concrete**, 255 P.3d at 1061.

31:6 GOOD OR JUST CAUSE — DEFINED

No instruction provided.

Notes on Use

1. When required, an instruction defining “good and just cause” should be used with Instructions 31:1, 31:3 and 31:4. If the employment contract, handbook, personnel manual, etc., contains a definition or examples of what constitutes “cause” or “good and just cause,” this instruction should set out those examples. If the employment contract, handbook, personnel manual, etc., does not define “cause,” the court may be required to formulate an appropriate instruction informing the jury of what “good or just cause” for termination of employment means.

2. Colorado appellate courts have not yet addressed the following questions, among others, that might be raised by this type of instruction:

- a. Whether the test is an objective or subjective one;
- b. What constitutes legally sufficient or legally insufficient causes (apart from the clearly insufficient ones such as discrimination on an impermissible basis);
- c. The consequences of a “mixed motive” termination (e.g., the employer’s termination decision is based in part on factors that are recited in the manual or are legally sufficient and in part on factors that are not included in the manual or are legally insufficient);
- d. Whether “good or just cause” necessarily incorporates components of “due process” (i.e., notice, opportunity to be heard, etc.); or
- e. Whether the meaning of the term “good or just cause” is a question of law for the court or a factual question for the jury to determine in light of the facts and circumstances of a given case.

Source and Authority

1. In **Adams v. Frontier Airlines Federal Credit Union**, 691 P.2d 352 (Colo. App. 1984), the court held that whether an employee’s job performance was adequate was a question for the trier of fact to determine, notwithstanding the employer’s claim that its determination of inadequacy was based on competent evidence and was, therefore, conclusive. Thus, the court implicitly rejected the employer’s subjective good faith determination as a standard for good or just cause.

2. In **Fredrickson v. Denver Public School District No. 1**, 819 P.2d 1068 (Colo. App.), *cert. denied* (1991), the court construed the “good and just cause” provision of the statute setting forth the grounds for dismissal of a public school teacher with tenure, now § 22-63-301, C.R.S., as requiring conduct that adversely impacts a teacher’s fitness to perform his or her job duties or that materially and substantially affects his or her job performance. *Accord Board of Educ. v.*

Flaming, 938 P.2d 151 (Colo. 1997). *See also* **Snyder v. Jefferson County Sch. Dist. R-1**, 842 P.2d 624 (Colo. 1992); **School Dist. No. 1 v. Cornish**, 58 P.3d 1091 (Colo. App.), *cert. denied* (2002) (allowing teaching certificate to lapse and not informing school officials of such lapse constituted “other good and just cause” for terminating teacher’s employment); **Kerin v. Board of Educ.**, 860 P.2d 574 (Colo. App.), *cert. denied* (1993).

3. In **Barham v. University of Northern Colorado**, 964 P.2d 545 (Colo. App. 1997), *cert. denied* (1998), the court held that a section of the university code providing for termination of tenured faculty only for “legally sufficient ground or reason” was not impermissibly vague and, therefore, did not violate tenured professor’s right to substantive due process or equal protection.

31:7 GENERAL DAMAGES FOR WRONGFUL DISCHARGE — BREACH OF CONTRACT CLAIM

If you find in favor of the plaintiff, (*name*), on (his) (her) claim for breach of an employment contract, then you must award (him) (her) actual or nominal damages.

To award actual damages, you must find by a preponderance of the evidence that the plaintiff incurred actual damages as a result of the breach and the amount of those damages.

To the extent that actual damages have been proved by the evidence, you shall award as actual damages:

1. The amount of earnings and benefits the plaintiff would have received under the terms of the contract during the full term of the contract:

a. less any expenses arising from the contract which (he) (she) did not have to pay because the contract was ended; and

b. less any amount (he) (she) earned from any replacement employment; and

c. less any amount (he) (she) reasonably could have earned from any replacement employment.

2. (*Insert the proper measure of any recoverable special damages of which there is sufficient evidence*), provided, as to these damages, you find by a preponderance of the evidence (a) that they were a natural and probable consequence of the claimed breach of the contract by the defendant, (*name*), and (b) that, at the time the parties entered into the contract, the defendant reasonably could have anticipated from the facts or circumstances that the defendant knew or should have known that these damages would probably be incurred by the plaintiff if the defendant breached the contract.

If you find in favor of the plaintiff, but do not find any actual damages, you shall nonetheless award (him) (her) nominal damages in the sum of one dollar.

Notes on Use

1. Use whichever parenthesized and bracketed words and phrases are appropriate.
2. Except when the amount of damages is not in dispute, e.g., liquidated damages, the amount due on a promissory note, etc., the instruction should not state the amount of damages prayed for. *See Rodrigue v. Hausman*, 33 Colo. App. 305, 519 P.2d 1216 (1974).
3. Omit either numbered paragraph 1 or 2 if inapplicable.
4. If there is sufficient evidence that the plaintiff may not have reasonably mitigated his or her damages by seeking other employment, paragraph 1c of this instruction should be given

together with Instruction 5:2. An employee's duty to mitigate or minimize damages includes duty to accept unconditional offer of reinstatement if no special circumstances exist to justify rejection of offer. **Fair v. Red Lion Inn**, 943 P.2d 431 (Colo. 1997) (employee's rejection of employer's unconditional offer of reinstatement resulted in loss of any claim for damages for back pay from date of offer).

5. In any case where, in mitigating damages, the plaintiff has incurred additional expenses, such damages may be recovered as special damages. *See, e.g., School Dist. No. 3 v. Nash*, 27 Colo. App. 551, 140 P. 473 (1914). *See also* Instruction 31:8 (Mitigation of Damages for Wrongful Discharge).

6. For authorities on the measure of damages in breach of contract cases in general, see Source and Authority to Instruction 30:37.

Source and Authority

1. This instruction is supported by **Colorado School of Mines v. Neighbors**, 119 Colo. 399, 203 P.2d 904 (1949) (plaintiff entitled only to nominal damages where his earnings after the breach exceeded those he would have earned under the contract); **Ryan v. School District No. 2**, 68 Colo. 370, 189 P. 782 (1920) (same); **Saxonia Mining & Reduction Co. v. Cook**, 7 Colo. 569, 4 P. 1111 (1884); C. MCCORMICK, DAMAGES §§ 158-162 (1935). *See also Adams v. Frontier Airlines Fed. Credit Union*, 691 P.2d 352 (Colo. App.), *cert. denied* (1984) (plaintiff entitled to recover value of benefits employment contract provided including employer's pension contributions, life, health and dental insurance, and use of car); **Technical Computer Servs., Inc. v. Buckley**, 844 P.2d 1249 (Colo. App. 1992), *cert. denied* (1993) (damages reduced by amount of salary received from other employment).

2. For additional damages that an employee may be entitled to recover upon termination as a civil penalty for an employer's refusal, without a good faith legal justification, to pay compensation promptly when due, see § 8-4-109, C.R.S., formerly § 8-4-104, C.R.S.; **Jet Courier Services, Inc. v. Mulei**, 771 P.2d 486, 500-01 (Colo. 1989) (discussing the statute); **Porter v. Castle Rock Ford Lincoln Mercury, Inc.**, 895 P.2d 1146 (Colo. App. 1995); **Technical Computer Services, Inc. v. Buckley**, 844 P.2d 1249 (Colo. App. 1992), *cert. denied* (1993). *See also Carruthers v. Carrier Access Corp.*, 251 P.3d 1199 (Colo. App. 2010) (prevailing employees and employers may recover attorney fees and costs under the wage statute unless the wage claim is for less than \$7,500, in which case only employers may recover such costs if the court finds that the employee's wage claim is frivolous); **Lee v. Great Empire Broad., Inc.**, 794 P.2d 1032 (Colo. App. 1989) (wage statute applies only to wages earned and unpaid at the time of employee's discharge).

3. As to when a plaintiff may be entitled to recover interest on damages for breach of contract, generally, see Note 5 of the Introductory Note to Part E of Chapter 30. *See also Shannon v. Colorado Sch. of Mines*, 847 P.2d 210 (Colo. App. 1992) (prejudgment interest on damages for loss of future profits not recoverable).

4. Under the collateral source rule, damages awarded for breach of an employment contract cannot be reduced by the amount of unemployment benefits received by the discharged

employee. **Technical Computer Servs., Inc. v. Buckley**, 844 P.2d 1249 (Colo. App. 1992), *cert. denied* (1993).

5. If an employee is discharged in violation of the procedural provisions of a personnel manual or handbook (see Instruction 31:4), but the employer establishes “good or just cause” for the discharge, an award of nominal damages may be appropriate. *See* **Rogers v. Board of Trustees**, 859 P.2d 284 (Colo. App.), *cert. denied* (1993).

31:8 MITIGATION OF DAMAGES FOR WRONGFUL DISCHARGE

If an employee is wrongfully discharged, that employee must take reasonable steps to reduce or minimize the damages that might result from that discharge. However, the employee is not required to take any steps that would not be reasonable under all of the circumstances.

The defendant, *(name)*, has the burden of proving that plaintiff, *(name)*, did not take reasonable steps to reduce or minimize (his) (her) damages.

[If you find that:

1. The plaintiff failed to seek other employment that was substantially similar to the position (he) (she) had held with the defendant, and

2. Seeking other similar employment would have been reasonable under all of the circumstances, then you must reduce the amount of any actual damages suffered by the plaintiff by the amount of any earnings and benefits (he) (she) might reasonably have expected to earn from that other employment during any period during which you find that the plaintiff suffered damages, as Instruction No. __ instructs you to do.]

[If you find that:

1. After the plaintiff was discharged, the defendant offered to re-employ the plaintiff (in the same position from which [he] [she] was discharged) (in another position with substantially the same compensation, benefits and responsibilities as [he] [she] had before the discharge), and

2. That offer was made without requiring the plaintiff to waive any right (he) (she) might have and was not dependent upon some other improper requirement, and

3. The plaintiff failed to accept that offer, then you may not award to the plaintiff any amount for earnings or benefits for any period after (he) (she) failed to accept the defendant's offer of re-employment unless you also find that the plaintiff has proved that there were special circumstances that reasonably justified the failure to accept that offer of re-employment.]

Notes on Use

1. Use whichever parenthesized and bracketed words and phrases are appropriate.
2. For a general description of when the issue of mitigation of damages should be submitted to the jury, see the Notes on Use to Instruction No. 5:2.

Source and Authority

1. This instruction is supported by **Fair v. Red Lion Inn**, 943 P.2d 431 (Colo. 1997).

2. The defense of mitigation of damages can be asserted as an affirmative defense to either a tort claim for wrongful discharge in violation of public policy (see Instructions 31:12 and 31:13) or a claim for a discharge in violation of an express or implied contract (see Instructions 31:1, 31:3, and 31:4). Generally, the question of what constitutes a reasonable effort to mitigate damages is to be determined by the trier of fact. **Fitzgerald v. Edelen**, 623 P.2d 418 (Colo. App. 1980), *cert. denied* (1981). But “the defense of failure to mitigate damages will not be presented to the jury unless the trial court determines there is sufficient evidence to support it.” **Fair v. Red Lion Inn**, 943 P.2d 431, 437 (Colo. 1997). *See also* **Bonidy v. Vail Valley Ctr. For Aesthetic Dentistry, P.C.**, 232 P.3d 277 (Colo. App. 2010) (employee’s decision to start her own business did not automatically constitute a failure to mitigate or terminate the accrual of back pay damages, and the formula for such damages is decided as a matter of law).

3. In the case of a discharged employee, if the former employer makes an “unconditional” offer to reinstate the employee to his or her former position or one that has substantially the same compensation, benefits, and responsibilities, the employee is under a duty to accept that offer, unless the employee can demonstrate the existence of “special circumstances” to justify the failure to accept it. In such a case, the employee’s right to collect any wages or benefits that would otherwise have been earned will cease as of the date that the unconditional offer was not accepted. **Fair**, 943 P.2d 431. *See also* **Ford Motor Co. v. EEOC**, 458 U.S. 219, 102 S. Ct. 3057, 73 L. Ed. 2d 721 (1982) (discharge in violation of Title VII); **Giandonato v. Sybron Corp**, 804 F.2d 120 (10th Cir. 1986) (relied upon by the Colorado Supreme Court in **Fair**, 943 P.2d 431). *But see* **Ryan v. Mineral County High Sch. Dist.**, 27 Colo. App. 63, 146 P. 792 (1915) (holding that the plaintiff failed to mitigate his damages where the employer offered employment conditioned upon the plaintiff’s release of a breach of contract claim against the employer). **Fair**, 943 P.2d 431, “disapproved” of **Ryan**, holding that the mitigation defense applies only in cases where the employer makes an *unconditional* offer of employment.

4. There has been no general definition of those “special circumstances” that would justify an employee in rejecting an unconditional offer of reinstatement. However, if the employee asserts that the offer was rejected because it was felt that the offer was not bona fide or that the employee would be retaliated against if he or she returned to the same employment, the employee has the burden of establishing such special circumstances. The employee’s subjective feelings upon the question are insufficient to present an issue for the jury. **Fair**, 943 P.2d 431.

5. Under a special statutory provision governing probationary teachers, § 22-63-203(3), C.R.S., a teacher who was improperly terminated was not obligated to mitigate his damages. **Hanover Sch. Dist. No. 28 v. Barbour**, 171 P.3d 223 (Colo. 2007).

31:9 CONSTRUCTIVE DISCHARGE — DEFINED

A constructive discharge occurs when an employer deliberately makes or allows an employee's working conditions to become so intolerable that the employee has no reasonable choice but to quit or resign and the employee does quit or resign because of those conditions. However, a constructive discharge does not occur unless a reasonable person would consider those working conditions to be intolerable.

Notes on Use

1. When applicable, this instruction should be given with Instructions such as 31:1, 31:3, 31:4, 31:12, and 31:13.

2. Where a constructive discharge claim is based on a violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 623, *et seq.*, rather than on state law, the state courts must apply the federal law of constructive discharge developed under that statute. **Evenson v. Colorado Farm Bureau Mut. Ins. Co.**, 879 P.2d 402 (Colo. App. 1993), *cert. denied* (1994).

Source and Authority

This instruction is supported by **Boulder Valley School District R-2 v. Price**, 805 P.2d 1085 (Colo. 1991); **Wilson v. Board of County Comm'rs**, 703 P.2d 1257 (Colo. 1985); **Koinis v. State Dep't of Pub. Safety**, 97 P.3d 193 (Colo. App. 2003), *cert. denied* (2004) (request for resignation, in and of itself, will not support claim of constructive discharge); **Krauss v. Catholic Health Initiatives Mtn. Region**, 66 P.3d 195 (Colo. App. 2003); **Montemayor v. Jacor Commc'ns, Inc.**, 64 P.3d 916 (Colo. App. 2002), *cert. denied* (2003); and **Christie v. San Miguel County Sch. Dist. R-2(J)**, 759 P.2d 779 (Colo. App.), *cert. denied* (1988).

31:10 CONSTRUCTIVE (IMPLIED) DISCHARGE

Even if the plaintiff resigned from (his) (her) employment, if you find that the words spoken or actions taken by the defendant would have led a reasonable person in the plaintiff's position to believe, and did lead the plaintiff to believe, that (he) (she) had been or was going to be discharged by the defendant, then the plaintiff was, in fact, discharged by the defendant.

Notes on Use

1. See Notes on Use to Instruction 31:9.
2. This instruction should be given if the evidence creates a legitimate issue as to whether the plaintiff's resignation was voluntary or was induced by the employer's conduct that led the plaintiff to believe and would have led a reasonable person in the plaintiff's position to believe that he or she had been or was going to be discharged.

Source and Authority

This instruction is supported by **Colorado Civil Rights Commission v. School District No. 1**, 30 Colo. App. 10, 488 P.2d 83 (1971).

31:11 AFFIRMATIVE DEFENSE TO CONTRACT CLAIM — AFTER-ACQUIRED EVIDENCE OF FRAUD OR OTHER MISCONDUCT

The defendant, (*name*), is not liable for breach of an employment contract if you find that the defendant has proved the affirmative defense of after-acquired evidence of (fraud) (misconduct). This affirmative defense is proved if you find all of the following:

1. The plaintiff, (*name*), (*describe type of misconduct, e.g., concealed or misrepresented a material fact or facts on a résumé with the intent of creating a false impression in the mind of the defendant; committed theft; committed sexual harassment; etc.*);

2. The defendant did not discover the (concealed or misrepresented fact or facts) (misconduct) until after the plaintiff was discharged; and

3. A reasonable, objective employer (would not have hired) (would have discharged) the plaintiff if it had discovered the (concealed) (misrepresented) fact(s) (misconduct) at the time of the plaintiff's (fraud) (misconduct).

Notes on Use

1. Use whichever parenthesized and bracketed words and phrases are appropriate. In paragraph 1, insert specific description of the conduct described.

Source and Authority

1. This instruction is supported by **Crawford Rehabilitation Services, Inc. v. Weissman**, 938 P.2d 540 (Colo. 1997).

2. Issues of whether a reasonable, objective employer would have hired or terminated an employee if it had known certain facts and questions of intent are generally for the trier of fact. However, if there is insufficient evidence to allow a reasonable fact finder to reach more than one conclusion from the evidence submitted, the question becomes one of law for the court. *See Crawford Rehab. Servs., Inc. v. Weissman*, 938 P.2d 540 (Colo. 1997).

3. After-acquired evidence of fraud or misconduct would also bar a claim of promissory estoppel based on an employer's policies. **Crawford Rehab. Servs., Inc.**, 938 P.2d 540. However, since promissory estoppel is an equitable claim, there is no right to a jury trial with respect to such a claim. **Snow Basin, Ltd. v. Boettcher & Co.**, 805 P.2d 1151 (Colo. App. 1990), *cert. denied* (1991).

4. The court of appeals decision in **Weissman v. Crawford Rehabilitation Services, Inc.**, 914 P.2d 380 (Colo. App. 1995), extended the doctrine to after-acquired evidence of misconduct that may have occurred after the commencement of the employment relationship. The supreme court's decision expressly did not reach that issue. **Crawford Rehab. Servs., Inc.**, 938 P.2d 540.

5. When after-acquired evidence is presented in a case alleging violation of a public-policy interest, such as violation of Title VII or violation of 29 U.S.C. 621, *et seq.*, then the after-acquired evidence serves to limit damages, but it does not act as a complete defense to the cause of action. **Crawford Rehab. Servs., Inc.**, 938 P.2d 540. **Crawford** declined to apply this limitation to claims for breach of implied contract and promissory estoppel if the employer can prove that the employee's concealment undermined the very basis upon which he or she was hired.

B. TORT CLAIMS

31:12 TORT CLAIM FOR WRONGFUL DISCHARGE BASED ON VIOLATIONS OF PUBLIC POLICY — EMPLOYER’S RETALIATION AGAINST AN EMPLOYEE FOR REFUSAL TO COMPLY WITH EMPLOYER’S IMPROPER DIRECTIVE — ELEMENTS OF LIABILITY

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on **(his) (her)** claim for wrongful discharge in violation of public policy, you must find that all of the following have been proved by a preponderance of the evidence:

1. During the course of the plaintiff’s employment with the defendant, the defendant directed the plaintiff (not) to: *(describe the action, omission, or conduct that would have (1) violated a statute, rule, or regulation relating to public health, safety, or welfare, or (2) undermined a public policy relating to plaintiff’s basic responsibility as a citizen, or (3) prevented the plaintiff from exercising an important work-related right or privilege);*

2. The plaintiff refused to comply with the defendant’s directive because the plaintiff reasonably believed that to do so would have been (illegal) (a violation of a rule) (a violation of a regulation) (contrary to the plaintiff’s duty as a citizen) (a violation of the plaintiff’s legal right or privilege as a worker);

3. The defendant was aware or reasonably should have been aware that the plaintiff’s refusal to comply with the defendant’s directive was based on the plaintiff’s reasonable belief that to do so would have been (illegal) (a violation of a rule) (a violation of a regulation) (contrary to the plaintiff’s duty as a citizen) (a violation of the plaintiff’s legal right or privilege as a worker); and

4. The defendant (constructively) discharged the plaintiff because the plaintiff refused to comply with the defendant’s directive.

If you find that any one of these *(number)* statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these *(number)* statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant’s affirmative defense(s) of *[insert any affirmative defense that would be a complete defense to plaintiff’s claim]*).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

Notes on Use

1. This instruction and Instruction 31:13 are predicated on **Martin Marietta Corp. v. Lorenz**, 823 P.2d 100 (Colo. 1992), where the court identified the elements of a claim for wrongful discharge under the public-policy exception to the employment at will doctrine. *See also Rocky Mtn. Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519 (Colo. 1996); **Bonidy v. Vail Valley Ctr. For Aesthetic Dentistry, P.C.**, 186 P.3d 80 (Colo. App.), *cert. denied* (2008). If the wrongful discharge claim is based on an employee's refusal to obey a directive of the employer, this instruction should be used. If the claim is based on an allegation an employer discharged an employee for exercising a right or duty without any prior order or directive not to exercise such right, Instruction 31:13 should be used.

2. **Martin Marietta Corp.**, 823 P.2d 100, identified the sources of public policy that would support this claim as public duties, important job-related rights, and statutes related to public health, safety, or welfare. But see Note 3 below. The trial court must determine initially as a matter of law whether the public policy involved is sufficiently specific and serious to support this claim. **Martin Marietta Corp.**, 823 P.2d 100; **Mariani**, 916 P.2d 519.

3. The language of Paragraphs 2 and 3 may need to be modified to reflect the source of the public policy supporting the claim, depending on the facts in the case. Cases decided prior to **Martin Marietta** held that a tort claim for wrongful discharge based on a violation of public policy could be maintained only if a specific statutory right or duty was involved, and such a claim could not be based on statutes containing only broad general statements of public policy. *See, e.g., Lathrop v. Entenmann's, Inc.*, 770 P.2d 1367 (Colo. App.), *cert. dismissed* (1989); **Cronk v. Intermtn. Rural Elec. Ass'n**, 765 P.2d 619 (Colo. App.), *cert. denied* (1988); **Farmer v. Central Bancorp., Inc.**, 761 P.2d 220 (Colo. App.), *cert. denied* (1988); **Pittman v. Larson Distrib. Co.**, 724 P.2d 1379 (Colo. App. 1986); **Corbin v. Sinclair Mktg., Inc.**, 684 P.2d 265 (Colo. App. 1984); **Lampe v. Presbyterian Med. Ctr.**, 41 Colo. App. 465, 590 P.2d 513 (1978). More recently, constitutional provisions, municipal ordinances, administrative regulations, professional rules, and accepted public policy have been held to support a claim for wrongful discharge, but only if the public policy involves a matter of serious public concern. *See, e.g., Crawford Rehab. Servs., Inc. v. Weissman*, 938 P.2d 540 (Colo. 1997) (administrative regulation providing that employees are entitled to ten minute rest period for each four hour work period does not constitute public-policy mandate sufficient to support tort claim for wrongful discharge); **Rocky Mtn. Hosp. & Med. Serv. v. Mariani**, 916 P.2d 519 (Colo. 1996) (rules of professional conduct for accountants promulgated by state board of accountancy have sufficient public purpose to constitute public policy for purposes of wrongful discharge claim); **Kearl v. Portage Envtl., Inc.**, 205 P.3d 496 (Colo. App. 2008) (preventing or opposing fraud on the government is a widely accepted public policy for purpose of wrongful discharge claim); **Bonidy**, 186 P.3d 80 (wage orders of Colorado Division of Labor mandating breaks from work implicated public safety where employee's job duties included sterilizing instruments, taking x-rays, and other medical procedures); **Jaynes v. Centura Health Corp.**, 148 P.3d 241 (Colo. App.), *cert. denied* (2006) (neither ethical standards published by private nurses' association nor statute governing patient quality management provided basis for nurse's claim against hospital for wrongful discharge in violation of public policy); **Slaughter v. John Elway Dodge Southwest/AutoNation**, 107 P.3d 1165 (Colo. App. 2005) (private employee who was allegedly terminated from her employment for refusing to take drug test did not state cause of action for

wrongful termination based on violation of public policy); **Herrera v. San Luis C.R.R.**, 997 P.2d 1238 (Colo. App. 1999), *cert. denied* (2000) (retaliatory discharge of employee for obtaining jury verdict under Federal Employer’s Liability Act stated claim for wrongful discharge in violation of public policy); **Flores v. American Pharm. Servs., Inc.**, 994 P.2d 455 (Colo. App. 1999), *cert. denied* (2000) (evidence that employee was discharged for reporting insurance fraud of co-employee was sufficient to support claim for wrongful discharge in violation of public policy where state statute declared need to aggressively confront problem of insurance fraud); **Hoyt v. Target Stores**, 981 P.2d 188 (Colo. App. 1998), *cert. denied* (1999) (evidence that employee was discharged for exercising job-related right to be paid for travel time from store to store in violation of Colorado Wage Claim Act supported claim for wrongful discharge in violation of public policy); **Webster v. Konczak Corp.**, 976 P.2d 317 (Colo. App. 1998) (retaliatory discharge of an employee for reporting a suspected violation of a regulation promulgated under the Limited Gaming Act may provide a sufficient basis for a claim for wrongful discharge in violation of public policy). *See also* **Coors Brewing Co. v. Floyd**, 978 P.2d 663 (Colo. 1999) (discussing application of public-policy exception to at-will employment doctrine).

Source and Authority

1. *See* **Rocky Mtn. Hosp. & Med. Serv. v. Mariani**, 916 P.2d 519 (Colo. 1996); **Martin Marietta Corp. v. Lorenz**, 823 P.2d 100 (Colo. 1992); **Middlemist v. BDO Seidman, LLP**, 958 P.2d 486 (Colo. App. 1997), *cert. denied* (1998).

2. An employee’s refusal to perform an illegal act is not limited to verbal expressions of refusal but can consist of inaction as well. **Rocky Mtn. Hosp. & Med Serv.**, 916 P.2d 519; **Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.**, 232 P.3d 277 (Colo. App. 2010) (evidence of employee’s objection to illegal policy followed by her immediate termination is adequate to support requirement that employee refused to perform illegal acts).

3. In some circumstances, Instruction 31:14 should be used with this instruction to permit the jury to determine whether the propositions set forth in paragraphs 2 and 3 of this instruction have been established by a preponderance of the evidence.

4. When a statute creates a duty that did not exist at common law and provides a remedy for a breach of that duty, the statute’s remedy is exclusive and precludes an action for wrongful discharge in tort based upon a common-law theory. **Farmers Group, Inc. v. Williams**, 805 P.2d 419 (Colo. 1991); **Krauss v. Catholic Health Initiatives Mtn. Region**, 66 P.3d 195 (Colo. App. 2003) (alleged violation of Family Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654); **Gamble v. Levitz Furniture Co.**, 759 P.2d 761 (Colo. App. 1988), *cert. denied* (1989); **Corbin v. Sinclair Mktg., Inc.**, 684 P.2d 265 (Colo. App. 1984).

5. Evidence of omissions or misstatements on employment application form, discovered by the employer after employee was discharged, cannot be relied upon as a complete defense to a tort claim for a retaliatory discharge in violation of public policy, but may provide grounds for limiting the relief available to the employee. **Weissman v. Crawford Rehab. Servs., Inc.**, 914 P.2d 380 (Colo. App. 1995), *rev’d on other grounds*, 938 P.2d 540 (Colo. 1997) (adopting after-acquired evidence rule enunciated by the United States Supreme Court in **McKennon v.**

Nashville Banner Publ'g Co., 513 U.S. 352, 115 S. Ct. 879, 130 L. Ed. 2d 852 (1995)); see Instruction 31:16.

31:13 TORT CLAIM FOR WRONGFUL DISCHARGE BASED ON VIOLATIONS OF PUBLIC POLICY — EMPLOYER’S RETALIATION AGAINST AN EMPLOYEE FOR EXERCISING A RIGHT OR PERFORMING A PUBLIC DUTY — ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim for wrongful discharge, based on a violation of public policy, you must find that all of the following have been proved by a preponderance of the evidence:

1. During the course of employment, plaintiff (*describe the action, omission, or conduct of plaintiff that was (1) an exercise of a statutory, regulatory, or rule-based right relating to public health, safety, or welfare, or (2) a performance of a public duty relating to plaintiff’s basic responsibility as a citizen, or (3) an exercise of an important work-related right or privilege*) because (he) (she) (reasonably believed [he][she]) had a right to (follow the [statute] [regulation] [rule]) (perform [his] [her] duty as a citizen) (exercise [his] [her] right or privilege as a worker);

2. The defendant was aware or reasonably should have been aware that plaintiff (reasonably believed [he] [she]) had a right to (follow the [statute] [regulation] [rule]) (perform [his] [her] duty as a citizen) (exercise [his] [her] right or privilege as a worker); and

3. The defendant (constructively) discharged the plaintiff because the plaintiff (followed the [statute] [rule] [regulation]) (performed [his] [her] duty as a citizen) (exercised [his] [her] right or privilege as a worker).

If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant’s affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff’s claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

Notes on Use

1. Use whichever parenthesized and bracketed words and phrases are appropriate. In paragraph 1, specify the plaintiff’s conduct asserted.

2. This instruction should be used instead of Instruction 31:12 in the situation in which an employer discharges an employee for exercising a right or duty without any prior order or directive not to exercise such right or duty. *See, e.g., Lathrop v. Entenmann's, Inc.*, 770 P.2d 1367 (Colo. App.), *cert. dismiss'd* (1989) (discharge allegedly in retaliation for filing workers' compensation claim); **Kearl v. Portage Envtl., Inc.**, 205 P.3d 496 (Colo. App. 2008) (allegations that employee was fired in retaliation for reporting to employer possible fraud on government stated claim for wrongful termination); **Herrera v. San Luis C.R.R.**, 997 P.2d 1238 (Colo. App. 1999) (discharge based on securing verdict on claim against employer).

3. See also Notes on Use to Instruction 31:12.

Source and Authority

This instruction is supported by **Lathrop v. Entenmann's, Inc.**, 770 P.2d 1367 (Colo. App.), *cert. dismiss'd* (1989). Paragraph 2 is supported by **Martin Marietta Corp. v. Lorenz**, 823 P.2d 100 (Colo. 1992), and **Kearl v. Portage Environmental, Inc.**, 205 P.3d 496 (Colo. App. 2008).

31:14 ADVISORY INSTRUCTION ON WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

If you find that the defendant directed the plaintiff (not) to *(describe action, omission, or conduct set forth in paragraph 1 of Instruction 31:12)*, then you are advised that had the plaintiff complied with the defendant's directive, the plaintiff's conduct would have been (illegal) (contrary to the plaintiff's duty as a citizen) (or) (a violation of the plaintiff's legal right or privilege as a worker).

Notes on Use

1. Depending on the facts of the case, this instruction may be appropriate when Instruction 31:12 is given.

2. If this instruction is used, insert the specific action, omission, or conduct asserted by plaintiff consistent with that described in Instruction 31:12.

Source and Authority

See Source and Authority to Instruction 31:12.

31:15 DAMAGES FOR WRONGFUL DISCHARGE — TORT CLAIM

Plaintiff, (*name*), has the burden of proving, by a preponderance of the evidence, the nature and extent of (his) (her) damages. If you find in favor of the plaintiff, you must determine the total dollar amount of the plaintiff's damages, if any, that were caused by the wrongful discharge of the plaintiff by the defendant(s), (*name[s]*), (and the [*insert appropriate description, e.g., "negligence"*]), if any, of any designated nonparties).

In determining such damages, you shall consider the following:

1. Any noneconomic (losses) (injuries) which the plaintiff has had or will probably have in the future, including: (*insert any recoverable noneconomic losses for which there is sufficient evidence*); and

2. Any economic (losses) (injuries) which the plaintiff has had or will probably have in the future, including: (*insert any recoverable economic losses for which there is sufficient evidence*).

Notes on Use

1. The amount of damages prayed for should not be stated in this instruction nor in the statement of the case. **Rodrigue v. Hausman**, 33 Colo. App. 305, 519 P.2d 1216 (1974).

2. Use whichever parenthesized words or phrases are appropriate.

3. Back pay damages are recoverable in a wrongful termination case. **Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.**, 232 P.3d 277 (Colo. App. 2010) (back pay damages are “the amount the employee reasonably could have expected to earn absent the wrongful termination, reduced by either (a) the employee’s actual earnings in an effort to mitigate damages or (b) the amount the employee failed to earn by not properly mitigating his or her damages”).

4. Where there is sufficient evidence to justify an award of punitive damages, see Instruction 5:4.

5. If the affirmative defense of failure to mitigate damages has been raised and there is evidence to support such defense, Instruction 31:8 should be given with this instruction. *See Bonidy*, 232 P.3d 277 (employee’s decision to start her own business did not automatically constitute a failure to mitigate or terminate the accrual of back pay damages).

Source and Authority

See generally Damages recoverable for wrongful discharge of at-will employee, 44 ALR4th 1131.

**31:16 AFFIRMATIVE DEFENSE TO DAMAGES FOR PUBLIC-POLICY
DISCHARGE CLAIM — AFTER-ACQUIRED EVIDENCE OF FRAUD OR
OTHER MISCONDUCT**

If you find that the plaintiff, *(name)*, had actual damages, then you must consider whether the defendant, *(name)*, has proved (his) (her) affirmative defense of after-acquired evidence of (fraud) (misconduct). The plaintiff cannot recover any damages that occurred after the date that the defendant discovered evidence of (fraud) (misconduct) by the plaintiff. This affirmative defense is proved if you find all of the following:

1. The plaintiff *(describe type of misconduct, e.g., concealed or misrepresented a material fact or facts on a resume with the intent of creating a false impression in the mind of the defendant; committed theft; committed sexual harassment, etc.)*;

2. The defendant did not discover the (concealed or misrepresented fact or facts) (misconduct) until after the plaintiff was discharged; and

3. A reasonable, objective employer (would not have hired) (would have discharged) the plaintiff if it had discovered the (concealed or misrepresented fact or facts) (misconduct) at the time of the plaintiff's (fraud) (misconduct).

If you find that any one or more of these statements has not been proved, then you shall make no deduction from the plaintiff's damages.

On the other hand, if you find that all of these statements have been proved, then you must not award the plaintiff any damages occurring after the date that the defendant discovered evidence of the (fraud) (misconduct) by the plaintiff.

Notes on Use

1. Use whichever parenthesized and bracketed words and phrases are appropriate. In paragraph 1, describe the typed of misconduct alleged.

2. The issue of whether a reasonable, objective employer would have terminated an employee if it had known certain facts is generally for the trier of fact. However, if there is insufficient evidence to allow a reasonable fact finder to reach more than one conclusion from the evidence submitted, the question becomes one of law for the court. *See Crawford Rehab. Servs., Inc. v. Weissman*, 938 P.2d 540 (Colo. 1997).

Source and Authority

1. This instruction is supported by *Weissman v. Crawford Rehabilitation Services, Inc.*, 914 P.2d 380 (Colo. App. 1995), *rev'd on other grounds*, 938 P.2d 540 (Colo. 1997). *See also McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 115 S. Ct. 879, 130 L. Ed. 2d 852 (1995).

2. The court of appeals decision in **Weissman v. Crawford Rehab. Servs., Inc.**, 914 P.2d 380 (Colo. App. 1995), extended the doctrine of after-acquired evidence of misconduct to misconduct that may have occurred after the commencement of the employment relationship. The supreme court's decision expressly did not reach that issue. **Crawford Rehab. Servs., Inc.**, 938 P.2d 540.

3. The court of appeals decision in **Weissman**, 914 P.2d 380, also extended the doctrine to claims of public-policy discharge, applying the United States Supreme Court's decision in **McKennon v. Nashville Banner Publishing Co.**, 513 U.S. 352, 115 S. Ct. 879, 130 L. Ed. 2d 852 (1995), and allowing after-acquired evidence to limit the type of relief available, although it cannot be relied upon to bar a public-policy discharge claim. The supreme court's decision reversed and remanded the public-policy discharge claim for failure to state a claim and, therefore, did not reach the issue. **Crawford Rehab. Servs., Inc.**, 938 P.2d 540.