

1 available for a bench trial on front pay, and how long such a bench trial will last. Within
2 7 days of the filing date of this Order, the parties shall submit a joint report addressing
3 these issues.

4 As to preliminary jury instruction number 16 (Doc. 57-1 at p. 16), the instruction
5 states: “The parties have agreed to certain facts [to be placed in evidence as Exhibit __]
6 [that will be read to you]. You should therefore treat these facts as having been proved.”
7 At least 7 days before trial (i.e., 10/28/14), the parties shall indicate what Exhibit number
8 they agree to, and shall also indicate at what point in the trial they would like the Court to
9 read these stipulated facts to the jury.

10 As to the Verdict Form (Doc. 58), the Court notes that the parties have a space for
11 the jurors’ printed names and signatures. However, unless it is deemed necessary in the
12 future, the jurors remain anonymous and are assigned juror numbers. Thus, typically a
13 verdict forms reflects the following:

14 We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths, do
15 find as set forth above.

16
17 (1) _____ (5) _____
18 (2) _____ (6) _____
19 (3) _____ (7) _____
20 (4) _____ (8) _____

21 FOREPERSON

22 The jurors do not write their names in the spaces, but only their assigned juror
23 numbers. The Court has the jurors’ names that correspond to jurors’ assigned numbers,
24 and can disclose those names if it becomes necessary. As such, within 7 days of the
25 filing date of this Order, the parties shall submit an updated verdict form reflecting the
26 above information.

27 The verdict form includes a provision that states: “If you answered ‘yes’ to
28 Question No. 1, did the District know or show reckless disregard for whether its conduct

1 was prohibited by law? Answer (yes or no).” See Doc. 58-1 at p. 1. This verdict
2 provision corresponds to stipulated final jury instruction number six (Doc. 59-1 at p. 7)
3 which is based on Ninth Circuit Model Civil Jury Instruction 11.7B; the comment to this
4 instruction states in part:

5 The ADEA incorporates the liquidated damages provision of the Fair Labor
6 Standards Act ("FLSA"). 29 U.S.C. § 626(b)(ADEA remedies provision);
7 see 29 U.S.C. § 216(b) (FLSA remedies provision). However, unlike the
8 FLSA, the ADEA awards liquidated damages only if the defendant’s
9 violation is willful. 29 U.S.C. § 626(b) (ADEA remedies provision);
10 *Lorillard v. Pons*, 434 U.S. 575, 581 (1978); compare *Bratt v. County of*
11 *L.A.*, 912 F.2d 1066, 1071 (9th Cir.1990) (holding that under the FLSA,
12 employer can only avoid liquidated damages by proving that it acted with
13 "a good faith intent to comply with the FLSA and a reasonable basis for its
14 interpretation of the FLSA and the applicable regulations.").

15 Willfulness is a question for the jury to decide. See *E.E.O.C. v. Pape Lift,*
16 *Inc.*, 115 F.3d 676, 681 (9th Cir.1997); *Brooks v. Hilton Casinos Inc.*, 959
17 F.2d 757, 767 (9th Cir.1992) (award of liquidated damages is mandated on
18 jury finding of willfulness). If the jury finds willfulness, the plaintiff is
19 entitled to double the amount of back pay awarded. *Cassino v. Reichhold*
20 *Chems., Inc.*, 817 F.2d 1338, 1348 (9th Cir.1987) ("**By the express terms**
21 **of the statute, liquidated damages are an additional amount equal to**
22 **the backpay and benefits award.**"). The verdict form should provide a
23 separate question as to willfulness.

24 The Court is uncertain how the parties would like to proceed as to this issue.
25 Verdict question number 2 directs the jurors to enter a damages amount; if the jurors
26 answer yes to question number 3, would it be advisable to have them write the same
27 amount of damages for question number 2 as the amount of liquidated damages as to
28 question number 3? Alternatively, would the Court simply have the Clerk of the Court
enter judgment in an amount equal to whatever appears as the damages amount next to
question number 2 of the Verdict Form if the jurors answer yes to question number 3?
The parties shall indicate their preferences as to this issue in a joint report and submit an
updated verdict form (if applicable) within 7 days of the filing date of this Order.

1 **Disputed Final Jury Instruction**

2 The record reflects that there is only one disputed jury instruction which is a final
3 jury instruction as to business judgment submitted by Defendant which states:
4

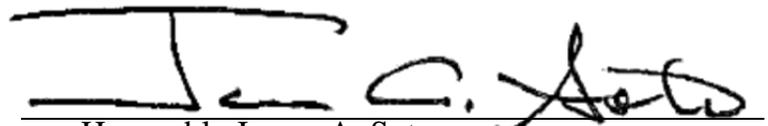
5 As you deliberate you must remember that the role of the jury is not to
6 second guess the District's business or management decisions. You must
7 not substitute your own judgment about whether any particular business or
8 management decisions were wise, or even fair. You may not return a
9 verdict for Mr. Duarte just because you might disagree with a business or
10 management decision by the District, or because you might believe that it
11 was harsh, unreasonable, or unfair.

12 Employers are entitled to make their own subjective business or
13 management judgments and to set any standards for employment they want,
14 regardless of how those standards may appear to the jury, and to decide to
15 discharge an employee for any reason that is not discriminatory.
16 Employers have the right to make good or bad, wise or unwise, and fair or
17 unfair business or management decisions. Your role as the jury simply is to
18 determine whether Mr. Duarte has proven the specific elements of his legal
19 claim as I have described those elements to you in these instructions.

20 *See* Doc. 60-1 at p. 1.

21 Lastly, the Court notes that it has not received the Word versions of Defendant's
22 responses (Docs. 69 and 70) to Plaintiff's motions in limine; Defendant shall email these
23 to chambers (soto_chambers@azd.uscourts.gov) by 10/3/14. The Court will issue an
24 Order on the motions in limine prior to trial.

25 Dated this 2nd day of October, 2014.

26 

27 Honorable James A. Soto
28 United States District Judge