

Duty to Mitigate Damages in Employment Discrimination and Termination Cases: Challenges at Trial

Scope of Duty, Proving Lack of Mitigation, Expert Testimony

WEDNESDAY, MARCH 23, 2022

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Today's faculty features:

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The Duty to Mitigate Damages in Employment Cases

March 23, 2022

Meet the Presenters



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Agenda

- 1 What are the various damages in a wrongful termination case?
- 2 How do you calculate back pay?
- 3 Plaintiff's duty to diligently and consistently look for replacement work.
- 4 Plaintiff's duty to document his or her efforts.
- 5 Plaintiff has a duty to mitigate but Defendant has the burden of proof that Plaintiff failed to mitigate at trial.
- 6 Use of expert witnesses to show failure to mitigate.
- 7 What if plaintiff mitigates by getting subsequent employment--does Defendant's obligation to pay back pay and front pay end? If Plaintiff loses or quits that job?

**What are the various damages
in a wrongful termination case?**

What are the various damages in a wrongful termination case?

- Back pay
- Front Pay
- Compensatory Damages
- Punitive Damages
- Attorneys' Fees



How do you calculate back pay?

How do you calculate Back pay?

- Back pay is calculated from the date of the unlawful act to the date of the verdict
 - In wrongful termination cases, back pay is calculated from the date of termination to the date of verdict
- Consider what the employee would have earned
 - Salary
 - Bonuses
 - Benefits
- Subtract efforts that employee took (mitigation)



**Plaintiff's duty to diligently
and consistently look for
replacement work.**

Plaintiff's duty to diligently and consistently look for replacement work.

- Mitigation: efforts that Plaintiff takes to find replacement work
- Replacement work:
 - comparable work
 - but not the perfect job



**Plaintiff's duty to document his
or her efforts.**

Plaintiff's duty to document his or her efforts.

- Document re-employment efforts:
 - Applications
 - Cover letters
 - Resumes
 - Networking meetings

- Make sure documentation does not contain sensational or embarrassing notes



**Plaintiff has a duty to mitigate but
Defendant has the burden of proof
that Plaintiff failed to mitigate at
trial.**

Plaintiff has a duty to mitigate but Defendant has the burden of proof that Plaintiff failed to mitigate at trial.

- Mitigation defense: plaintiff has not adequately mitigated damages
- Burden of proving mitigation defense is on Defendant
- Required showing:
 1. plaintiff failed to use reasonable diligence in the job search
 2. reasonable likelihood that plaintiff would have found comparable employment if the plaintiff used reasonable diligence



Use of expert witnesses to show failure to mitigate.

Use of expert witnesses to show failure to mitigate.

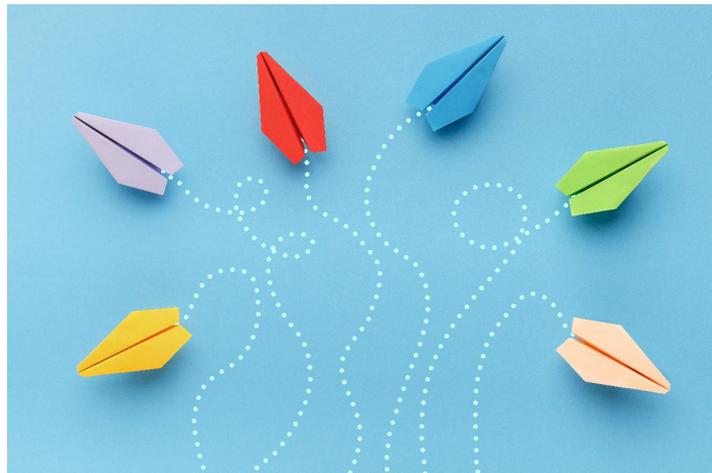
- Vocational expert: can explain *how* and *why* plaintiff unreasonably failed to mitigate
- Methodology:
 - Skills assessment:
 - Plaintiff's qualifications
 - Market within commuting distance
 - Compensation for available jobs
 - Plaintiff's specific efforts
 - Adequacy of efforts



What if plaintiff mitigates by getting subsequent employment--does Defendant's obligation to pay back pay and front pay end? If Plaintiff loses or quits that job?

What if plaintiff mitigates by getting subsequent employment--does Defendant's obligation to pay back pay and front pay end? If Plaintiff loses or quits that job?

- Liability does not always stop when the employee finds a new job
- Jurisdictions are split
- *Why* the former employee left or was fired from the subsequent job *may* matter:
 - Compelling or justifying reasons
 - including termination for violation of new employer's policies
 - Personal reasons unrelated to the job or as a matter of personal convenience



Thank you / Questions?

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