

Practical considerations regarding an employee's duty to mitigate damages

CACI 3963 says that plaintiff's damages should be reduced by the amount that plaintiff could have earned from other employment

By Bobby Shukla

As employment practitioners, we are all well aware that our clients have a duty to mitigate their lost wages. This duty, however, has been interpreted in nuanced ways by courts that are worth noting and reviewing, especially with new developments in case law. This article aims to provide practical considerations regarding an employee's duty to mitigate to help you maximize wage loss awards.

In employment cases, the burden is on the defendant to demonstrate that a plaintiff did not mitigate lost wages damages. (*Candari v. Los Angeles Unified School Dist.* (2011) 193 Cal.App.4th 402, 409.) The defendant meets its burden by establishing that: (1) "comparable" or "substantially similar" employment was available; (2) plaintiff failed to use "reasonable efforts" to obtain and retain such employment throughout the period during which wage loss is sought; and (3) the amount the employee earned or with reasonable efforts might have earned from other employment. (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182.)

Reasonable efforts are a fact-driven analysis, but efforts should generally exceed more than a few applications per month. (See *NLRB v. Mercy Peninsula Ambulance Service, Inc*. (9th Cir. 1979) 589 F.2d 1014, 1018 [finding that an average of only three applications a month for nine months was not reasonable; "[t]o hold otherwise would encourage idleness and reward slothfulness"], citing *NLRB v. Arduini Manufacturing Corp.*, (5th Cir. 1968) 394 F.2d 420, 424 [finding that failure to apply to a company hiring in the same field of work, visiting only four companies in search of employment and registering with the Employment Security Office not reasonable].)

CACI 3963 and the "substantially similar" test

CACI 3963 outlines the elements a defendant has to prove to apply its affirmative defense that your client failed to mitigate her damages. The instruction states:

> Defendant claims that if Plaintiff is entitled to any damages, they should be reduced by the amount that Plaintiff could have earned from other employment. To succeed, Defendant must prove all of the following: (1) That employment substantially similar to Plaintiff's former job was available to her; (2) That Plaintiff failed to make reasonable efforts to seek [and retain] this employment; and (3) The amount that Plaintiff could have earned from this employment.



The jury instruction identifies the following factors to consider in identifying employment "substantially similar" to Plaintiff's former position: (a) the nature of the work; (b) whether the new position was substantially inferior; (c) the salary, benefits, and hours; (d) the required similar skills, background, and experience; (e) the job responsibilities; (f) the locality; and (g) [which allows the parties to insert other relevant factor(s)].

The jury instruction also states, in deciding whether Plaintiff failed to make reasonable efforts to retain comparable employment, you should consider whether Plaintiff quit or was discharged from that employment for a reason within her control.

The Directions for Use state that the instruction "may be given for any claim in which the plaintiff seeks to recover damages for past and future lost earnings from an employer for a wrongful termination of employment . . . when there is evidence that the employee's damages could have been mitigated."

The directions make clear that the jury instruction should only be given if defendant can present evidence that the damages could have been mitigated, which is evidence of the availability of comparable employment and earnings from that employment. Defendant cannot simply focus on plaintiff's efforts. Without disclosing a vocational expert, Defendant will have a hard time meeting this burden at trial. Even when the instruction is given,

Copyright © 2022 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



due to specifying the test for substantial similarity, plaintiffs can very effectively use it to show that defendant has not met its burden. It is also advisable to review the factors in the instruction with your client from the outset of the case to inform their job searches.

In particular, you want clients to understand which jobs they are not required to search for or accept (noncomparable or inferior ones) and if they choose to reject a job offer that they be able to establish how the offer is not comparable to their former position.

Actual earnings from inferior employment

The recent decision in *Martinez v. Rite Aid Corporation* (2021) 63 Cal.App.5th 958 – a case with a dizzying procedural history, tried to verdict no less than three times – holds that actual earnings from substitute employment, even if the employment is from inferior work, must be offset from recovery. The *Martinez* court expressly disagreed with the holding in *Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, which held that a discharged plaintiff's earnings from substitute employment should not be deducted because the new employment was not "substantially similar" where it required the plaintiff to rent a room and live away from his family during the week. "[W]ages actually earned from an inferior job may not be used to mitigate damages because if they were used then it would result 'in senselessly penalizing an employee who, either because of an honest desire to work or a lack of financial resources, is willing to take whatever employment he can find.'" (*Id.* at 1432.)

The *Villacorta* decision relied on prior case law that held a plaintiff is not required to accept inferior work as part of the duty to mitigate damages. (See *Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176 [finding that actor's refusal to accept defendant's alternative offer of a role in a 'western style motion picture' should not be applied to mitigate the plaintiff's damages because the alternative offer was not substantially similar to the former role in a 'song-and-dance production.']; see also *Rabago-Alevarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91 [plaintiff's acceptance of inferior work did not waive her right to decline other inferior employment opportunities and the amount plaintiff might have earned in employment which was substantially inferior to the plaintiff's former position should not be deducted from recovery].)

The *Martinez* court distinguished *Parker* and *Rabago-Alvarez* as cases addressing projected income, as opposed to actual earnings, and the employer's burden to prove that an employee *could have* earned income from other employment. The court held "the similarity or dissimilarity of the substitute employment to the prior position has no bearing on whether actual earnings, as opposed to projected earnings, are deducted from a lost earnings award." The court reasoned that back pay awards are designed to make an employee whole and awarding back pay with no offset for actual earnings would make an employee "more than whole." (63 Cal.App.5th at 976.)

Still no duty to look for or accept an inferior job

The *Martinez* holding renders the counterintuitive result the *Villacorta* court aimed to avoid, namely rewarding a plaintiff who chooses not to work at all, or who can afford that choice, a higher award than one who has to, or chooses to, accept inferior work. Nevertheless, while *Martinez* holds that inferior job earnings are offset, it does not change the fact that there is no duty for a plaintiff to look for or accept an inferior job in order to adequately mitigate damages. It is only in the instance that your client accepts an inferior job that this holding may apply. Moreover, your client remains free to reject jobs that appear comparable but do not meet the test for being 'substantially similar.' (See *Cunningham v. Retail Clerks Union* (1983) 149 Cal.App.3d 296, 307 [holding it was reasonable for plaintiff to reject a position that paid more than her former job but required she rent another place to live, imposed added financial burdens, and forced her away from her home and community of 25 years].)

While this holding is not helpful to plaintiffs, offsetting actual earnings as part of a damages analysis could work in a client's favor. This kind of deduction can demonstrate reasonableness to a jury, furthering credibility which can result in a greater overall outcome in the case. Further, if your client accepts an inferior position due to need and can effectively testify to the emotional and humiliating impact of that choice, of going backwards in their career, etc., even if those earnings are offset, you have a powerful opportunity to increase emotional distress damages.

Rejecting an 'offer of reinstatement'

Many of us have been on the receiving an end of a strategic, and thus insincere, 'offer of reinstatement' from the defense. These types of offers were established by the U.S. Supreme Court in *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) and provide an opportunity for employers to stop the accrual of lost wages. For this kind of offer to be valid it needs to be unconditional and must be for reinstatement to the same or substantially equivalent position that your client formerly held. Significantly, where an employee acted reasonably in rejecting a reinstatement offer, there is no such preclusion to back pay damages. (See *Ortiz v. Bank of American National Trust and Savings Association* (1987) 852 F.2d 383, 386 ['Because there was evidence of Ortiz's poor mental condition, the jury did not clearly err in finding reinstatement was not a reasonable alternative mandated by the duty to mitigate damages.'].) Importantly, the burden of proof remains with defendant to prove the offer was a valid unconditional offer of reinstatement and that the employee failed to reasonably accept that offer. (*Smith v. World*

Copyright © 2022 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



Insurance Company (8th Cir. 1994) 38 F.3d 1456, 1465.)

Typically, these offers are made in cases where the defendant recognizes there is strong liability and, since defendants are taking the risk that the plaintiff might accept the offer, where the reason for termination is not performance-based. As such, you can anticipate the cases where the offer may be made. In those cases, it is important to discuss the possibility of the offer with the client at the outset of the case since the defense makes these offers early in the case to try and cut off accruing lost wages. If the client is clear she cannot go back to work for the company to protect her mental health, you can help her establish those facts even before an offer is made and include them in the response rejecting the offer. These offers also must be specific enough for the plaintiff to assess whether it is comparable to her former job and where an offer is vague, the plaintiff has no duty to inquire into the specifics before rejecting the offer. (See *Xiao-Yue Gu v. Hughes STX Corp.*, 127 F. Supp. 2d 751, 756 (D. Md. 2001).) Your clients should be apprised of this as well in the event an offer is made directly to the client.

Quitting or getting fired from subsequent employment

The duty to mitigate is not limited to making reasonable efforts to seek and accept comparable employment, but extends to retaining comparable employment. Once a plaintiff finds comparable employment that ends for some reason, defendants will argue that lost wages do not resume after subsequent employment ends. While being fired for cause in the subsequent job is a failure to mitigate, losing the subsequent job for reasons beyond a plaintiff's control may not be. (See *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1502-1503 [plaintiff who found another job within days of wrongful termination but then two months later was fired from that job for 'good cause' failed to mitigate damages, but could have mitigated if the second termination was beyond his control].) Therefore, terminations that are not for cause and, where plaintiff continues to make reasonable efforts to look for comparable employment, do allow a lost wages claim to resume. Further, even in instances where a plaintiff was terminated for cause from subsequent employment, if it can be attributed to the defendant's actions, i.e., the plaintiff's emotional distress and lack of confidence from the original termination, you can viably argue that lost wages resume.

The effect of not looking for a job

Disability

Your client's failure to look for a job is typically not a strong fact when it comes to the duty to mitigate. The most common and justifiable reason your client may not look for work is if she suffered severe emotional distress as a result of defendant's actions and is unable to work. As we know, in those instances, the strongest supporting evidence to establish that fact will come from a medical provider.

While that is a disability caused by the employer's actions, an illness or disability not caused by the employer also may not bar recovery of wages lost during that period. In *Mayer v. Multistate Legal Studies, Inc.* (1997) 52 Cal.App.4th 1428, a plaintiff who was unable to secure new employment due to being diagnosed with Hodgkin's disease after his termination was able to recover lost wages for that period. The *Mayer* plaintiff, who was diagnosed three months after his termination, testified that his illness would not have prevented him from continuing to work for defendant, but the illness did prevent him from securing new employment since due to treatment he was bald and frail, which made it obvious to prospective employers that he was ill. The Court found that defendant's wrongful act, not plaintiff's illness prevented him from working and reasoned that defendant having caused the initial discharge could not purge itself of wrongdoing without having offered to reinstate plaintiff. The Court further found that defendant's wrongful conduct placed plaintiff in a materially worse position and the disputed evidence regarding whether plaintiff could have continued to work in his former job during his illness was less important than the fact that plaintiff's wrongful termination deprived him of the opportunity to even attempt (with or without reasonable accommodations) to do that job during the treatments. (*Id.* at 1436.)

Pregnancy

Some courts from other jurisdictions have similarly found that pregnancy after a wrongful termination does not limit recovery of back pay. (See *EEOC v. Service News Co.* (4th Cir. 1990) 898 F2d 958, 963 [plaintiff who did not look for work during pregnancy, after an initial application for work, entitled to back pay for that time period because her 'inaction was justifiably based upon her belief in the futility of further efforts during her pregnancy']; see also *Harper v. Thiokol Chem. Corp.* (5th Cir. 1980) 619 F2d 489, 493 [finding that plaintiff who got pregnant six months after wrongful termination, and had made serious efforts to obtain employment before that, is entitled to backpay for the ten months she could not work due to pregnancy].)

Self-employment

With regard to self-employment, plaintiffs can demonstrate reasonable efforts to mitigate damages by starting a business as long as plaintiff applies sufficient effort trying to make the business successful. Courts apply this standard even if those efforts ultimately fail. In *Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1284-1285, the plaintiff was a lawyer who, after being fired applied for one government law job, which she did not get, then started her own law practice. Despite her efforts at success, the practice did not generate much income. The

Copyright © 2022 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



defendant in that case argued that she did not mitigate lost wages because it was not reasonable for her to pursue an unsuccessful law practice. The court found that 'in the absence of suitable employment' pursuing a law practice was reasonable mitigation even if it generated little income.

Given that multiple factors inform the analysis about comparable work and mitigation efforts, as the legal standards and cases reviewed here demonstrate, there are various ways to position your case, from the beginning, to justify a full measure of damages.

Bobby Shukla represents plaintiffs in employment litigation at Shukla Law. *She currently serves on the Board of the San Francisco Trial Lawyers Association (SFTLA) and the Board of the Bay Area Chapter of the National Lawyers Guild. Last year, she was a finalist for SFTLA's Trial Lawyer of the Year Award.*


Shukla

Copyright © 2022 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**