

# Back Pay Ruling Shows Nuanced Test For Extended Liability

By **Lynn Kappelman and John Ayers-Mann**

In a Jan. 10 decision in *Santiago v. Meyer Tool Inc.*[1], the U.S. District Court for the Southern District of Ohio held that the defendant is entitled to discovery regarding the reasons for the plaintiff's termination from subsequent employment because a defendant may seek to toll its liability for back pay where an employee's termination from a subsequent employer was willful.

The decision underscores an important misconception about back pay damages in wrongful termination cases. Employers and their attorneys defending wrongful termination claims often assume that back pay liability ends when the plaintiff finds a commensurate job after termination. But many may be surprised to learn that whether and when an employer's back pay liability ends may depend on why the employee left his subsequent job, and also on the particular jurisdiction.

Back pay is one element of damages in a wrongful termination case. The jury calculates back pay by adding up all of the plaintiff's lost wages from the date of termination until the date of the verdict.

It is well-settled law that former employees are required to make reasonable efforts to mitigate their damages after termination by seeking subsequent employment. The corollary is that an employer's liability for back pay in a wrongful termination case will be reduced by the employee's earnings after termination. Common sense suggests then that once an employee finds a new job paying her the same or more than the position from which she was terminated, the first employer's obligation for back pay would end.

Not so fast. Unfortunately for employers, there is a split in the circuits as to whether and when an employer may be liable for back pay even after a former employee resigns, or is fired from, her subsequent employment.

In some jurisdictions, the employer's liability for back pay after the employee leaves her subsequent employment may turn on whether the employee had compelling or justifiable reasons for leaving that subsequent job. For example, in *Brady v. Thurston Motor Lines*,[2] the U.S. Court of Appeals for the Fourth Circuit held in 1985 that a former employee must "use reasonable diligence to maintain any suitable employment which is secured."

But, the Brady court held, "the rule that voluntary termination of interim employment tolls the back pay period is not unqualified." The Brady court explained that when the employee voluntarily leaves her subsequent employment for "compelling or justifying reasons," the first employer may be back on the hook for back pay.

However, when the employee leaves the job for "personal reasons unrelated to the job or as a matter of personal convenience" the first employer would not be on the hook for back pay after that subsequent resignation. Similarly, the Brady court held that when the employee is fired from subsequent employment for justifiable reasons, that may end back pay liability.



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In *Brady*, where two employees had been fired from their subsequent jobs because they chose to violate their employers' work rules, the court concluded that the first employer was not still liable for back pay since their behavior "amount[ed] to a lack of reasonable diligence in maintaining interim employment."

While the consensus in circuit courts across the country remains that a plaintiff has the duty to seek and maintain subsequent employment after the employer terminates her, courts have varied as to how they treat an employer's back pay obligations after the plaintiff's subsequent employment ends.

For example, in 2004, the U.S. Court of Appeals for the First Circuit held in *Johnson v. Spencer Press of Maine Inc.*[3] that "back pay is not permanently terminated when an employee is fired for misconduct or voluntarily quits interim employment." However, because the court concluded on other grounds that the plaintiff was not entitled to back pay, the court did not have to "craft general principles for how back pay should be calculated when an employee who has been discriminated against is fired from intervening employment."

In 1996, the U.S. Court of Appeals for the Sixth Circuit offered yet another twist on this rule in *Thurman v. Yellow Freight Systems Inc.*[4] In *Thurman*, a plaintiff sued Yellow Freight for wrongful termination and sought back pay damages, including for the period after he was terminated from his subsequent employer.

The plaintiff had been terminated from his subsequent position for damaging a company vehicle by driving it under an overpass that was too low. The *Thurman* court concluded that the original employer could be on the hook for back pay because "[t]here was no evidence that *Thurman* acted intentionally" when he lost his subsequent job, and the plaintiff did not "[act] willfully or [commit] a gross or egregious wrong."

Illustrating another application of the rule, in *Hawkins v. 1115 Legal Service Care*,[5] in 1998 the U.S. Court of Appeals for the Second Circuit addressed whether an employer could be liable for back pay when an employee voluntarily quits her subsequent position. In that case, a plaintiff sued her former employer for wrongful termination.

Three months after termination, she obtained a job with a subsequent employer, but later quit that job to become self-employed. On appeal, the court explained that a plaintiff's decision to leave her subsequent employment would not bar a back pay award if the reason she quit was to find better work, including some form of self-employment, if undertaken in good faith and as a reasonable alternative to other work.

The court therefore affirmed the district court's ruling that a jury could conclude that "[the plaintiff] made appropriate efforts to earn money as a self-employed lawyer after finding the working conditions [of her subsequent employer] unsatisfactory."

*Brady*, *Johnson*, *Thurman* and *Hawkins* highlight the circuits' inconsistent treatment of back pay following subsequent employment in wrongful termination cases. It is therefore critical for employers to know the rules in their particular jurisdiction. Understanding how the back pay rules work in the specific jurisdiction will assist the employer, for example, in valuing a case, conducting appropriate discovery about subsequent employment, and ultimately presenting the case at trial.

For example, counsel for the employer in a wrongful termination case should always subpoena employment records from the plaintiff's subsequent employer. Not only will this

give you data about the plaintiff's mitigated earnings but you may also learn the true reason for her termination from that subsequent employment.

In those jurisdictions where the plaintiff's back pay damages end when she is terminated for her own wrongdoing, this will be critical information. Similarly, if the plaintiff voluntarily resigned from her subsequent employment, it will be important to ask questions during the plaintiff's deposition to determine the reasons for her resignation, and whether there is a good argument that her resignation was not justified.

Do not overlook the plaintiff's online or social media presence in seeking to determine the real reasons for her termination or resignation. Often the first place people will go to complain about their employer is Facebook, Twitter, Glassdoor and other social media or online comment sites.

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[1] *Santiago v. Meyer Tool, Inc.*, 2020 U.S. Dist. LEXIS 4634 (S.D. Ohio Jan. 10, 2020).

[2] *Brady v. Thurston Motor Lines*, 753 F.2d 1269 (4th Cir. 1985).

[3] *Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368 (1st Cir. 2004).

[4] *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160 (6th Cir. 1996).

[5] *Hawkins v. 1115 Legal Service Care*, 163 F.3d 684 (2d Cir. 1998).