

The Mitigation Defense Tool Your Employment Case May Need

By **Dawn Solowey and Lynn Kappelman**

Recently, we have discovered that many employment litigators, and the employers they represent, struggle with how to mount an effective mitigation defense. We have found that even experienced litigators and sophisticated companies can have a bit of a blind spot when it comes to how to construct a compelling argument that the plaintiff has failed adequately to mitigate damages.

This mistake can prove costly at trial. But hiring a vocational expert who can explain how and why the plaintiff unreasonably failed to make a good faith effort to obtain employment may help to avoid the issue.

Lawyers who have not tried many employment cases often blow their opportunity to limit damages by not doing enough to show that the plaintiff failed to adequately mitigate her damages post-termination. What novice trial lawyers miss is that the employer has the burden of proof at trial as to whether the plaintiff adequately mitigated her damages.

Often counsel will puff out their chests and declare: "The plaintiff testified at the deposition that she did not make sufficient efforts to get a new job, so we can prevent her from recovering full back pay." This may seem like enough, until the wake-up call at trial in the form of jury instructions on mitigation.

The jury instructions will remind jurors that the employer must present evidence that there were actually jobs available that the plaintiff could have obtained. For example, one pattern instruction[1] provides:

It is the Defendant's burden to prove that Plaintiff failed to make reasonable efforts to minimize [her] damages. This defense is proven if you find ... that: 1. There were or are substantially comparable position[s] which Plaintiff could have discovered and for which Plaintiff was qualified; and 2. Plaintiff failed to use reasonable diligence to find suitable employment.

The instruction does not require that the plaintiff succeed in obtaining employment, only that she make a good faith effort to do so. The jury instruction makes clear: "If the Defendant has proven [plaintiff failed to mitigate damages], then you must deduct from any award of back pay the amount of pay and benefits Plaintiff could have earned with reasonable effort." This instruction is representative of what many courts will require; the special verdict form will follow suit.

To prove the first element of the mitigation defense, standard discovery responses and deposition testimony alone are not enough for a compelling mitigation narrative. In a typical case, the plaintiff produces a stack of job search documents, and testifies that she looked on various job boards and applied for numerous positions.

Most plaintiffs present their job search as extensive (no matter the facts) — the well-prepared plaintiff will be ready to do so at deposition. Ideally, the employer's counsel will



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obtain important concessions from the plaintiff at deposition, such as jobs ruled out or turned down, or unreasonable parameters on their search. But even those admissions will not be enough to satisfy the first mitigation element.

Instead, in order to satisfy the first prong of the defense, counsel must prove that the plaintiff had other job opportunities available. Trial often occurs three or four years post-termination and it is difficult to go back to find the available job opportunities for which the plaintiff was qualified.

Even harder is to find a way to authenticate such information so that you can present it to the jury. An employer who cannot successfully show available opportunities may get ambushed at trial by a plaintiff who has been content to sit back for years letting lost wages pile up.

The solution: hiring a vocational expert who can explain how and why the plaintiff unreasonably failed to mitigate. A good expert will provide a skills assessment regarding the jobs the plaintiff was qualified to perform, and show the jobs which were available within commuting distance in the years following her termination, along with the compensation for each such job. Finally, the expert can analyze what the plaintiff did to search for a position and develop an opinion as to the adequacy of those efforts.

How does this expert analysis work in a real-life trial? First, the expert will present a list of all of the plaintiff's competencies, which often amounts to a considerable list of marketable skills.

Second, the expert will explore what employment was potentially available to the plaintiff. This step will show the jury a representative list of actual jobs — including titles and wage ranges — appropriate for the plaintiff's skill set.

Third, the expert conducts a labor market survey, within the relevant geographic radius and time period, that shows the actual posted positions that existed during the time frame at issue, with the names of the relevant companies and the expected earnings from such positions. Finally, the expert analyzes the plaintiff's actual job search strategy and opines specifically about whether and how it fell short.

With the expert's opinion, the employer's mitigation defense is backed by a fact-based analysis of the plaintiff's missed opportunities, presented live. The jury does not have to take the counsel's word that the plaintiff did not do enough to find replacement employment, but can rely on the expertise of a trained expert. Without such an expert, it would be difficult or impossible to lay an adequate foundation at trial for documents reflecting the jobs available for which the plaintiff did not apply.

In addition, the expert can help push back when the plaintiff suggests that it was an impossible job market, by providing tangible, easy-to-understand evidence as to what jobs were available and what a diligent job search would look like. This is not necessarily information that is within jurors' life experience, especially since job opportunities and search methods can vary considerably between industries, levels of seniority and other factors.

Every employer hopes that the jury will find no liability at all, and therefore never reach damages. But a comprehensive trial strategy must consider that the jury might consider damages.

Since lost wages are often a key driver of those damages, the mitigation defense can be a powerful defense against a runaway jury verdict. A vocational expert is key for ensuring the employer optimizes that defense.

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[1] Faculty of Federal Advocates, Ad Hoc Committee, Model Employment Law Jury Instructions, September 2013.