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Mitigation In Employment Cases

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I. Introduction

This paper will address legal issues regarding mitigation of damages in employment cases. Mitigation can be a tricky area of law with significant traps for the unwary. Careful practitioners for employers and employees should research carefully the rich body of case law regarding mitigation before advising their clients. This paper discusses most of the significant issues that typically arise regarding mitigation, as well as the most important cases in the Fifth Circuit and Texas state courts.

II. What Is Mitigation; And How Is It Used In Employment Cases?

The duty to mitigate damages is an ancient legal principle. C. McCormick, *Law of Damages* 127 (1935) In general, mitigation is the duty of a claimant to use reasonable means to avoid or minimize the damages it seeks to recover. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982). McCormick summarizes “the general rule” as follows: “Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided.” *Id.*, at 127.

Mitigation has been used in employment cases to reduce or completely eliminate damages for lost wages. The Fifth Circuit described the general notion of mitigation in the employment context by stating: “A plaintiff may not simply abandon his job search and continue to recover back pay.” *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 393 (5th Cir. 2003). The law governing mitigation in employment cases can lead to counter-intuitive results. For example, an employee may fail to mitigate even though he is earnestly searching for work. Further, even when an employee finds a new job, he may still be failing to mitigate. The issue in these cases is

whether the new job is substantially equivalent to the old job. If not, the employee has failed to mitigate and can lose any opportunity for lost wages. On the other hand, there are circumstances where an employee can turn down a new job but still avoid a mitigation defense. Likewise, an employee can avoid a mitigation defense even after resigning from a new job.

III. What Types Of Employment Claims Are Subject To Mitigation?¹

The majority of claims for lost compensation are subject to a mitigation defense. Thus, “all ...Title VII claimants, [are] subject to the statutory duty to minimize damages.” *Ford Motor Co. v. E. E. O. C.*, 458 U.S. 219, 231, 102 S. Ct. 3057, 3065, 73 L. Ed. 2d 721 (U.S. 1982). This duty stems from Section 706(g) of the Civil Rights Act of 1964 which provides that “[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.” The duty to mitigate damages also applies to other discrimination claims, such as the ADA. *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1045 (5th Cir.1998) (“A plaintiff suing for back pay under the ADA has a duty to mitigate her damages by using reasonable diligence to obtain substantially equivalent employment.”). Likewise, a plaintiff suing for back pay under the ADEA has a duty to mitigate his damages. *West. v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 393 (5th Cir. 2003). Mitigation also applies to maternity discrimination claims. *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1045 (5th Cir.1998) (Title VII pregnancy discrimination case) (citing *Sellers v. Delgado Coll.*, 902 F.2d 1189, 1193 (5th Cir.1990)).

Claimants asserting Texas state court employment claims are also subject to a mitigation requirement. The general rule as to mitigation of damages in breach of employment suits is that the discharged employee must use reasonable diligence to mitigate damages by seeking other

¹ Although it is beyond the scope of this paper, obviously mitigation applies to a wide variety of claims including breach of contract, landlord-tenant, negligence, DTPA, and others.

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