Labor Law Journal, Plaintiff's Duty to Mitigate Damages in the COVID-19 Era, (Sept. 9, 2020)

Labor Law Journal

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I. Introduction

Employment litigation continues to be a growing portion of federal and state court dockets. Although wage and hour, ERISA, disability accommodation and other employment-related claims make up a significant amount of these cases, wrongful discharge suits due to discrimination, retaliation, breach of contract, and other theories remain a major concern for employers due to potential liability exposure. These types of cases may include damages for emotional distress, lost benefits, and front and back pay.

Damages in wrongful termination suits are often difficult to predict because the back or front pay amounts depend largely on a plaintiff's ability to find post-termination work. Before COVID-19, the unemployment rate in the United States was at one of the lowest points in history hovering close to three and a half percent (3.5%)–employment plaintiffs were able to find new work with relative ease. [2] With unemployment now at a double digit rate, job prospects have dwindled and it will likely take longer to find alternative employment. On the other hand, if an employer can show that the plaintiff's former position was or would have been eliminated after termination, back or front pay may be negligible because he or she would not have earned anything from the date of that elimination. Although former employers have virtually no control over a plaintiff's future employment prospects, it is important to understand how a plaintiff's duty to mitigate may be impacted in these unprecedented times.

This article explores how a plaintiff's duty to mitigate his or her damages may evolve in the wake of the COVID-19 pandemic. Section II details the current state of the law, focusing on alternative employment, the "lower sights" doctrine, and the role of continued education. Section III explores the effects of COVID-19 on a plaintiff's duty to mitigate. This section focuses in particularly on rising unemployment, industry upheaval, cataclysmic shutdowns, and the transformation to remote working. Section IV concludes.

II. State of the Law: Plaintiff's Duty to Mitigate

Plaintiffs in wrongful discharge cases have a duty to mitigate their damages in order to be eligible for back pay or front pay damages. [3] A plaintiff satisfies this duty by exercising "reasonable diligence to seek out or not refuse a

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job that is substantially equivalent to the one at issue." [4] "Employment is substantially equivalent when it 'affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status' as the position from which the plaintiff has been terminated." [5] A plaintiff can demonstrate "reasonable diligence" by "demonstrating a continuing commitment to be a member of the work force and by remaining ready, willing, and available to accept employment." [6] The relevant inquiry is the search itself, not the search's success: "A plaintiff's efforts to mitigate need not be successful but must represent an honest effort to find substantially equivalent work." [7]

Although it is the plaintiff's duty to mitigate his or her damages, failure to mitigate is an affirmative defense that a defendant carries the burden to prove. [8] A defendant employer may do so by demonstrating "(1) that suitable work existed, and (2) that the employee did not make reasonable efforts to obtain it." [9] If a defendant can show that the employee did not make reasonable efforts to obtain employment, the defendant need not prove comparable work was available. [10]

A. Alternative employment: what constitutes "comparable" work?

While a plaintiff has an obligation to seek substantially comparable work, a plaintiff can—and in some instances must—accept a "lesser" role in order to satisfy his or her duty to mitigate. For instance, the United States Supreme Court held that the mitigation duty may require a plaintiff to accept a lower-paying position if one equivalent to his or her former position is unavailable. [11] Similarly, if a plaintiff exercised the requisite diligence but cannot find comparable employment, the plaintiff can satisfy the duty to mitigate by accepting a lower-paying job or changing careers, with wages earned reducing but not erasing an employer's liability for back pay. [12]

When evaluating the sufficiency of subsequent efforts to obtain employment, courts distinguish between plaintiffs who demonstrate reasonable diligence in searching and those who make minimum efforts. [13] In *Ortega v. Chicago Board of Education*, for instance, the plaintiff sought damages following a jury verdict in her favor for discrimination under the ADA. [14] The employer defendant argued that the plaintiff's back pay should be limited due to her failure to mitigate. [15] The court awarded back pay and front pay as part of compensatory damages and found that the plaintiff had acted with reasonable diligence when she submitted over 900 applications in her chosen field before eventually accepting a lower-paying government job. [16] In assessing the defendant's failure-to-mitigate defense, the *Ortega* Court compared its plaintiff to the plaintiff in *Williams v. Imperial Eastman Acquisition Corporation*, who returned home to run his family's cattle farm after submitting only two applications for comparable work. [17]

B. The "Lower Sights" doctrine: lowering expectations after unsuccessful searching

Some circuit courts have held under the "lower sights" doctrine that a claimant must consider accepting a lower-paying position after an extended period of fruitless searching, reasoning that if a plaintiff "fails to 'lower his sights' after the passage of a reasonable period of unsuccessful employment searching, he may be held to have forfeited his right to reimbursement on the ground that he failed to make the requisite effort to mitigate his losses." [18]

Not all circuits follow the lower sights doctrine, and those that do "must be careful" not to contravene Title VII's intent by applying it. [19] The duty to mitigate is at its heart a factual inquiry, and courts must take into account the reasonableness of a plaintiff's search. Accordingly, the lower sights doctrine could see increased relevancy as COVID-19 continues its toll on the job market. This may be particularly applicable in cases where full-time jobs in a plaintiff's field and geographic area are unavailable. [20] In *Garner v. G.D. Searle Pharmaceuticals & Co.*, the plaintiff accepted a lower-paying, lower-status sales position in a different industry while continuing to pursue work comparable to her prior position even after she accepted the job. [21] Because there was no showing that

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full-time jobs in her field and geographic area were available, the court held that she had satisfied her duty to mitigate damages. [22] Employers in circuits recognizing the lower sights doctrine may be able to argue for its application in post-pandemic times, where high-paying and directly comparable jobs may be scarce. Applying this concept to the "substantially similar" employment inquiry may require plaintiffs to lower their financial sights and accept a job with reduced compensation than their previous positions.

C. Return to school: Can further education satisfy an obligation to mitigate?

Courts apply a similar sufficiency-of-search analysis to plaintiffs who return to school. A plaintiff who "voluntarily absents from an active job market" to pursue additional education likely has not satisfied his obligation, in contrast to a plaintiff who pursues additional education only after a diligent, yet unsuccessful job search. [23]

In *Miller v. AT&T*, for example, the plaintiff enrolled at a university after five months of searching for employment without success. [24] The defendant argued the plaintiff had "effectively removed herself from the job market and failed to mitigate her damages by enrolling as a full-time student." [25] In doing so, the defendant pointed to a long line of cases holding that "an individual who abandons her willingness to search for and return to work and opts instead to attend school during the back pay period generally does not meet her duty to mitigate damages during the time she is in school." [26]

The *Miller* Court distinguished these cases, however, and awarded back pay to the plaintiff; it found back pay should not be cut off at her enrollment date because she continued to mitigate her damages while in school. [27] In doing so, the court differentiated between plaintiffs who "attend school after diligent efforts to find work have proven to be unsuccessful, or who continue[] to search for work while enrolled in school" and plaintiffs who return to school in the hopes of graduating with higher earning potential. [28] Thus, plaintiffs who return to school to further their careers and increase their earning potential may not have mitigated their damages successfully, but plaintiffs who return to school after a diligent and thorough job search may have done so. Finally, the court acknowledged the challenge of deciding between continuing a fruitless job search and attempting to gain marketable skills for future employment, observing that "[b]ecause it is the employer's violation of the law that puts such an employee in this predicament, the former employee should be given some latitude by the courts in reviewing her post-termination actions." [29]

Not all courts are as friendly to plaintiffs seeking further education, however. [30] In *Miller v. Marsh*, the Eleventh Circuit affirmed the district court's denial of back pay, finding the plaintiff "removed herself from the labor market" and was not "ready, willing, and available for employment" as needed to support an award of back pay because she enrolled full-time as a law student. [31] In *Miller*, the plaintiff filed a failure-to-hire sex discrimination claim against the Army Corps of Engineers, and the Corps conceded liability. Although the plaintiff indicated that she was willing to leave school and accept a job from the Corps, the court held that willingness to accept one particular job did not satisfy the requirement for her to be "available and willing to accept substantially equivalent employment elsewhere." [32]

Similarly, in *Washintgon v. Kroger Co.*, the Circuit Court affirmed the district court's decision not to award back pay for the time the plaintiff was enrolled full-time in college. [33] The plaintiff provided no evidence suggesting she "could have held a full-time job with curtailing her schooling" and made no other showings of her availability to return to the labor market. [34] Accordingly, the court determined the plaintiff was not eligible for back pay during her college years. [35]

There is no clear consensus on whether a plaintiff's attending school will limit his or her ability to recover damages. Despite some case law indicating a return to school does not automatically cut off back pay eligibility, plaintiffs seeking to mitigate damages by returning to school are still likely to face an uphill battle to show that they have properly mitigated their damages when they have not actively remained in the labor market.

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II. Mitigation in the COVID-19 Era

The global pandemic has brought high unemployment, mass hiring freezes and industry disruptions (and in some cases upheaval). As employers weigh difficult employment decisions in the coming months or years, it is important to consider how COVID-19 has shaped the job market and how the new landscape could affect a plaintiffs' ability to recover back pay. Below we discuss three features relevant to mitigation: (1) the reduced job market and the drastic decline of certain industries; (2) closures, layoffs or other group decisions that would have impacted the job of an already-discharged employee; and (3) COVID-related changes in the work environment, such as the ability to work from home and the establishment of workplace safety protocols.

A. Reduced job market and industry decline

Since the onset of COVID-19 in the United States, unemployment rates have skyrocketed to record highs, topping out at 14.7% in April 2020 and exceeding the rates seen during and after the 2008 financial crash. [36] These high rates have continued even as businesses begin returning to normal operations: as of July 2020, the unemployment rate was still in double-digits at 10.2%. [37] Layoffs have disproportionately affected certain industries, and many workers have shouldered the brunt of the job loss and wage reductions. [38]

In this environment, the chance that a plaintiff will successfully find comparable new employment is significantly reduced. A difficult job market does not, however, excuse a plaintiff from conducting a reasonable and diligent search for comparable employment. [39] A tenet of Title VII is that a plaintiff "may not simply abandon his job search and continue to recover back pay." [40] Thus, the duty to mitigate "[does] not evaporate in the face of [plaintiff's] difficulties" finding work. [41] Because the duty to mitigate is a two-pronged test—the work must be available *and* the search must be diligent [42]—plaintiffs may not rely on high unemployment rates as an excuse to diminish their search efforts. [43]

In *Falls Stamping & Welding Co. v. Int. Union, United Auto., Aircraft & Agr. Implement Workers of Am.*, the union representing the plaintiff "presented evidence of the extremely high rate of unemployment…during the back pay period" in effort to show searching for work would be futile. [44] The court disagreed with this argument: "While such evidence may explain why many claimants were unsuccessful in obtaining employment despite extensive efforts, it is not directly pertinent to the question at hand, i.e. whether reasonable efforts were made to obtain employment." [45] Indeed, the court suggested, unemployment rates and the scarcity of work may even be completely irrelevant if a defendant can show the plaintiff's search lacked adequate diligence in the first place. [46] Similarly, in *Payne v. Security Savings & Loan Assoc.*, the plaintiff pursued an "earnest and extensive" search for his first year of unemployment without success. [47] Discouraged, he gradually reduced his efforts to "a trickle." [48] The Seventh Circuit affirmed the district court's decision to reduce back pay for failure to mitigate. [49]

In a similar vein, an unstable economy or job market may also affect the amount of damages a plaintiff receives. In *Greenbaum v. Svenska Handelsbaken, N.Y.*, for example, the court found an award of front pay to a plaintiff would be "unduly speculative" "in light of the nature of the market at issue, as well as the financial instability of the defendant company itself" and the plaintiff's "own prospects for future advancement." [50]

Plaintiffs must also consider temporary work when mitigating their damages: in *Hutchison v. Amateur Electronic Supply, Inc.*, the trial court held that a plaintiff who "registered with the State of Wisconsin Job Service, attended seminars, joined a networking group, took courses to upgrade her computer skills, answered newspaper ads, and submitted nearly 600 resumes to prospective employers" over the course of several years had not properly mitigated her damages because she failed to register with a temporary employment agency that would have supplied her with work within two weeks. [51] In short, "a plaintiff 'cannot just leave the labor force after being wrongfully discharged in the hope of someday being made whole by a judgment.'" [52]

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A more nuanced issue is presented by the disproportionate rates of unemployment in certain industries. Airlines, hotels, restaurants and bars in particular have struggled to stay afloat, [53] as have the oil and gas drilling, automotive parts, and equipment industries. [54] Jobs in the leisure, casino, retail, laundry/personal services, and dental offices all fell by over fifty percent (50%) between February and April 2020. [55] Motion pictures and sound recording, home furnishing stores, sports, and performing arts saw employment drop between 45 and 49 percent in the same time frame. [56] It is estimated that it will take months, if not years, for businesses to return to pre-pandemic levels even after the economy reopens. [57]

What are an employee's mitigation obligations if there is no work in his or her industry? The key inquiry is the extent to which the former employee's tasks and responsibility can be transferred to jobs in other industries. The concept of transferable skills is not new. Vocational experts and the Department of Labor apply this theory in a variety of situations, particularly in Social Security disability benefit hearings before administrative law judges. [58] Vocational experts consider past jobs and experiences the claimant held, and they use Department of Labor data to identify transferable skills that could apply to new jobs that a claimant might not have applied for based on title alone. [59] If a plaintiff has searched unsuccessfully for similar work but not assessed how his or her skills may transfer to other jobs, the former employer has a colorable argument that the plaintiff has not properly mitigated his or her damages.

Job transferability depends on the nature of the plaintiff's work. If skills are transferable, a plaintiff may be required to change fields or relocate in search of comparable work. [60] In *Booker v. Taylor Milk Co.*, the court assessed the transferability of plaintiff's former position in response to his argument that postings for assembly workers and factory workers were not substantially equivalent to his former position as a laborer and dock handler. [61] In evaluating whether the plaintiff had satisfied his duty to mitigate, the Third Circuit noted that he was "essentially an unskilled worker." [62] Consequently, since the defendant employer had identified "numerous postings" for other, similarly unskilled positions for "laborers, general laborers, light labor positions, and movers" at comparable rates of pay, the employer had carried its burden of demonstrating that suitable work existed and the plaintiff had failed to pursue it. [63]

Some skills, however, may not be transferable. While a financial or accounting employee at an energy company should be able to take a similar role at a healthcare or insurance company, an operations employee may not, depending on the facts, have the same opportunity. The bottom line is that employers engaged in settlement negotiations or litigation should be able to identify the skills necessary to perform their former employee's job in order to highlight what other jobs might have been available that the employee did not pursue.

B. Post-termination closures and layoffs

As economic hardships continue to weigh on businesses and business owners, some have been forced to temporarily or permanently cut departments and positions, or even to shut down entirely. [64] Such an event, even if it occurred after a plaintiff's discharge, could cut off a plaintiff's entitlement to back pay if it would have affected the plaintiff's employment. Specifically, a plaintiff whose position would have been eliminated or otherwise affected due to the pandemic—or for any other reason—is not eligible to accumulate damages after that point in time. [65]

Essentially, a plaintiff "cannot receive [damages] for a job that did not exist." [66] In *Reed v. A.W. Lawrence & Co., Inc.*, the Second Circuit held that the district court did not abuse its discretion in limiting a Title VII plaintiff's front pay to seven weeks when the office in which she was employed was scheduled to be closed seven weeks from the date of the jury verdict in her favor—even though the court also found that the plaintiff had satisfied her duty to mitigate. [67]

Likewise, in *Mittl v. New York State Div. of Human Rights*, the court held a plaintiff was not eligible for back pay after the point that her former employer eliminated the receptionist position altogether due to economic concerns.

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[68] The *Mittl* Court looked to the Third Circuit for support in *Bartek v. Urban Redevelopment Auth. of Pittsburgh*. The *Bartek* Court held that a plaintiff was not eligible for back pay after the date on which the position for which he was wrongfully denied promotion was eliminated. [69] The *Bartek* defendant claimed there were comparable positions at plaintiff's former employer for which he would have been eligible after his position was eliminated. [70] The defendant argued that those positions prevented the court from granting back pay. [71] The Third Circuit held that plaintiff offered insufficient evidence to support this claim, however, and held the district court did not abuse its discretion in denying back pay damages. [72]

Moreover, recessions and economic downturns may affect an employer's obligation to provide back pay. Specifically, employers may not be required to compensate employees during work slowdowns or temporary closures. [73] In the same way that an employer would not compensate a plaintiff with overtime that would not have existed, an employer should not have to compensate a prevailing plaintiff for his or her full salary if their salary would have been reduced during the pandemic. Hence, if a plaintiff's salary would have been reduced had they remained at his or her job, any back pay liability should be lowered accordingly.

"The purpose of a back pay award is to make whole the victim of unlawful discrimination[…], not to punish an employer or provide a windfall to the employee." [74] In the COVID-19 era, plaintiff's damages may be subject to reduction due to closures, temporary furloughs and cuts in pay or hours. The relevant back or front pay inquiry is what the plaintiff would have been entitled to if he or she remained employed; that number should *not* be calculated merely by multiplying the plaintiff's former salary and benefits by the duration of the period determined by the court if the economic circumstances have changed dramatically.

B. The "new" workplace

COVID-19 has transformed the workplace. Remote working is the default where possible, and is likely to outlive the pandemic to some extent. Meanwhile, traditional workplaces are being infused with a plethora of new safety and health precautions to prevent the spread of novel coronavirus. What does this mean for "substantially comparable" employment?

As an initial matter, a wrongful discharge plaintiff "need not seek or accept employment which is 'dangerous [or] distasteful." [75] And several appellate courts have suggested that a plaintiff who leaves a job which is more dangerous than the job he was wrongfully terminated from has not necessarily failed to mitigate his damages (as would be the case if he left the new job for minor reasons or because he was fired for cause). [76] Extrapolating this concept to the pandemic, the question is whether a plaintiff has mitigated her damages if she declines to accept (or quits) a job because it will not allow her to work remotely or because she does not believe the business is taking enough precautions to avoid infection.

The answer, not surprisingly, is fact-dependent. In *N.L.R.B. v. Midwestern Personnel Services, Inc.*, for example, the plaintiff accepted another job following his termination, but subsequently left that job because it "required him to cut timber, which was more dangerous than the position he held" with the defendant. [77] The court found that the plaintiff had mitigated his damages, taking into account the diligence with which he first sought new employment and suggesting he was not required to accept a more dangerous job to ensure back pay. [78] Applying this case to COVID-19, a plaintiff could argue that lack of social distancing, improperly filtered air conditioners, or other COVID-related hazards create a dangerous work environment such that he or she should not be required to accept that position as a condition for back pay.

On the other hand, rejection of a job offer must be objectively reasonable. [79] "Whether rejection of the job offer [in mitigation] is reasonable depends upon the circumstances surrounding the offer and its rejection." [80] Reasonableness in turn "is determined applying an objective standard, i.e., whether a reasonable person, in similar circumstances, would have rejected the offer." [81] In *Rutherford v. American Bank of Commerce*, the court held a plaintiff had not failed to mitigate her damages when she refused an entry level job offer that did

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not take into account her years of experience and offered only remote possibilities for advancement comparable to her former position. [82] In *N.L.R.B. v. Madison Courier, Inc.*, the court found a plaintiff's refusal reasonable when the proffered employment was over fifty miles away and required her to spend Monday through Friday in a different city away from her family. [83]

Employers planning to present a failure to mitigate defense should carefully observe what health officials and organizations such as the Centers for Disease Control (CDC) or the World Health Organization (WHO) identify as reasonable workplace precautions. Moreover, these observations should guide an employer's discovery process, and defendants should find out as much as possible about the prospective employer's health precautions in order to present the best possible affirmative defense if a plaintiff is claiming safety issues prevented him or her from accepting a job.

IV. Conclusion

In this COVID-era, plaintiffs may wrongly believe that they do not have a duty to mitigate in light of the heightened unemployment rate. However, their failure to diligently seek employment may result in a diminished or no back pay award. Further, plaintiffs whose former jobs may have been lost or reduced for economic reasons are likely to see reduced damages, if any, because such back pay award can only compensate them for the earnings they would have received had they not been wrongfully discharged. Further, given the proliferation of remote working, plaintiffs may need to expand the geographic scope of their job search in order to qualify as a "diligent" search.

It appears the pandemic may have a profound effect on a plaintiff's duty to mitigate his or her damages. Employers should continue to critically and carefully think ahead when considering terminating employees in a protected class and be prepared to diligently scrutinize a plaintiff's mitigation efforts. Understanding the law regarding mitigation as applied to these times, may help resolve cases earlier, or in some instances may result in reduced back pay awards.

Footnotes

1 The ideas expressed in this article are solely the opinions of the authors.

2 *Unemployment Rate 2.0 Percent for College Grads, 3.8 Percent for High School Grads in January 2020*,U.S. Bureau of Labor Statistics (Feb. 12, 2020), https://www.bls.gov/opub/ted/2020/unemployment-rate-2-percent-for-college-grads-3-8-percent-for-high-school-grads-in-january-2020.htm#:~:text=The%20national%20unemployment%20rate%20was,people%20age%2016%2 0and%20older.).

3 42 U.S.C. §2000e-5(g); *Booker v. Taylor Milk Co.*, 64 F.3d 860, 864 (3d Cir. 1995) (“A successful claimant's duty to mitigate damages is found in Title VII: "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.") (citing 42 U.S.C. §2000e–5(g)(1)).

4 *Mathieu v. Gopher News Co.*, 273 F.3d 769, 783 (8th Cir. 2001); *see Dailey v. Societe Generale*, 108 F.3d 451, 456 (2d Cir. 1997).

5 *Powers v. Northside Indep. Sch. Dist.*, 951 F.3d 298, 308–09 (5th Cir. 2020) (citing *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 393 (5th Cir. 2003)).

6 *Booker v. Taylor Milk Co.*, 64 F.3d 860, 865 (3d Cir. 1995) (citing *Hutchison v. Amateur Elec. Supply, Inc.*, 42 F.3d 1037, 1044 (7th Cir.1994); *Ford v. Nicks*, 866 F.2d 865, 873 (6th Cir.1989)).

7 *Townsend v. Bayer Corp.*, 774 F.3d 446, 466 (8th Cir. 2014); *Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1061 (8th Cir. 2002).

8 *Pennsylvania State Police v. Suders*, 542 U.S. 129, 132, (2004) ("…the plaintiff who alleges no tangible employment action has the duty to mitigate harm, but the defendant bears the burden to allege and prove that the plaintiff failed in that regard."); *Dailey*, 108 F.3d at 456; *see also Everhart v. Bd. of Educ. of Prince George's Cty.*, 660 F. App'x 228, 230 (4th Cir. 2016) ("A successful Title VII plaintiff is generally entitled to back pay ‘as

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a matter of course, unless the defendant comes forward with evidence that the plaintiff did not exert reasonable efforts to mitigate [his] damages.'") (quoting *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1358 (4th Cir. 1995)).

9 *Dailey*, 108 F.3d at 456 (2d Cir. 1997) (citing *Clarke v. Frank*, 960 F.2d 1146, 1152 (2d Cir.1992); *Gaddy v. Abex Corp.*, 884 F.2d 312, 318 (7th Cir.1989)).

10 *See Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1527 (11th Cir.1991) ("If … an employer proves that the employee has not made reasonable efforts to obtain work, the employer does not also have to establish the availability of substantially comparable employment."); *see also Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 54 (2d Cir. 1998); *Sellers v. Delgado College*, 902 F.2d 1189, 1193 (5th Cir.1990); *Walsh v. Scarsdale Union Free Sch. Dist.*, No. 16 CIV. 3558 (NSR), 2019 WL 6789581, at *5 (S.D.N.Y. Dec. 12, 2019).

11 *Ellis v. Ringgold Sch. Dist.*, 832 F.2d 27, 30 (3d Cir. 1987) (citing *Ford Motor Company v. EEOC*, 458 U.S. 219, 231 n. 16 (1982)).

12 *E.E.O.C. v. Exxon Shipping Co.*, 745 F.2d 967, 977–78 (5th Cir. 1984) (finding "a Title VII claimant may voluntarily accept employment that is not substantially equivalent and any sums actually earned thereby will reduce the employer's liability for back pay.").

13 *Compare Ortega v. Chi. Bd. of Educ.*, 280 F. Supp. 3d 1072, 1083 (N.D. Ill. 2017) *with Williams v. Imperial Eastman Acquisition Corp.*, 994 F. Supp. 926 (N.D. Ill. 1998).

14 *Ortega*, 280 F. Supp. 3d at 1073.

15 *Id*. at 1078.

16 *Id*. at 1083.

17 *Id*. ("*Williams* 'does not teach that starting an alternative career in lieu of continuing to seek comparable employment necessarily constitutes a failure to mitigate damages.'")(citations omitted); *see also Williams*, 994 F. Supp. at 932.

18 *Berger v. Iron Workers Reinforced Rodmen*, 170 F.3d 1111, 1133-34 (D.C. Cir. 1999) (internal quotations and citations omitted); *Ford Motor Co.*, 458 U.S. at 232 n.16 (citing to *N.L.R.B. v. Madison Courier, Inc.*, 505 F.2d 391, 395 (D.C. Cir. 1974).

19 *Id*. at 1134.

20 *Garner v. G.D. Searle Pharmaceuticals & Co.*, No. 290CV688-MHT, 2013 WL 568871 (M.D. Ala. Feb. 14, 2013).

21 *Id*. at *10.

22 *Id*. *But see EEOC v. Kallir, Philips, Ross, Inc.*, 420 F. Supp. 919, 925-26 (S.D.N.Y. 1976) (excepting a claimant with specialized pharmaceutical advertising expertise from the lower sights doctrine).

23 *Moore v. Houlihan's Rest., Inc.*, 07-CV-03129 (ENV) (RER), 2011 WL 2470023, at *5 (E.D.N.Y. May 10, 2011); *see, e.g.*, *Miller v. AT & T*, 83 F. Supp. 2d 700, 707 (S.D.W. Va. 2000), aff'd sub nom. *Miller v. AT & T Corp.*, 250 F.3d 820 (4th Cir. 2001)

24 *Miller*, 83 F. Supp. 2d 700 at 703, 706.

25 *Miller*, 83 F. Supp. 2d 700 at 703, 707.

26 *Id*. (citing cases).

27 *Miller*, 83 F. Supp. 2d 700 at 703, 706.

28 *Miller*, 83 F. Supp. 2d 700 at 707 ("The time a person spends in school learning a new career is an investment for which future benefits are expected. The student is compensated for the time in school by the opportunity for future earnings in the new career and thus suffers no damages during that period.")

29 *Id*.

30 *See Miller v. Marsh*, 766 F.2d 490 (11th Cir.1985); *Washington v. The Kroger Co.*, 671 F.2d 1072 (8th Cir.1982).

31 *Miller*, 766 F.2d at 492.

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32 *Id*.

33 *Washington*, 671 F.2d at 1079.

34 *Id*.

35 *Id*.; *see also Taylor v. Safeway Stores, Inc*., 524 F.2d 263, 268 (10th Cir. 1975) (superseded on other issue by statute).

36 Bureau of Labor Statistics, U.S. Dept. of Labor, *Unemployment Rate Rises to Record High 14.7 Percent in April 2020*, Econ. Daily (May 13, 2020), https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm#:~:text=Unemployment%20rate%20rises%20to%20record%20high%2014.7%20percent%20in%20April%202020&text=The%20unemployment%20rate%20in%20April,available%20 back%20to%20January%201948).

37 *The Employment Situation – July 2020*, News Release, Bureau of Labor Statistics (Aug. 7, 2020), https://www.bls.gov/news.release/pdf/empsit.pdf.

38 Michaelyn Corbett, *Estimating Wrongful Termination Damages Amid COVID-19*, Law 360, https://www.law360.com/articles/1279648/estimating-wrongful-termination-damages-amid-covid-19 (last visited August 1, 2020).

39 *See* Payne v. Security Sav. & Loan Ass'n, F.A., 924 F.2d 109, 111(7th Cir. 1991); *Falls Stamping & Welding Co. v. Int. Union United Auto*., 485 F.Supp. 1097, 1144 (N.D. Ohio 1979).

40 *West v. Nabors Drilling USA, Inc*., 330 F.3d 379, 393 (5th Cir. 2003) (internal citation omitted).

41 *Payne v. Security Sav. & Loan Ass'n, F.A*., 924 F.2d 109, 111. (7th Cir. 1991); *Gracia v. Sigmatron Int'l, Inc*., 130 F. Supp. 3d 1249, 1256 (N.D. Ill. 2015), aff'd, 842 F.3d 1010 (7th Cir. 2016) (internal citation omitted).

42 *Dailey*, 108 F.3d at 456 (citing *Clarke v. Frank*, 960 F.2d 1146, 1152 (2d Cir.1992); *Gaddy v. Abex Corp*., 884 F.2d 312, 318 (7th Cir.1989)).

43 *Falls Stamping & Welding Co*., 485 F.Supp. at 1144.

44 *Id*.

45 *Id*.

46 *Id*. ("'With such diligence lacking, the circumstance of a scarcity of work and the possibility that none would have been found even with the use of diligence is irrelevant.'") (citing American Bottling Co., 116 N.L.R.B. 1303, 1307 (1956)).

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62 *Id*.

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65 *See Reed v. A.W. Lawrence & Co*., 95 F.3d 1170 (2d Cir. 1996) (affirming district court's decision to limit front pay to the date employee's job was scheduled to be eliminated); *see also Mittl*, 764 N.Y.S.2d at 40 (cutting off back pay where plaintiff "failed to produce any evidence from which to infer that she would nevertheless have been retained" by defendant notwithstanding the elimination of her position).

66 *Murphy v. FedEx Nat. LTL, Inc*., No. 4:07CV01247 JCH, 2009 WL 1310252, at *6 (E.D. Mo. May 11, 2009).

67 *Reed*, 95 F.3d at 1182.

68 *Mittl*, 764 N.Y.S.2d at 40; *see also Bartek v. Urban Redevelopment Auth. of Pittsburgh*, 882 F.2d 739 (3d Cir. 1989).

69 *Bartek*, 882 F.2d at 747.

70 *Id*.

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73 *Gaddy v. Abex Corp*., 884 F.2d 312, 319-20 (7th Cir. 1989). *But see Goss v. Exxon Office Systems Co*., 747 F.2d 885, 889 (3d Cir.1984) ("the risk of lack of certainty with respect to projections of lost income must be borne by the wrongdoer, not the victim.").

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