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Employment Discrimination

Mitigating Damages in a Weak Economy

In order to succeed on a claim for employment discrimination, an employee terminated from his or her job must attempt to mitigate his or her damages. This means that the employee cannot just exit the workforce and sue the discriminating employer for lost wages. Instead the employee must make reasonable efforts to find other suitable employment. As the current economic slowdown continues, with its attendant high unemployment rates and lack of employment opportunities, courts are being forced to address questions about what mitigation measures can reasonably be expected of wrongfully terminated employees in this weak economy.

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Mitigation Generally

To prevail on a claim for employment discrimination, under Title VII of the Civil Rights Act of 1964, or any of the other federal employment discrimination statutes, a terminated employee must attempt to mitigate his or her damages by using "reasonable diligence in finding other suitable employment."[1] The test for the reasonableness of a plaintiff's mitigation efforts is a flexible one, and takes into account such factors as: the individual characteristics of the plaintiff, the job market, and the quantity and quality of the measures taken by the plaintiff to procure alternate employment.[2] To satisfy his or her mitigation obligations, a plaintiff need not go into another line of work, accept a demotion, or accept employment in a demeaning position that is not "substantially equivalent" to the one that he or she was denied as a result of the discrimination.[3]

The employer/defendant bears the burden of proving that the plaintiff has failed to mitigate his or her damages and, in the usual case, must do so by establishing (1) that suitable work existed, and (2) that the plaintiff did not make reasonable efforts to obtain it.[4] However, the law within the Second Circuit provides an exception to this general rule, and releases the employer from the burden of establishing the availability of comparable employment if it can prove that the employee made no reasonable efforts.[5]

The Current Weak Economy

The country is currently suffering through what is certainly the worst period of prolonged economic downturn since the passage of Title VII in 1964. One of the ramifications is a protracted period of high unemployment and a lack of job opportunities for the unemployed or underemployed. The bleak prospects for finding employment have caused many job seekers to just give up and drop out of the labor force. In fact, some commentators have suggested that a laid-off employee is now more likely to drop out of the labor force than to find new employment.[6]

Given the state of the job market, courts are now being faced with questions about what can be reasonably expected of an employment discrimination plaintiff in attempting to mitigate damages.

For example, in *Gardner v. Grenadier Lounge*,[7] a federal court sitting in Michigan rejected a defendant's argument that the plaintiff had failed to mitigate her damages and granted the plaintiff, a former waitress, summary judgment on her pregnancy discrimination claims. There, the plaintiff testified that she tried to find work that was comparable to her past employment as a waitress through "job fairs, Internet postings, and 'out walking, driving, looking for work.'" The court, in rejecting her employer's argument that plaintiff's efforts to mitigate damages were insufficient, held that the plaintiff's "diligence in seeking employment is assessed in view of the individual characteristics of the claimant and the job market" and the fact "[t]hat she was unable to find a job is not surprising, given that since 2005, the economy in Detroit and southeastern Michigan has gotten progressively more dismal." Thus, the Court implied that, given the likely futility of her job search, it was holding the plaintiff to a lower standard for attempting to mitigate her damages than it would have had there been a robust job market.

Counsel for terminated employees in New York should be careful not to overly rely upon the holding in *Garner*, because, as is set forth above, the law in the Second Circuit is that if an employer establishes that the terminated employee made no efforts to find suitable alternate employment, it is not required to demonstrate that such employment opportunities actually existed. Thus, a terminated employee who drops out of the job market will not be able to merely rely upon the fact that the economy is "dismal." He or she will actually have to make a reasonable effort to find work before dropping out of the job market.

Another question that the courts will have to revisit is how much time and effort a wrongfully terminated employee is required to put into finding a new job prior to returning to school for training in

a new job field. In the past, courts have held that a wrongfully terminated employee must use diligent efforts to find work in his or her field, and that such efforts must prove fruitless, prior to going to school for alternative job training in order to satisfy his or her mitigation obligations.[8] However, at least one recent decision indicates that courts may consider the economic realities of the current weak job market in easing this burden on plaintiffs.

In *Siegel v. Edmark Auto Inc.*,[9] the plaintiff, who had been employed as an Internet sales associate by the defendant, claimed that her employment had been terminated in violation of the Family and Medical Leave Act. Following the termination of her employment, the plaintiff quickly enrolled in dental assistant school. The plaintiff presented expert testimony that, as she was terminated during a significant recession, it was unlikely that she would have been able to mitigate her damages. The defendant presented alternative expert testimony based upon what the defendant's expert deemed to be plaintiff's "failure to perform a job search that included her best set of skills and experience, which was sales." In ruling on defendant's motion for summary judgment, the court rejected the defendant's argument that plaintiff had failed to mitigate her damages by enrolling in dental assistant school, holding that a jury could find that the plaintiff had acted reasonably "especially in light of the economic conditions at the time." Thus, the Court did not strictly impose the requirement that the terminated employee seek new employment in the same field in order to mitigate her damages.

In *EEOC v. Dresser Rand Co.*,[10] a federal court in the Western District of New York was faced with the somewhat related question of whether a terminated employee can be required to seek retraining in order to properly mitigate his or her damages. In this case, the defendant terminated the plaintiff from his position as a machinist, allegedly in violation of Title VII. In arguing that the plaintiff had failed to mitigate his damages, the employer offered expert testimony that if plaintiff had obtained training to operate computer numerical controlled ("CNC") machines, which training would have entailed 13 credit hours of courses, he would have improved his employment prospects. In rejecting this argument, the court held that plaintiff's "failure to pursue CNC training is not relevant to show that he failed to mitigate his damages, since he was not under any obligation to seek such training."

Notwithstanding the fact that the employer's argument was unsuccessful in the *Dresser Rand Co.* case, given that so many of those who have not dropped out of the labor force entirely during the current economic slowdown have accepted employment and have sought job training that they would not have accepted or sought in a vibrant economy, courts should expect to hear more arguments similar to those in *Dresser Rand Co.* in the future. Just as it does not sound unreasonable for a terminated employee to claim that it would be futile to seek new employment in certain fields in the current job market, it does not seem unreasonable for employers to argue that, given the current economic situation, terminated employees should be required to take steps to make themselves more employable.

Conclusion

While the fundamentals of the law of mitigation of damages in employment discrimination cases are likely to remain unchanged, as courts are presented with litigation arising in the face of a prolonged period of high unemployment, the courts are likely to hear arguments that were not made in the past. Thus far, courts have appeared to be sensitive to the economic realities that exist. Counsel for employers and employees alike should be aware of the developing law coming from these decisions and should not hesitate in making creative arguments attuned to the present realities of the depressed job market.

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1. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982).
2. *Dailey v. Societe Generale*, 108 F.3d 451, 456 (2d Cir. 1997) (citations and quotations omitted).
3. *Ford Motor Co.*, 458 U.S. at 231-32.
4. *Dailey*, 108 F.3d at 456.
5. *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47. 54 (2d Cir. 1998).
6. Phil Izzo, Why Did the Unemployment Rate Drop?, The Wall Street Journal, Jan. 7, 2011; Arthur Delaney, Since 2009, Unemployed More Likely to Drop Out of Labor Force than Get Jobs, HuffPost Politics, Sept. 20, 2010.
7. 2008 U.S. Dist. LEXIS 54976, 20-4 (E.D. Mich. July 15, 2008).
8. *Dailey*, 108 F.3d at 457.
9. 2011 U.S.Dist.LEXIS 888324 (D. ID Aug. 8, 2011)
10. 04-CV-6300 (W.D.N.Y. Aug. 10, 2011)