THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
GEORGE F. WALKER Employee	OEA Matter No. 1601-0046-97R16
v.	Date of Issuance: February 25, 2021
OFFICE OF THE CHIEF TECHNOLOGY OFFICER[1] Agency	JOSEPH E. LIM, ESQ. Senior Administrative Judge

Omar Melehy, Esq., Employee Representative
Frank McDougald, Esq., Agency Representative

SECOND INITIAL DECISION ON REMAND[2]

PROCEDURAL HISTORY

This matter has a long and complex procedural history. On November 14, 1996, George F. Walker ("Employee"), a Supervisory Computer Specialist, DS-14, Step 6, in the Career Service, filed a petition for appeal with the Office of Employee Appeals ("OEA") for the Office of the Chief Technology Officer's ("OCTO" or "Agency") final decision to remove him from service, effective November 1, 1996. The cause for removal was: "Insubordination, to wit: Failure or refusal to comply with written instructions or direct orders by a superior."[3] This matter was originally assigned to Administrative Judge Kenneth Hughes but was reassigned to Senior Administrative Judge Daryl J. Hollis after Judge Hughes left the Office's employ. After a January 6, 1998, evidentiary hearing, Judge Hollis issued an Initial Decision (ID) on October 19, 1998, in which he held that Agency had failed to prove its charges against Employee. He reversed the removal action and ordered Agency to reinstate Employee to his position of record with all appropriate back pay and benefits.

Agency filed a Petition for Review of the ID with this Office's Board. On April 30, 1999, the Board issued an Opinion and Order on Petition for Review (O&O) in which it affirmed the ID without comment. Agency timely appealed to the D.C. Superior Court. On October 30, 2000, Judge Richter

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[1] On March 26, 1999, the Department of Administrative Services (DAS) was subsumed by the Office of the Chief Technology Officer (OCTO).

[2] This decision was issued during the District of Columbia's Covid-19 State of Emergency.

[3] In addition to insubordination, Agency initially cited as cause for Employee's removal the following: 1) Inexcusable neglect of duty; 2) Dishonesty; and 3) Misuse, mutilation, of destruction of District property, public records, or funds. *See* the June 20, 1996, advance notice of proposed adverse action. However, in the agency's final decision, the deciding official dismissed these latter three charges and removed Employee for insubordination alone.

issued an Order affirming this Office's ID. [4] In his Order, he affirmed the OEA's order to reinstate [Employee] to a similar and equal position, denied Employee any award for pain and suffering, and remanded the case for a determination of whether and to what extent [Employee] made efforts to mitigate his damages after his termination. On November 27 and 28, 2000, Agency and Employee respectively filed with the Superior Court a Motion for Reconsideration of Judge Richter's October 30, 2000 Order. On January 2, 2001, Judge Richter issued a second Order in which he affirmed his October 30, 2000, Order and denied both reconsideration motions.[5]

After the parties failed to settle despite months of mediation and an offer of reinstatement to Employee to a Data Center Services Manager, DS-301-14, Grade 14, Step 6 position, Judge Hollis held an evidentiary hearing on January 30, 2003, and October 20, 2003. On December 16, 2004, Judge Hollis issued an Addendum Decision ("AD") whereby he ordered the Agency to place Employee in the position of Data Center Services Manager, DS-301-14, Grade 14, Step 9 within OCTO. He also ordered Agency to reimburse Employee all backpay and benefits lost as a result of its improper removal action, but only from November 1, 1996 to March 26, 1999, because he found that Employee failed to mitigate damages beyond those dates.

Both parties appealed the AD and on April 14, 2008, this Office's Board issued an Opinion and Order on Petition for Review (O&O) in which it affirmed the AD. Again, both parties appealed the decision to the Superior Court. Employee argued that it was the Telecommunications Manager position, not the Data Center Services Manager position, that was comparable to his previous position. He also argued that the Federal Back Pay Act governed his entitlement to back pay. Agency argued that Employee was entitled only to back pay through June 11, 1997, and that the Data Center Services position was the right one.

On April 20, 2009, Associate Judge Neal Kravitz of the D.C. Superior Court affirmed the AD in part and vacated and remanded in part. He held that neither the Data Center Services Manager position nor the Telecommunications Manager positions were comparable to Employee's previous position and ordered this Office to identify a truly comparable position to which Employee can be reinstated. Judge Kravitz also vacated Judge Hollis' decision on back pay and ordered this Office to consider whether the Federal Back Pay Act governs whether Employee had a duty to mitigate his damages and, if so, whether he satisfied that duty.

This matter was assigned to me on July 13, 2009. Following a status conference on July 20, 2009, the parties engaged in mediation talks, but failed to reach an agreement. By mutual consent of the parties, Employee was reinstated as a Telecommunications Specialist, CS 14/6, on November 16, 2009. Thus, the only outstanding issue was back pay. After another status conference on May 14, 2010, the parties briefed the applicability of the Federal Back Pay Act to this matter. Based on the parties' request, an Evidentiary Hearing was held on July 27 and 29, 2011. The record closed on

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[4] Employee Exhibit 38. *D.C. Department of Administrative Services v. George Walker and Office of Employee Appeals*, Civil Action No. 99-MPA-10 (D.C. Superior Ct. October 30, 2000) Order at 8.

[5] Judge Roberts also declined to consider Employee's request for "litigation expenses . . . incurred [while] acting as *pro se* counsel while litigating a 'frivolous and wasteful' lawsuit." January 2, 2001 Order at 6.

September 7, 2011, after the submission of closing arguments. On November 7, 2011, I issued an Addendum Decision on Remand ("ADR") that found that Employee had the duty to mitigate his damages and that he has failed to meet his burden of proof that he tried to mitigate his damages and thus, did not merit back pay.

On March 20, 2012, Employee appealed the November 7, 2011, Addendum Decision on Remand to the D.C. Superior Court. On July 2, 2012, the Superior Court issued a Memorandum Opinion and Order Affirming In-Part and Reversing In-Part Agency Decision.[6] The Superior Court affirmed that Employee was subject to the District Personnel Manual ("DPM") and that under both the DPM and the Federal Back Pay Act, Employee had a duty to mitigate his damages by "seek[ing] alternative employment with reasonable diligence."[7] However, the Court also found that Employee was entitled to full restoration of his service credit or leave. Employee appealed that decision to the D.C. Court of Appeals on or about July 18, 2013.

On November 25, 2015, the District of Columbia Court of Appeals ordered this Office to re-adjudicate Employee's back pay claim and ordered Agency to restore Employee's annual leave accrued during his 13-year separation period pursuant to the rules in the Federal Back Pay Act.[8] The Court held that on the issue of Employee's back pay claim, it was the Agency, not Employee, who had the burden of proof on whether Employee tried to mitigate his damages. The Court also held that instead of a sweeping finding on the mitigation question, the undersigned was required to make a period by period determination. On February 29, 2016, the D.C. Superior Court remanded the matter back to OEA pursuant to the D. C. Court of Appeals decision. On December 31, 2016, Employee retired from Agency.

On October 16, 2019, Employee filed a Petition for Writ of Mandamus asking the District of Columbia Court of Appeals to order OEA to implement the Court's remand order. OEA had no record of its being served with either of the D.C. Court of Appeals or D.C. Superior Court remand orders; thus, OEA was not aware of any remands until sometime around October 2019. Between November 25, 2015, and October 2019, neither party notified OEA about the Court's outstanding remand order.

On November 8, 2019, I issued an Order for a status conference to be held on November 25, 2019. At the November 25, 2019, status conference, I set a January 6, 2020, deadline for the parties to ascertain the status of Walker's annual leave. Upon Agency's request, Employee consented to an extension of the deadline to January 31, 2020.

On December 11, 2019, the D.C. Court of Appeals denied Employee's Petition for Writ of Mandamus after being notified that OEA was never served with the remand order and that the matter was proceeding forward at the OEA. On February 8, 2020, I held another status conference and issued an order setting April 10, 2020, as the deadline for the parties to submit stipulations of fact, witness

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[6] *George Walker v. Office of the Chief Information Technology Officer*, *et al*., Case No. 2011 CA 00494 P (MPA) (D.C. Super. Ct. July 2, 2012).
[7] *Id*. at p. 17.
[8] *Walker v. Office of the Chief Technology Officer*, 127 A.3d 524 (D.C. 2015).

lists, exhibit lists, and to identify proposed hearing dates. After requests for postponements by the parties, I held an Evidentiary Hearing virtually on June 20 and 21, 2020, via WebEx due to the Covid-19 operational status. On November 6, 2020, the parties agreed on $139,603.49 as the amount to be paid out for Employee's annual leave hours to which Employee is entitled. The record was closed after the parties submitted their written closing arguments on January 29, 2021.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

1. Whether Agency met its burden of proof in proving that Employee failed to make reasonable efforts to mitigate his backpay damages following his removal.
2. If so, what is the proper amount of backpay damages to be awarded to Employee following his removal.

POSITIONS OF THE PARTIES

Because the D.C. Court of Appeals has affirmed that Employee was required to mitigate his backpay damages, Employee now asserts that he had indeed made reasonable efforts to mitigate them. Therefore, he is entitled to a significant amount of back pay, with some set off based on the amount of money he earned while he was not in Agency's employ. He disagrees with Judge Hollis' evidentiary finding and the undersigned's evidentiary finding that he had failed to make reasonable efforts to mitigate his damages after March 26, 1999. Agency counters that Employee has a duty to mitigate his damages but failed to make reasonable efforts to do so, and thus should not be awarded any back pay. However, with regards to Employee's leave benefits, both sides have agreed on $139,603.49 as the amount to be awarded for Employee's leave.

SUMMARY OF TESTIMONY AND OTHER EVIDENCE[9]

Job Market for Employee 1997 to 2009

Glen Carter ("Carter") July 29, 2011, Transcript Vol. 2, pgs. 311-343:

Carter was the Deputy Chief Technology Officer at OCTO from April 2009 to December 2010. Mr. Carter described the current responsibilities of Employee's job as a Telecommunications Specialist and he indicated that the D.C. Government had many job openings during the relevant period for which Employee was qualified. As for the Monster.com website, he stated from personal experience that once he lets his account lapse, he cannot get back in to update his account.

[9] For a more coherent and seamless discussion of testimony, the testimonies and exhibits of 2011 and 2020 are combined and summarized.

Debbie Moreau ("Moreau") July 29, 2011, Tr. pgs. 231-311 and July 20, 2020 Tr. 15-110.

Moreau worked as a Vocation Rehabilitation Counselor and was certified as a disability management specialist, a case manager, and held certifications with the Department of Labor's ("DOL") Office of Workers' Compensation Program.[10] Moreau has also testified as an expert witness before both Federal and State tribunals on workers compensation cases, disability rehabilitation, and vocational evaluation matters. In her work, she applies her expertise in assessing what is an appropriate job search. She was certified as an expert witness for the narrow purpose of giving testimony concerning what is an adequate job search for an unemployed individual who is actively seeking employment.

Moreau stated that Employee's background was in information technology ("IT") and telecommunications. She took note of the fact that Employee's resume reflected an impressive work history and education for the fields of telecommunications and information technology that he was pursuing. Employee's resume showed that he worked for both private industry, Federal government, and the D.C. government in several capacities, among them: Systems Engineer, Deputy Administrator, Telecommunications Chief, Manager of both Audit and Operations Division, etc. Employee has a degree in Engineering Mathematics and Physics, and 18 hours of a Masters in Business Administration. Thus, judging from these qualifications and work experience, Ms. Moreau determined that Employee qualified for many managerial and technical positions in the fields of computer and information systems management, network administration, and computer support specialist, among others.

In doing a labor market analysis for the field of information technology, Moreau used the U.S. Bureau of Labor Statistics ("BLS") to show that in the Washington. D.C. metropolitan area alone, careers in Information Technology grew much faster than average on a nation-wide basis for the period of 1996 through 2006.[11] Moreau said that the 1996 to 2006 BLS stats show above average job growth in IT throughout the nation. Subsequent BLS statistics for the period of 2003 to 2009 showed that Management Information Systems jobs for the D.C. area increased by 19.93%; Computer Support Specialists increased by 21.78%; and Network and Computer Systems Administrators increased by 60%.[12]

Moreau testified that she reviewed the position descriptions prior to determining if Employee had sufficient education, work experience, and transferable skills to compete for the open positions available. Moreau identified ninety-two positions that were available for Employee to apply for. Additionally, data from the BLS reflected employment in three areas: computer and information systems managers, network and computer system administrators, and computer

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[10] Agency Exhibit No. 12. Moreau resume.

[11] Table 3 occupational employment statistics for network and computer systems administrators on a national and D.C. level show an 30.64% increase nationally and 50% increase in the D.C. the District always had a strong job market for IT.

[12] *See* July 29, 2011, Agency Exhibit 13.

support specialists. She explained that the BLS provides employment projections for a ten-year period of time from 1996 to 2006 and 2008 to 2015. According to Moreau, the BLS illustrated that careers in IT grew faster than average on a nationwide basis. The BLS provided a breakdown of how many people were employed in different positions. For instance, in 2003, there were 266,000 people working as computer and information systems managers. By 2009, the number of persons employed were 287,210. While the nationwide increase for IT jobs was 7.97%, the District of Columbia saw almost a twenty percent increase net growth of those particular positions.

Moreau stated that the District has always had a very strong labor market for positions within IT. She noted that while there have been some years that there was a stronger increase in terms of job availability, there has always been a market for IT and related computer fields. However, the years from 2000 to 2002 were referred to as the dotcom bust. There were jobs available, but during that two-year time period, the growth was not exponential. Nonetheless, Moreau testified that although there was variability in the IT job growth, there was always a job market for IT, even during the dotcom bust of 2000-2002.

Anthony Bird ("Bird") July 20, 2020 Tr. 114-204.

Bird testified that he worked as a vocation rehabilitation counselor and vocational consultant.[13] Additionally, he was a certified rehabilitation Counselor, which is the national standard for the field that he works in. Bird explained that a vocational rehabilitation counselor was principally involved in assisting individuals with handicapping conditions to find suitable work. He stated that a vocational consultant was an individual who used experience and education to develop opinions of what people can do and what they could learn in litigated cases. Bird explained that vocational assessments were the same in every case irrespective of the type of case. In each case, he was hired to assess and determine what type of employment an individual could hold and what they could earn provided their circumstances.

Bird opposed Moreau's assertion that Employee would have secured a job. He then clarified that he believed Employee would not have secured a position comparable in terms of function and salary to the one that he held with Agency in 1996. In his view, when an individual holds a senior-level position, it has an extremely serious impact on their future employability. Bird explained that prospective employers would be suspicious as to why someone would leave a senior position on a career track to pursue a comparable position. He stated that when an employee is terminated, they usually have no references from their last employer. This was the case with Employee. Bird stated that Employee carried a stigma of having been terminated from his last significant job. Bird stated that Employee's termination would have become known, and his age would be considered a factor to prevent him from securing a comparable job. He indicated in his report that he considered Employee employable in lesser jobs, but not with positions comparable to working at Agency.

[13] Employee Exhibit 41, Bird Resume.

Bird stated that from the mid-90s to 2000, the labor market for IT jobs was severely limited due to layoffs. Dotcom companies closed and the IT labor market suffered. Moreover, strong managers, supervisors, and directors that were laid off were not able to replace their positions until 2003. Bird asserted that the labor market was so bad due to the 2007 recession that Employee would not have found a comparable job during that time frame.

Bird testified that the likelihood of Employee securing employment comparable to his position with Agency in 1996 during the period of the dotcom bust was two percent. From 2002 to 2003, the likelihood would have been below ten percent (10%). He noted in his report that Employee would have made approximately fifty thousand dollars ($50,000).[14] Bird further explained that an employer would have hired Employee in the IT field without having to pay him a larger salary due to the scarcity of available work.

Bird admitted there would be thousands of jobs available for Employee's background and experience from 1996 to 2007. IT job growth before the dotcom bust was strong, and it recovered around 2003. He admitted there was a modest drop in jobs due to the dotcom bust. Bird believed Employee could get an IT job after the 2007 great recession, but with lesser pay.

Bird believes that Employee would have gotten a job, but in a lesser capacity than he was already working. He believed that Employee would have earned half of what he was earning in his chief position with Agency. Bird reiterated that Employee would have secured a job, but it would not have been comparable to the one with Agency at the time of his termination. He agreed that Employee should have applied for more jobs when it became evident that his business ventures were not working.

Employee's Efforts to Mitigate His Damages

Debbie Moreau ("Moreau") July 29, 2011, Tr. pgs. 231-311 and July 20, 2020 Tr. 15-110.

As a licensed vocational counselor equipped to assist people return to work, Moreau conducted vocational assessments by speaking with individuals to obtain information regarding their education, employment history, and demographic information. Once Moreau developed the individual's profile, she determined which type of positions would be appropriate for them to pursue. Adhering to the standards set by the Department of Labor and the Maryland State Workers Compensation, Moreau stated that she assisted individuals to return to work. She was required to determine if an individual made a reasonable effort to find work.

Moreau did a sampling of the jobs advertised in the mega employment section of the Washington Post during the relevant time period and identified 92 positions over the course of the 25-week period that were specifically suited to Employee's qualifications. These advertised positions do not even include the positions posted online. The years 2003 to 2009 covered 345 weeks. If Employee merely did five applications per week, he would have applied for approximately 1600

[14] July 20, 2020, Tr. at Pg. 199, line 18.

positions. Ms. Moreau pointed out that based on Employee's own answers in his deposition, he made 100 applications from October 20, 2003, to November 1, 2009, versus the 1600 that he could and should have done. When asked to verify that, the witness read from page 14 of the Employee's deposition:

> Question: "So, you would say then that your best estimate is approximately 25 paper applications and approximately 75 online or Internet applications?"
>
> Employee: "Yes, my best estimate."
>
> Question: "And that would be from the period October of 2003 through the date of your employment with OCTO on or about November of 2009?"
>
> Employee: "Yes, to the best of my knowledge."

Moreau explained that both the DOL and the State of Maryland guidelines expect individuals to perform work search from four to six hours a day. She counsels her clients that it is a full-time job to get a job, requiring a minimum of four to six hours a day. She further explained that some commissioners in the State of Maryland reasoned that eight hours of work search daily was required to be considered a reasonable job search. Individuals were instructed to contact ten to twenty prospective employers and submit a minimum of three to ten online or paper applications each week. Job applicants were also expected to avail themselves of any available resources. Moreau testified that for an adequate job search, an applicant must make 10 to 20 employer contacts a week, submit 10 applications a week, and follow up on those applications. These parameters are based on the Department of Labor's and Maryland workers compensation's standards.

Moreau testified that she was asked to provide an opinion on the adequacy of Employee's job search. She reviewed Employee's resumes, education, training, work history, and transferrable skills. Moreau noted that Employee's early 50s age was considered an asset since he was applying for supervisory positions. Moreau stated that she was asked to identify jobs that Employee was qualified for from October 2003 to November 2009. She explained that there were several positions that were available for customer service division chief. Additionally, there were numerous positions available that involved the supervision of seven or more people. However, Moreau could not definitively provide positions that required management of seven of more people without contacting the employer. She explained that the senior personal computer specialist, the customer service division chief, project manager, senior systems administration network intra-ops manager telecommunications account manager, systems administrator, and telecom customer service head were positions that involved supervision.

Moreau recalled that Employee submitted twenty-five paper applications and seventy-five online applications between the years 2003-2009. After assessing Employee's work search efforts, she concluded that Employee spent an extremely limited time applying for positions based on the one hundred applications over a six-year period. Pursuant to the Department of Labor guidelines,

the percentage of time that Employee spent looking for work represented less than seven percent of what is required for a suitable job search. Moreau explained that the total effort of one hundred applications equates to an average of more than one application per month. In order to be in compliance with the standard, Employee would have needed to submit twenty applications per month.

Moreau recalled Employee discussing his self-employment during a deposition where Employee stated that he started two companies.[15] Employee told her that he spent eighty percent of his work time with the Thomas Walker and Company, five percent on managing the telecommunications enterprise management company, and one percent on pre-paid legal services. Based on Employee's deposition testimony, he earned approximately ten thousand dollars during the six-year period. Employee provided in his deposition that fourteen percent of his time was dedicated to seeking gainful employment.

Moreau stated that employers typically requested references from a prior employer after the individual has applied. If an individual was unemployed for an extensive period, it could negatively affect their potential ability to gain employment. In Employee's case, he had his own business and would be able to mitigate the fact that he had been unemployed for an extensive period. She opined that Employee's termination for misconduct would not have necessarily affected his ability to gain employment especially since he was wrongfully terminated. She posited that there were a lot of high-level individuals who were terminated and were able to find employment.

Moreau argued that had Employee earned a reasonable income with his self-employment venture, she would not have determined that Employee needed to work. However, this was not the case since Employee made ten thousand dollars in a six-year period and no one could live on that. She pointed out the fact that Employee filed for bankruptcy and almost lost his home was more proof that he was unsuccessful in his business. Moreau reasoned that someone who was self-employed but still could not pay their mortgage and other living expenses should seek employment.

Moreau stated that Employee had some of his business ventures while he was working with Agency, so she viewed the income as extra money. Moreau contended that in a job interview, Employee would be able to inform prospective employers that his business did not generate the level of income that he was hoping for. Thus, he would be able to use his business to aid him in gaining employment. Moreau reiterated that Employee had the education and skills to obtain another job. She stated that at the time it was an excellent job market and Employee was well suited in the labor market but did not make any effort to get the job. She noted that absence or termination from a job does not necessarily impact a job search

Moreau's expert opinion is that Employee's job search effort was very minimal for the years 2003 to 2009, and that you can't get a job if you don't look for a job. She said that Employee's job

[15] Agency Exhibit 17, Employee Deposition December 14, 2010.

search efforts were less than 7% of what would be required for job search. She emphasized that the recommended job search was at least 20 applications per month, while Employee averaged one per month.

Anthony Bird ("Bird") July 20, 2020 Tr. 114-204.

Bird testified that he did not address the adequacy or lack of Employee's job search in his report. Bird provided that the term adequacy connotes that if one applied for an adequate job search, it would result in a desired outcome. He explained that adequate job search does not apply in this matter because irrespective of the job search, it would not result in the desired outcome, and the desired outcome is to secure a comparable position. Because of the senior level Employee worked at, Bird firmly believed that prospective employers would have found out about his termination. He also acknowledged that this was not always the case because some individuals were hired without employers finding out.

If an individual was not employed, Bird advised clients to search for work for at least six hours per day, five days per week. Some of his colleagues reasoned that eight hours should be spent; however, Bird stated that seeking employment was difficult and full of rejection. According to Bird, submitting two applications per week would have been considered sufficient for work search.

Bird conceded that Employee did not perform an adequate job search since he only filed one hundred applications from 2003-2009. He stated that there were hundreds of jobs available comparable to Employee's position. If Employee were called for an interview, the prospective employer would not readily know from Employee's resume that he was terminated because it would have not been indicated on his resume or application. He explained that there are sections on an online application that may ask for a reason why the individual left their employer and Bird counseled the prospective employee to note on the application that it would be discussed during the interview. Bird also stated that in his report, he had indicated that Employee could have obtained an IT position that paid about $50,000 a year.[16]

George Walker ("Employee") July 27, 2011 Tr. pgs. 44-200; July 29, 2011 Tr. pgs. 343-376; July 21, 2020 Tr. 4-48.

Employee described his extensive 35 years work experience in the information technology field, starting from his federal government position as Information Technology Planning Manager to Telecommunications Chief with the Agency. He occupied the latter position for the two years immediately preceding his removal. The job of the chief was to report to the director of the Department of Administrative Services. He supervised seven full time employees. Employee was responsible for their performance review, recruiting, and hiring. He testified that he wrote the team manual, telecommunications policies and standards, for the document that set the systems to move the District from analog communications to digital communications. In 1996, Employee was in a

[16] July 20, 2020, Tr. at Pg. 185, line 4.

Grade 14, Step 6. Historically, he received a two-step increase every year based on having outstanding performance evaluations.

Employee stated that Agency offered him a position as a data center manager that according to Agency was a reinstatement. Employee did not accept the position despite having the same salary as his prior position since it was not a supervisory role. The position appeared to only need one person to ensure that all of the equipment ran properly. He believed that working as a data center manager would have been a major demotion from his position as he believed it was a babysitting computer position. Employee also believed that accepting this position would be held against him in trying to get his prior position back. Employee returned to Agency in 2009 and that he was part of the Civil Service Retirement System.[17]

From November 1, 1996, when he was terminated, though October 19, 1998, when Judge Hollis issued a decision reinstating Employee, Employee testified that he spent about 80 percent of his time litigating his case through the OEA.[18] Employee represented himself and spent his time performing research to aid him in his efforts to get his job back.[19]

November 1, 1997 to December 31, 1997

Throughout 1997, Employee submitted ten to fifteen paper applications per week.[20] Employee was simultaneously submitting online applications and had submitted his resumes on various job sites such as Monster.com, HeadHunter.com, Job.com, and CareerBuilder.com.[21] In addition to his job search, he was acting as his own lawyer in appealing this matter before this Office from November 1996 to late 1998. His *pro se* efforts took 16 hours of his time per week.

In connection with efforts to obtain employment from St. Mary's County, Maryland, in 1997, he was informed by a member of their Human Resources Department, off the record, that despite his interest in Employee's qualifications he couldn't take a chance on hiring Employee due to a negative reference he had received from one of Employee's former supervisors.[22] Other than receiving acknowledgments indicating that his applications had been received, he received no affirmative responses, for either interviews or job offers in 1997.[23]

Employee made various attempts to earn income outside the telecommunications field after having little success in gaining employment following his removal in November 1996. Employee testified that he founded Walker Home Improvements in 1997.[24] While the business was still technically in operation up to 2009, Employee performed most of his work in connection with the

[17] July 2020 Agency Exhibit 8. Employee letter dated 11/12/2009.
[18] July 27, 2011 Tr. at 68:6-18.
[19] July 27, 2011 Tr. at 67:12-20, 68:12-14.
[20] July 27, 2011 Tr. at 65:3-7.
[21] July 27, 2011 Tr. at 65:7-14.
[22] Dec. 14, 2010 Deposition of Walker, Agency Exh. 17 at 73:4-17, July 27, 2011, Tr. at 62:21 – 63:22.
[23] July 27, 2011 Tr. at 65:3 – 67:1; *see also* Employee Exh. 1 – 13.
[24] July 27, 2011 Tr. at 86:12-15.

business from 1997 to 2003. The work included creating and printing business cards, stationary, invoices, and flyers, putting up promotional materials in the surrounding neighborhoods, and actually performing various types of repairs, along with some minor building projects.[25] Employee stated that he grossed approximately $8,000 from its inception to 2003.[26] Employee testified that this enterprise involved handyman work that he did, primarily for his friends and neighbors. Based on the invoices contained in the exhibit, Employee received about $834.90 from this endeavor. Employee testified that he netted $3,500 from operating this business for six years. Employee did not break down his business income per year.

1998

Throughout 1998, he submitted three to four written job applications per week and in addition, continued to post his resume online on four web sites (monster.com, headhunter.com, careerbuilder.com and USAJobs.gov).[27] Though he did receive an interview from AT&T for a telecommunications position, Employee was not offered the position and did not receive any other interview or job offers that year.[28]

Another business that Employee started was the Telecommunications Enterprise Management Group, LLC ("TEMG"). Employee testified that TEMG is a "residential telecommunications cabling business" that was incorporated in 1998. Further, he had to have a Master Electrician's license to run this business, and therefore he had to study for and pass an exam in Prince Georges County, Maryland in order to get his license. On direct examination, Employee testified that preparing for and taking the exam consumed about six months spread over approximately a year. However, on cross-examination, he testified that it took about a year and a half, and that he devoted about 20 to 30 hours per week to the process. Additionally, as part of his preparation he attended various seminars. On cross-examination, Employee admitted that he had not kept any records of his exam preparation or the start-up time for TEMG, nor had he kept records of his claimed seminar attendance. As of January 30, 2003, Employee had not yet realized a profit from the company.

1999

Throughout 1999, Employee again sent out about three to four job applications per week, while continuing to post his resume online.[29] In fact, he even applied to a few government positions posted on the Office of Personnel Management ("OPM") website, though, as expected, he did not receive any responses.[30]

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[25] July 27, 2011 Tr. at 88:2-11; *see also* Employee Ex. 24 Invoice.
[26] July 2011 Employee Ex. 24 contains documents pertaining to "Walker Home Improvements".
[27] July 27, 2011 Tr. at 69:15 – 71:2.
[28] July 27, 2011 Tr. at 73:6 – 74:12.
[29] July 27, 2011 Tr. at 74:13-17.
[30] July 27, 2011 Tr. at 75:3-7.

Beginning in 1999, Employee was also involved in Pre-Paid Legal, as a salesman (official title was "associate"). and 2000 up until 2003[31], Employee started selling memberships for Pre-Paid Legal, an organization which provides reduced legal fees to its members. Employee Exhibits 26 and 27 consists of documents relating to his participation in "Pre-paid Legal Services", which he described as a "multi-level marketing" in which he sold memberships to others.[32] Employee also stated that in all that time, he made only $700.[33] During cross-examination, he modified this estimate to between $500 to $700.[34]

As a salesman/associate for Pre-Paid Legal, Employee was tasked with encouraging consumers to buy memberships in the company's pre-paid legal plans and/or join the company as associates themselves, for which he received a small commission.[35] In connection with this work, Employee was granted licenses to sell the plans in Virginia, Mississippi, Illinois, Alabama and Arkansas; in Maryland, he did not need a license.[36]

In 1999 Employee testified that he also began an internet-based company called the African American Business Directory ("AABD"), an online directory for African American-owned businesses to list their businesses for consumers. The documents show that the parent company for the AABD is "Telecommunications Ventures Group, LLC" and Employee averred that he is the sole owner of both the parent company and AABD. Despite efforts connected to the enterprise, including developing and creating his own website, attending functions to hand out cards and flyers to promote the site, Employee was unable to make the kind of monetary investment necessary to make the enterprise profitable and it failed.[37]

2000

Employee continued his job search in earnest, sending about two paper applications per week or approximately nine paper applications per month, despite his ongoing lack of success in finding employment, while continuing to post online applications to Monster, HeadHunter, Careerbuilder, and Job.com.[38] While he received one interview in 2000 with Fox Technologies for a Computer Specialist Position, he did not receive the job, nor did he get any other interview or job offers that year.[39]

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[31] Employee seemed unclear about the year he started or ended a business venture. At one point, he testified that he started this business in 1999. A few minutes later, he would testify that he started that same business in 2000. He was equally indefinite when he started talking about the start dates of his other business ventures. Also see July 27, 2011 Tr. Pgs. 93-94 and Dec. 14, 2010 Deposition of Walker, Agency Exh. 17 at 62-63.

[32] July 27, 2011 Tr. at 89.

[33] July 27, 2011 Tr. at 90.

[34] Dec. 14, 2010 Deposition of Walker, Agency Exh. 17 at 62-63.

[35] July 27, 2011 Tr. at 89:6 – 90:3; *see also* Employee Exhs. 25 – 27.

[36] Dec. 14, 2010 Deposition of Walker, Agency Ex. 17 at 91:1 – 92:1, July 27, 2011 Tr. at 90:4-11, Employee Exh.26-27.

[37] July 27, 2011 Tr. at 99:16 – 101:9; *see also* Employee Exh.14.

[38] July 27, 2011 Tr. at 77:6-22.

[39] July 27, 2011 Tr. at 78:10 – 79:4.

2001

In 2001, Employee continued to send about two paper applications per week while still posting to the same online job sites.[40] Employee again received an interview, this time with an IT consulting firm, Turnbull and Associates, but again was not offered a job and received no other interviews or job offers that year.[41]

In 2001, 2002, or 2003,[42] Employee started "Telecommunications Enterprise Group," a residential construction wiring company that does home automation and for which he obtained his masters electrician license. Employee Ex. 14 and 15 consists of various documents, his licenses and an invoice pertaining to the business. From its incorporation to its demise in 2008, he netted only $5,500 from this business.

2002

Employee testified that he created another business, the African-American Business Directory (AABA), before 2003.[43] Employee continued to average about two paper applications per week and still posted to the same online job sites, despite his continued lack of success.[44] Employee received two interviews in this year, first from Maxima, for a Computer Specialist position and then with Washington Homes, for a construction supervisor position.[45] Once again, he did not receive either position and no other interviews or job offers.[46] Employee also formed the Telecommunications Enterprise Group in 2002 which specialized in residential home automation technology and wiring, and Employee remained active in the business from 2003 up through 2008.[47] Not only did Employee spend his time marketing the business by setting up a website and contacting home developers, he also obtained a master's electrician's license so he could perform work for the business.[48]

For all his efforts, he only received six interviews, one each in 1997, 1998, 2000, 2001, and two in 2002. But none of the interviews yielded any job offers. He further testified that although he felt that he was qualified for every job for which he applied, one interviewer from St. Mary's County, Maryland, indicated to him in 1997 that his negative reference from the D.C. Government caused his rejection.

January 1, 2003 to November 1, 2009 Job Search Efforts by Employee

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[40] July 27, 2011 Tr. at 79:5-9.
[41] July 27, 2011 Tr. at 79:11-14.
[42] Employee gave different start dates at different points in his testimony.
[43] Employee Dec. 14, 2010, deposition, Agency Exh. 17 at 87.
[44] July 27, 2011 Tr. at 79:21 – 80:2.
[45] July 27, 2011 Tr. at 80:6-14.
[46] July 27, 2011 Tr. at 80:4-18.
[47] Dec. 14, 2010 Deposition of Walker, Agency Exh. 17 at 60:2 – 61:16; July 27, 2011, Tr. at 92:2-21, 94:19 – 95:6; *see also* Employee Exh. 14 – 23.
[48] Dec. 14, 2010 Deposition of Walker, Agency Exh. 17 at 60:13 – 61:16.

2003

Employee sent out a total of two paper applications and continued his job search online by posting his resume to the same websites.[49] Employee applied for an Information Technology position, a position similar to the position he held when he was terminated, with the St. Mary's County Government but he did not get the position.[50] Employee was advised by someone in "HR" that he did not get the position because he had received a negative reference from D.C. Government.[51] Employee did not know or remember the name of the HR person who told him about the negative reference.[52]

2004

Employee created another business, Walker Home Improvements (WHI), sometime before October 2003 and performed home improvements and other small home repair projects. Employee earned about $7,000.00, less about $3,500,00 in expenses, over the life of that business. [53] Another business Employee created in 2004 this period was Telecommunication Enterprise Management ("TEM"), a telephone and television electrical wiring business he ran from 2004 to October 31, 2009.[54] He provided a total of $174.95 in expenses and no information regarding its revenues or profits.[55]

2005

Employee applied to IT positions with Prince George's County in 2004 and Lockheed Martin in 2005. While both employers acknowledged his applications, neither employer contacted him further.[56]

2006

Employee's final and most ambitious business enterprise (begun on January 1, 2006 and continued until Employee's return to work on October 31, 2009) was "Thomas Walker and Company (TWC)," a construction company and an authorized dealer of American Elite Homes. the business objective was to build low to moderate income housing.[57] Besides the standard work necessary for the formation and the marketing of the business, Employee spent the majority of

[49] July 27, 2011, Tr. at pgs. 80:19-22, 81:4-12.
[50] Employee Dec. 14, 2010, deposition, Agency Exh. 17 at 72-73.
[51] *Id.*
[52] *Id.*
[53] Dec. 14, 2010 Deposition of Walker, Agency Exh. 17 at 67-68.
[54] Dec. 14, 2010 Deposition of Walker, Agency Exh. 17 at 57-61.
[55] Dec. 14, 2010 Deposition of Walker, Agency Exh. 17 at 60-62. While the figures of $10,000 earnings and $4.50 expenses came up in the deposition, Employee's Exh. 14 showed three receipts with a total of $174.95.
[56] Dec. 14, 2010 Deposition of Walker, Agency Exh. 17 at 77-81.
[57] Dec. 14, 2010 Deposition of Walker, Agency Exh. 17 at 33:4-15.

time contacting government officials and preparing presentations and other materials in an effort to convince the officials to let the company build low to moderate income homes on undeveloped tracks of land, thereby providing the benefit of housing to such individuals and the development of previously undeveloped land.[58] Employee worked about thirty-five (35) hours per week at TWC.[59]

Although the goal of this business was to build low income housing, he was never able to build a single house. Employee stated that the only customer he found for this business was himself. His house was damaged by a fire in 2008, and he rebuilt his house over the course of two years with insurance funds. For operating this venture from 2006 through 2009, the only income TWC earned was $10,000.00, received to restore Employee's fire-damaged house.[60] The net profit of $10,000 was derived from his general contractor's fee. On cross-examination, Employee admitted that he did not look for work during that time and also stated that the fire destroyed all records of his employment search.

In 2006, Employee sent another application to Prince George's County, Maryland, for an IT position but he did not get a job offer.[61] Employee distributed fliers and business cards related to his businesses to various organizations, including fraternities and sororities, but that he did not receive any business offers resulting from that effort.[62] To the best of his knowledge, Employee testified that he submitted approximately 75 job online applications and approximately 25 paper applications between October 20, 2003 to November 1, 2009.[63] For 2003, he did not submit any employment applications prior to October 20, 2003. Employee could not provide a yearly chronology or the specific dates he applied for jobs because he did not have documentation to support a chronology.[64] Instead of a yearly number of online applications submitted, Employee simply estimated the total online applications he submitted during the period.[65] Employee applied for jobs using a resume he could no longer produce because the computer containing his job search information was destroyed in a February 13, 2008 fire at his home.[66] Employee submitted his resume through a site known as "Monster" and he never received any responses to his resume.[67]

Addressing the issue of mitigation of damages, Employee testified that he made reasonable efforts to mitigate them. Employee stated that the one hundred applications that were submitted was in 2003. He asserted that he worked hard between 1996-1999 to gain employment. Employee insisted that during the period he was out of work, he was mitigating his damages against Agency.

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[58] Dec. 14, 2010 Deposition of Walker, Agency Exh. 17 at 32:8 – 54:14, July 27, 2011 Tr. at 101:10 – 105:17; *see also* Employee Exh. 30-31.
[59] Dec. 14, 2010 Deposition of Walker, Agency Exh. 17 at 55-56.
[60] Dec. 14, 2010 Deposition of Walker, Agency Exh. 17 at 41-43, 54,61.
[61] Dec. 14, 2010 Deposition of Walker, Agency Exh. 17 at 79.
[62] Dec. 14, 2010 Deposition of Walker, Agency Exh. 17 at 95-98.
[63] Dec. 14, 2010 Deposition of Walker, Agency Exh. at 14.
[64] Dec. 14, 2010 Deposition of Walker, Agency Exh. at 12
[65] July 20, 2020 Tr. at 34.
[66] Dec. 14, 2010 Deposition of Walker, Agency Exh. 17 at 17, 26.
[67] Dec. 14, 2010 Deposition of Walker, Agency Exh. 17 at 27-28.

From the time of his removal in November 1996 until he was reinstated in 2009 by Agency to a comparable position, he continually sent out resumes for various positions in the telecommunications field that were listed in the newspapers or on-line with job hunting services. He also sent applications to numerous Federal agencies.[68]

However, he did not apply for any positions with the D.C. Government because he figured he did not stand a chance. Employee testified that although he continually applied for positions after the time period shown in these documents, he did not keep any additional records, although he admitted that he could have done so. Later, Employee acknowledged that his job search during the period covered by the Report was limited.[69]

Employee admitted that he never posted any applications on the federal government website for fear that his negative termination information from the D.C. Government might reach them.[70] In 1998, he pared his efforts down to three or four paper applications per week. In 1999 to 2002, he scaled back further to two to three applications a week because "paper applications were expensive."[71] By 2003, he limited his job search efforts mainly to online job searches. He sent out only two paper job applications for 2003 and one each for 2004, 2005, 2006, and 2007. By 2008, he stopped sending out any paper job applications.

Under cross-examination, Employee could not explain why his testimony on the number of job applications he made differed so dramatically between his current answers and his answers during a sworn deposition. Taking a conservative estimate from Employee's testimony of two paper applications a week, this figure multiplied by 52 weeks in a year times 13 years yields 1352 total paper job applications. This was in sharp contrast to his deposition testimony under oath wherein Employee stated he had sent out only a total of 100 job applications both online and paper in six years.[72] Instead, Employee tried to explain it by saying that his "guesses" are better today.[73] He insisted that his testimony at the hearing purporting a significantly higher number of job applications was the more accurate one.

When asked how he managed to survive when he made so little money for 12 years, Employee testified that he took out his $40,000 federal retirement fund in 1997 and survived on that after filing for bankruptcy. He also dated, and then later in 2006, married a woman with a steady job at the D.C. Superior Court.[74] The couple was already dating before Employee lost his D.C. government job.

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[68] July 2011 Employee Exhibits 1 through 13 contains a number of applications for positions and some responses thereto. These documents cover the period from December 12, 1996 through January 17, 1997.
[69] Dec. 14, 2010 Deposition of Walker, Agency Exh. 17 at 94,114.
[70] July 27, 2011 Tr. p. 78.
[71] July 29, 2011 Tr. Vol. 2, p. 358
[72] July 29, 2011 Tr. p. 360-361.
[73] July 29, 2011 Tr. pgs. 350-351.
[74] When pressed, Employee seemed unsure what year he got married.

On cross-examination, Employee admitted that he deposited his retirement money in Angela Thomas' bank account to avoid showing it as income to the bankruptcy court.[75] Employee also said that his house went into foreclosure in 2002 but his then fiancée bought it, and thus it is the house they currently live in. He also asserted that he never had to file any tax returns until 2008 or 2009.

In his deposition, Employee estimated that he spent 80% of time on his Thomas Walker Company business, 5% managing telecommunications enterprise management company, and 1% selling prepaid legal services. His total income from all these businesses was $10,000 over six years. Employee admits spending only 14% of his time job hunting. Employee claimed his job search documents lost in fire. However, his job search would still be preserved on Monster.com but that he got no interviews.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Findings of Fact on the Information Technology Job Market for Employee from 1997 to 2009

Moreau testified that Employee had numerous transferable skills and employability assets. Based on her research, she testified that the number of individuals hired in the D.C. area in Employee's area of information technology ("IT") and computer-systems increased from 1996 to 2009. This was true even during the recession of December 2007 through June 2009. She showed that even a sampling of job openings suitable for Employee's qualifications proved that there was an abundant number each week. Bird, on the other hand, was considerably more pessimistic. Despite Employee's credentials, he estimated Employee's chances of securing comparable employment to be abysmal, as low as two percent during the dotcom bust from 2001 to 2003. However, while Moreau supported her opinion with official Federal government data, Bird merely relied on his personal opinions.

Based on their courtroom demeanor, consistency of testimony, corroboration with the documentary exhibits, I find the testimony of Moreau and Carter to be more credible than that of Employee and Bird.[76] Further, I note that the evidence presented regarding the abundance and steady growth of job openings in the D.C. Metropolitan Area suitable for Employee is supported by government data. I find that the IT job market was robust in the U.S. except for the period of the dotcom bust when the IT job market slowed down considerably but then recovered rapidly. Based on the testimonial and government data presented, I also find that the IT job market for Employee to be more robust for the Baltimore-Washington Metropolitan Area than nationwide throughout the relevant time period.

Findings of Fact on Employee's Efforts to Mitigate His Damages

It is undisputed that Agency paid Employee's backpay from November 1, 1996 to October 31, 1997. Thus, this period is excluded.

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[75] July 27, 2011 Tr. Pg. 147. Although it was never stated explicitly, one can presume Thomas is now his wife.
[76] See also June 2020 Agency Exhibits 4 and 5.

November 1, 1997, to December 31, 1997.

I find that Employee sent out an average of ten to fifteen paper job applications per week. In addition, Employee initiated his home building business. I therefore find that Employee attempted to mitigate his damages during this period.

1998

I find that Employee submitted three to four written job applications per week. He also started TEMG, a cabling business which never made a profit. Because Employee made the required job applications per week, I find that Employee attempted to mitigate his damages in 1998.

1999

I find that Employee again sent out about three to four job applications per week, while continuing to post his resume online.[77] Employee became a Pre-Paid Legal salesman and initiated another business, the AABD. None of these ventures made money. Because of these efforts, I find that Employee attempted to mitigate his damages in 1999.

Employee's testimony that he continued a diligent search for similar employment from the time of his separation until his reinstatement is also rendered suspect by the lack of corroborating testimony and any documents, such as cover letters or responses to his job applications, reflecting a continuing and reasonably diligent search.[78] It is also rendered suspect by his testimony that he devoted a significant amount of time starting and working on the AABD, the TEMG, and other self-employment projects.[79] By Employee's own admission, there were long periods when he did not devote any time at all on job hunting, such as when he spent all his time on legal research from August or November 1996[80] to late 1998, in order to adequately represent himself in this wrongful termination case, [81] or when he devoted all his time and efforts to his business ventures.

2000

Based on Employee's testimony that he sent about two paper applications per week or approximately nine paper applications per month while continuing to post online applications, I find that Employee attempted to mitigate his damages during 2000.

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[77] July 27, 2011 Tr. at 74:13-17.

[78] "[T]he uncorroborated testimony of a party who stands to benefit from an award of . . . back pay should be subject to strict scrutiny." *DeLorean Cadillac, Inc. v. National Labor Relations Board*, 614 F.2d 554, 555 (6th Cir. 1980). (citations omitted). I also note that in his exhibits, Employee included some cover letters but never bothered to include a copy of his resume.

[79] Since Employee's own testimony demonstrated that he netted approximately only $19,700 in the ten (10) years he ran his businesses, these attempts at self-employment were obviously unsuccessful.

[80] At various points of his testimony, Employee gave different dates for the same event.

[81] I note that since November 2002, Employee has been represented by one of several lawyers that he has hired through the years.

2001

Based on his testimony, I find that Employee may have started a residential construction wiring company around this time or the next two years, but this venture generated meager returns. Based on his testimony, I find that Employee attempted to mitigate his damages by sending about two paper applications per week while still posting to the same online job sites. I find that Employee had an unsuccessful job interview. I therefore find that Employee attempted to mitigate his damages in 2001.

2002

Employee also created two businesses, the AABA and the Telecommunications Enterprise Group. Employee continued to average about two paper applications per week and still posted to the same online job sites, I therefore find that Employee attempted to mitigate his damages in 2002.

January 1, 2003 to November 1, 2009

Based on Employee's testimony, he sent out approximately 75 job online applications and approximately 25 paper applications between October 20, 2003 to November 1, 2009. On average, this was slightly more than one submission per month and less than seven percent of the number required for a reasonable job search according to industry standards. If Employee had submitted just five (5) applications during the period, he would have submitted 1440 applications for employment. According to both experts Moreau and Bird, the industry standard for an individual seeking employment is to spend four to five hours every five days searching for work and to apply for at least three to ten jobs per week. I note that even Employee's expert, Mr. Bird, conceded that Employee's job search efforts for the period was inadequate.

Employee's own testimony showed that there were a number of sources available to assist him in a job search: the internet, government job announcements, and direct contact by phone or in person with particular employers to discover any job openings. On cross-examination, Employee admitted that he hamstrung his own job search efforts by refusing to apply for any D.C. government positions, certain Federal positions, and never bothered to seek counseling or assistance from any job search consultants despite the fact that his years of job search yielded not a single job offer.

Although Employee insisted that his job search efforts were adequate, the most glaring and significantly inconsistency was Employee's assertion on the number of job applications he made. During his sworn deposition, Employee asserted that he made only 100 job applications in six years. Yet in his courtroom testimony, Employee insisted that he actually made more than a thousand job applications during that time period. In the courtroom, Employee was given ample opportunities to explain the discrepancy. The only explanation he could come up with was that his memory was better now many years later and that the higher, and therefore more favorable, figure was the accurate one. It is one thing to be off by 5 or even 10%. But a discrepancy of a thousand percent is too glaringly disproportionate to ignore.

Equally damaging is Employee's admission that he hid most of his liquid assets from his bankruptcy trustee. But the most damaging to Employee's credibility is his own inconsistency. He gave different dates for the same event all throughout his testimony. He could not give a month, only the year, that he either started or closed a business venture. Yet even in the year, he gave different years at different points in his testimony.

This is not to say that Employee was not trying to mitigate his damages by starting his own businesses, but the glaring fact that all of his ventures over the years made hardly any money should have goaded him into at least devoting more time and effort in the years of 2003 to 2009 into his job search. In his testimony, Employee unwittingly admitted that it was his then-fiancée and now wife who assisted him financially throughout those years. He indicated that it was his fiancée who bought his house after it was foreclosed. At the time of his testimony, they currently live in said house.

Therefore, I find that for the years of 2003 until his return to work in November 1, 2009, the evidence showed that Employee did not exercise reasonable and sufficient diligence in attempting to find alternative employment after his termination. Thus, I find that the evidence shows that Employee did not mitigate his damages.

BACK PAY AND MITIGATION

An award of back pay is governed by Chapter 11B of the District Personnel Manual (DPM) ("Compensation"). Chapter 11B, Part II, Subpart 8 ("Back Pay") provides in pertinent part as follows:

> 8.1 Legal Basis The regulations provide that whenever an employee of the District government, on the basis of an administrative determination . . . is found by appropriate authority under applicable law to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or any pay . . . he or she is:
>
> > 1. entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or part of the pay . . . that the employee would have earned during that period if the personnel action had not occurred, *less any amounts earned through other employment (see section 8.11) during that period*.
>
> . . . .
>
> 8.11 Mitigation of Damages When an employee has been separated from his or her position by an unjustified or unwarranted personnel action, he or she is entitled to an amount (when this action is corrected) *equal to the difference between his or her [outside] earnings and the pay he or she would have received had it not been for the separation*.
>
> (emphasis added).

DPM Chapter 11B, Part II, Subpart 8, § 8.11, sets forth the basic requirement that, as part of a back pay calculation, an employee "who has been separated from his . . . position by an unwarranted or unjustified personnel action" must attempt to mitigate his damages by seeking other employment. Section 8.11(4) provides that the mitigation attempt must be "sufficient". Further, the D.C. Court of Appeals has held that an employee who has been improperly discharged must exercise "reasonable diligence in seeking alternative employment."[82] Additionally, the Court also held that "minimal efforts to seek employment . . . [are] not reasonably diligent."[83] In *EEOC v. Service News Co.,* 898 F.2d 958, 963 (4th Cir.1990), the Court held that "[l]ooking through want ads for an unskilled position, without more, is insufficient to show mitigation, and the back pay award should accordingly be reduced."

The U.S. Court of Appeals ("COA") held in *Ellis v. Ringgold School Dist.,*[84] that plaintiff was responsible for mitigating her damages by seeking other employment. That obligation compels a plaintiff to seek "amounts earnable with reasonable diligence."[85] The duty of mitigation may require that a plaintiff accept a lower paying position if one equivalent to that from which she was barred is unavailable.[86]

Substantially Equivalent Employment

The duty of a successful Title VII claimant to mitigate damages is *not* met by using reasonable diligence to obtain *any* employment. Rather, the claimant must use reasonable diligence to obtain *substantially equivalent employment.*[87] "Substantially equivalent employment is that employment which affords virtually identical promotional opportunities, compensation, job responsibilities, and status as the position from which the Title VII claimant has been discriminatorily terminated."[88]

Although the statutory duty to mitigate damages is placed on a Title VII plaintiff, the employer has the burden of proving a failure to mitigate.[89] To meet its burden, an employer must demonstrate that 1) substantially equivalent work was available, and 2) the Title VII claimant did not exercise reasonable diligence to obtain the employment. [90] In this matter, I have found that for the period of January 1, 2003 to November 1, 2009, Agency had proved that substantially

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[82] *Wisconsin Avenue Nursing Home v. D.C. Commission on Human Rights*, 527 A.2d 282 (D.C. 1987). *Wisconsin Avenue Nursing Home* involved a discriminatory discharge. Nonetheless, the principles regarding mitigation set forth in the case are applicable here.

[83] 527 A.2d at 292 (citing *Sangster v. United Air Lines, Inc.*, 633 F.2d 864, 866 & n.2 868 (9th Cir. 1980)).

[84] 832 F.2d at 29.

[85] *Craig v. Y & Y Snacks,* 721 F.2d at 82.

[86] *Ford Motor Company v. EEOC,* 458 U.S. 219, 231 n. 16, 102 S.Ct. 3057, 3065 n. 16, 73 L.Ed.2d 721 (1982).

[87] *Id.* See also *Anthony Anastasio v. Schering Corporation,* 838 F.2d 701 at 708.

[88] *Sellers v. Delgado College,* 902 F.2d 1189 at 1193; *see Mitchell v. Humana Hospital-Shoals,* 942 F.2d 1581, 1583 n. 2 (11th Cir.1991); *Ford,* 866 F.2d at 873.

[89] *See Robinson,* 982 F.2d at 897; *Anastasio v. Schering Corp.,* 838 F.2d 701, 707-08 (3d Cir.1988).

[90] *Supra Anastasio* at 708.

equivalent work for Employee was available, and that Employee did not exercise reasonable diligence to obtain the employment.

Once the employee establishes the amount of back pay he is entitled to receive, the burden shifts to the employer to prove what the employee could have earned by the exercise of reasonable diligence.[91] In *Wisconsin Avenue Nursing Home v. District of Columbia Com'n on Human Rights*,[92] the Court of Appeals noted that a back pay award should be equal to the salary a terminated employee would have received during the period of unemployment minus the "actual interim earnings *or the amounts she would have earned had she diligently sought other work"* (emphasis added).[93] In that regard, an employer has the burden of proof to establish the amount by which the salary that would have been earned during the period of unemployment from the employer should be reduced "to reflect the complainant's interim earnings *or to show her failure to take reasonable efforts to mitigate her damages by finding alternative employment"* (emphasis added).[94] The Court concluded that the finding by the Office was not supported by substantial evidence since the evidence only showed that the employee, during a year and a half period of unemployment, had interviewed for only two nurse assistant positions. *See also Sangster v. United Air Lines, Inc,* 633 F. 2d 864, 866, where a flight attendant's minimal efforts to seek employment over a period of eight years was not reasonably diligent.

Federal cases discussing precisely the same mitigation of damages defense have uniformly held that the proponent of the defense must prove with reasonable certainty, the amount that the employee would have earned had he or she exercised reasonable diligence in searching for employment. *See e.g. Jones v. Consolidated Rail Corp*., 800 F.2d 590, 594 (6th Cir. 1986) (The jury instructions "did not adequately inform the jury that the plaintiff was entitled to the difference between what he would have earned on the railroad and what he might have earned in another position. Because this may have affected the award of damages, it is also reversible error"); *Hadra v. Herman Blum consulting Engineers,* 632 F.2d 1242, 1245 (5th Cir. 1980) ("the defendant has the burden of proving the amount of money that a wrongfully discharged employee could have earned in mitigation of damages"); *Jackson v. Wheatley School Dist. No. 28 of St. Francis County,* 464 F.2d 411 (8th Cir. 1972) ("In determining the damages, the burden is on the [defendant] to show what the teachers, through *reasonable* efforts, could have earned to mitigate them"); *Hegler v. Board of Education of Bearden School District*, 447 F.2d 1078, 1081 (8th Cir. 1971) ("The overwhelming authority places the burden on the wrongdoer to produce evidence showing what the appellant could have earned to mitigate damages"); *John S. Doane Co. v. Martin*, 164 F.2d 537, 541 (1st Cir. 1947) ("In the matter of the mitigation of the damages, the burden is upon the respondent to produce evidence showing the amount of money the petitioner did earn, or with reasonable care and diligence could have earned, and since there is to be a new trial evidence to this effect should be presented").

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[91] *Remedio v. Revlon,* 528 F.Supp. 1380; *Kaplan v. International Alliance of Theatrical and Stage Emp. & Motion Picture Machine Operators, et al.* 525 F.2d 1354.

[92] 527 A.2d 282 at 292

[93] *Id.* at 291.

[94] *Id.*

This holding was affirmed by the D.C. Court of Appeals in the instant matter.[95] It found that Agency can satisfy its burden of proof by "show[ing] [the employee's] failure to take reasonable efforts to mitigate [his] damages by finding alternative employment."[96] The Court also held that "any deduction in the back pay awarded to Employee must rest… on clear and reasoned findings that are particularized as to the time period of the deduction and the reasonable course of mitigation that Employee failed to follow during that period. To the extent the ALJ determined that Employee was required to have taken one of those positions as a mitigation measure, he needed to make findings to that effect that identified the position and the date it was offered, explained why turning it down was unreasonable, explored whether taking it would have prejudiced Employee's ongoing legal claims against the District, and addressed the earlier findings suggesting that the position was not comparable to the one from which Employee was terminated."[97] In the instant matter, the COA issued a decision in which it was explained that "any deduction in the back pay awarded to Mr. Walker must rest . . . [on] findings that are particularized as to the time period of the deduction and the reasonable course of mitigation that Mr. Walker failed to follow during that period."[98]

In the instant matter, I have found that for the period of January 1, 2003 to the date Employee obtained a substantially equivalent position with Agency on November 1, 2009, Employee failed his affirmative duty to exercise reasonable and sufficient diligence in attempting to find alternative employment in his field from the time of his unwarranted separation in November 1996. The discussion now turns to Employee's entitlement, if any, to additional back pay for that period.

As explained *supra,* back pay is designed to restore a victim of discrimination to the economic position he would have enjoyed absent the unlawful discrimination. The Supreme Court has instructed that "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of [Title VII]."[99] It is the complainant's burden to present evidence demonstrating the amount of her damages, but once such evidence has been presented*, the burden shifts to the defendant to establish the amount by which those damages should be reduced* to reflect the complainant's interim earnings or to show her failure to take reasonable efforts to mitigate her damages by finding alternative employment. (Emphasis added).[100]

Again, in *District of Columbia v. Jones*, 442 A.2d 512 (D.C. 1982), the Court of Appeals stated this succinctly: "If the employee has obtained a substitute job, ***or could obtain one by reasonable effort, he is chargeable with the income he*** **obtains** ***or reasonably could obtain in this fashion, but only if the employer sustains the burden of proving these facts***." *Id*. at 524 (emphasis

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[95] *Walker v. Office of the Chief Technology Officer*, 127 A.3d 524 (D.C. 2015).

[96] *Wis. Ave. Nursing Home v. District of Columbia Comm'n on Human Rights,* 527 A.2d 282, 291 (D.C. 1987).

[97] *Walker v. Office of the Chief Technology Officer*, 127 A.3d 524 (D.C. 2015) at 22.

[98] *Id.*

[99] *See Albemarle Paper Co.,* 422 U.S. at 421, 95 S.Ct. at 2373.

[100] *Rasimas v. Mich. Dep't of Mental Health,* 714 F.2d 614, 623 (6th Cir.1983), *cert. denied,* 466 U.S. 950, 104 S.Ct. 2151, 80 L.Ed.2d 537 (1984); *see Horn v. Duke Homes, Div. of Windsor Homes,* 755 F.2d 599, 606, 608 (7th Cir.1985).

added). In *Wisconsin Avenue Nursing Home*,[101] the Court of Appeals again made a similar pronouncement: "A back pay award should equal the salary the complainant would have received from the time of the violation until the date on which the Commission issued its final order, minus the complainant's actual interim earnings or *the amounts she would have earned had she diligently sought other work*."[102] (emphasis supplied). *See also Trustees of the University of the District of Columbia v. Vossoughi*, 963 A.2d 1162, 1178-79 (D.C. 2009) (holding that the Defendant, UDC, did not meet its burden to support a jury instruction on mitigation of damages where "[it] did not meet its burden of establishing what, if any, property [plaintiff] could have recovered from the dumpsters, piles of trash, and boxes he observed, let alone the value of that property").

In the instant matter, while Agency has met its burden of proving that Employee failed to adequately mitigate his damages for 2003 to 2009, it utterly failed to present any evidence as to what amounts Employee would have earned had he tried to find equivalent employment for that period. In this matter, however, it was Employee's own witness, Anthony Bird, who testified that in his report, he had stated that Employee could have earned $50,000 per year from an IT position during the relevant time period. In *Wisconsin Avenue Nursing Home*, *supra*, the D.C. Court of Appeals held that, " Although it was the Home's burden to show that Wills did not seek alternative employment with reasonable diligence, it could satisfy that burden through the testimony of Wills herself." Here, we could use the testimony of Employee's own witness to establish that Employee would have earned $50,000 per year had he tried to adequately mitigate his damages. I therefore conclude that Employee must be made whole by Agency for the entire period of his unemployment less any amounts already paid, any of his actual interim earnings, and the amounts he could have earned from January 1, 2003 to the date he began working again for Agency.

ORDER

1. It is hereby ORDERED that Agency reimburse Employee all back pay and benefits lost as a result of its improper removal action starting from the date of his removal to December 31, 2002, less any amounts already paid and any of his actual interim earnings; and

   It is hereby ORDERED that Agency reimburse Employee all back pay and benefits lost as a result of its improper removal action starting from January 1, 2003, to November 2, 2009, less an annual amount of $50,000 prorated to the months Employee was unemployed; and

2. It is hereby ORDERED that Agency pay Employee $139,603.49 for Employee's annual leave hours as the parties have agreed; and

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101 *Supra*, 527 A.2d 282 (D.C. 1987)
102 *Id*. at 291.

3. Agency file with this Office, within 30 calendar days from the date on which this addendum decision becomes final, documents showing compliance with the terms of this Order.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge