

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
George F. Walker)	OEA Matter No. 1601-0046-97R09
Employee)	
)	Date of Issuance: November 7, 2011
v.)	
)	Joseph E. Lim, Esq.
Office of the Chief Technology Officer ¹)	Senior Administrative Judge
Agency)	
_____)	

Omar Melehy, Esq., Employee Representative
Ross Buchholz, Esq., Agency Representative

ADDENDUM DECISION ON REMAND

INTRODUCTION AND PROCEDURAL HISTORY

On November 14, 1996, 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) from Agency's final decision, effective November 1, 1996, removing him from his position for: "Insubordination, to wit: Failure or refusal to comply with written instructions or direct orders by a superior."²

This matter was originally assigned to Administrative Judge Kenneth Hughes. Judge Hughes scheduled an evidentiary hearing for November 3 and 4, 1997. However, Judge Hughes left the Office's employ prior to the Hearing being held. The case was reassigned to Senior Administrative Judge Daryl J. Hollis. After a January 6, 1998, 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.

¹ It is uncontroverted that on March 26, 1999, the Department of Administrative Services (DAS) was subsumed by the Office of the Chief Technology Officer (OCTO).

² 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.

Agency timely 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. Pursuant to OEA Rule 633.3, 46 D.C. Reg. 9319 (1999), the O&O became the Office's Final Decision (FD) in the matter on May 5, 1999.

Agency timely appealed the FD to the D.C. Superior Court. That appeal was captioned *Department of Administrative Services v. George Walker and Office of Employee Appeals*, Civil Action No. 99-MPA-10 and was assigned to Judge Robert I. Richter. On October 30, 2000, Judge Richter issued an Order affirming this Office's FD. Further, he wrote as follows:³

This Court will . . . affirm the OEA's order to reinstate [Employee]. However, in light of the recent reorganization discussed in [Agency's] brief,⁴ this Court agrees that it would be impossible to reinstate [Employee] to his former position of record. Therefore, this Court will remand the case so that the OEA can conduct a hearing to determine whether a similar and equal position exists for [Employee].

This Court will also remand the case for a determination of whether and to what extent [Employee] made efforts to mitigate his damages. The OEA ordered [Agency] to reimburse [Employee] for salary and benefits lost as a result of the action. However, this Court agrees with [Agency] that there is no information before it concerning the efforts that [Employee] took to mitigate the losses resulting from his termination, and will not order back pay without such information.

Finally, the Court agrees with [Agency] that there is no basis upon which to award [Employee] "pain and suffering damages." Therefore, [Employee's] request for \$100,000 in pain and suffering damages will be denied.

Thus, in addition to affirming the Office's FD, Judge Richter "ordered that the case be remanded to the OEA for a determination of whether a comparable position exists for [Employee], and whether [Employee] took any efforts to mitigate damages after his termination." *Id.*

On November 27, 2000, Agency filed with the Court a Motion for Reconsideration of Judge Richter's October 30, 2000 Order. On November 28, 2000, Employee filed a similar motion. On January 2, 2001, Judge Richter issued a second Order in which he affirmed his October 30, 2000,

³ October 30, 2000 Order at 8.

⁴ See n.1, *supra*.

Order and denied both reconsideration motions.⁵

Judge Hollis held an evidentiary hearing on January 30, 2003, and October 20, 2003, after the parties failed to settle despite months of mediation and an offer of reinstatement of Employee to a Data Center Services Manager, DS-301-14, Grade 14, Step 6 position. 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, Step 9 within OCTO. He also ordered Agency to reimburse Employee all back pay 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 this previous position. He also argued that the 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.

After I held a status conference on July 20, 2009, the parties engaged in mediation talks but they failed to reach an agreement. Employee was reinstated to an appropriate position on November 16, 2009. Thus, the only outstanding issue is back pay. After another status conference on May 14, 2010, the parties briefed the issue on the applicability of the Federal Back Pay Act to this matter. As will be discussed below, I found that Employee has the duty to mitigate his damages.

Based on the parties' request, the hearing was held on July 27 and 29, 2011. The record closed on September 7, 2011, the date Employee submitted his closing argument.

JURISDICTION

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

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.

ISSUE

Whether Employee made reasonable efforts to mitigate his back pay damages following his removal.

POSITIONS OF THE PARTIES

Employee argues that he should not be required to mitigate his back pay damages. Employee argues that his entitlement to back pay is solely governed by the Federal Back Pay Act (FBPA), and that under said act, he is under no duty to mitigate his damages. Therefore, he asserts that he is entitled to back pay from November 1, 1996, the date of his termination, until November 9, 2009, the date he was reinstated.

However, if he is indeed required to mitigate his damages, Employee argues that he 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 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. Agency bases its assertion upon the following arguments: 1) Employee forfeited his right to argue the application of the Federal Back Pay Act when he failed to raise the argument before Judge Hollis at the time of the hearing on mitigation; 2) Employee's back pay is covered not by the Federal Back Pay Act, but by the Comprehensive Merit Personnel Act and the provisions of the District Personnel Manual, both of which mandate mitigation of damages and its offset by outside employment during the period covered by the personnel action being corrected; 3) even under the FBPA, employees have a duty to mitigate their damages.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

1. THE BACK PAY/MITIGATION ISSUE.

Employee argues that this matter is governed by the Federal Back Pay Act, 5 U.S.C. § 5596 (FBPA), and that under this statute, he has no duty to mitigate his damages.

Regarding the question of back pay, Judge Richter of the D.C. Superior Court had previously remanded the case for a determination to be made as to whether or not Employee made reasonable efforts to mitigate his damages following his removal in November 1996. At that time, there was no question about the requirement that an employee who has been removed must make reasonable efforts to mitigate damages. Judge Hollis held evidentiary hearings on January 30, 2003, and October 20, 2003. After an extensive hearing, Judge Hollis found in an addendum decision that Employee did not exercise reasonable and sufficient diligence in attempting to find alternative

employment after March 26, 1999, and thus, has failed to mitigate his damages. Thus, he found that Employee was only entitled to back pay from November 1, 1996, (the day of his unwarranted removal) until March 26, 1999.

The parties appealed the decision all the way to Superior Court. This time it was Judge Kravitz who vacated the back pay decision on April 20, 2009, and ordered OEA to reconsider the issue of back pay, and consider in the first instance Employee's argument, made for the first time before the court, that the Federal Back Pay Act (FBPA) governs the questions of whether Employee had a duty to mitigate his damages and, if so, whether Employee satisfied that duty.

I. Employee Forfeited His Right to Argue the Federal Back Pay Act Applied When He Failed to Raise the Argument Before Judge Hollis at the Time of the Hearing on Mitigation.

Employee failed to make the argument regarding the FBPA until he filed his Petition for Review of the ADR with the OEA Board. At that time, he first argued, essentially, that he was not required to mitigate his damages and that Judge Hollis erred by not applying the FBPA. On March 1, 2005, Agency filed its Opposition to Employee's Petition for Review. In that Opposition, Agency argued, *inter alia*, Employee did not raise this issue before Judge Hollis at the time of the hearing and OEA Rule 634.4 states: "Any objections or legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board." It is a well-settled point of law that an appellate body should only consider issues that were properly preserved in the court below.⁶ Because of Employee's failure to timely make the FBPA argument before Administrative Judge Hollis, there was no record for the Board to review regarding the issue of whether the FBPA applied. Therefore, the Board may not and did not rule on the issue.

Because Employee failed to make the FBPA argument before Judge Hollis, he cannot properly raise this argument before an appellate body. Nonetheless, because the Superior Court has stated that this Office must do so, the FBPA argument will be discussed.

II. Employee's Backpay is Not Covered by the Federal Back Pay Act but by the Provisions of the District Personnel Manual.

Prior to the 1973 Home Rule Act, the Federal Back Pay Act ("FBPA") specifically applied to District of Columbia employees and entitled them to back pay in cases concerning any "unjustified or unwarranted" personnel action.⁷ But even under the FBPA, there is a statutory duty for discharged employees to make reasonable efforts to mitigate their damages by seeking

⁶ *Singleton v. Wuff*, 428 U.S. 106, 120 (U.S., 1976). (Att. 11). See also *Flynn v. Comm'r*, 348 U.S. App. D.C. 64 (D.C. Cir., 2001). (Att. 12).

⁷ 5 U.S.C. §5596 (b)(1)(A)(i).

substantially equivalent employment.⁸ Thus, Employee's claim that he was never required to mitigate his damages fails even under the FBPA.

Nonetheless, in the 1973 Home Rule Act, Congress legislatively directed the District government to establish its own comprehensive personnel system to replace the federal system.⁹ D.C. Code § 1-204.22(3). Congress set forth its mandate and policy in D.C. Code §1-242 (3), which specified that “[p]ersonnel legislation enacted by Congress prior to or after January 2, 1975 . . . shall continue to be applicable until such time as the Council shall . . . provide for coverage under a District government merit system.” The Act also stated that the new personnel system “shall provide for persons employed by District government immediately preceding the effective date of such system personnel benefits . . . at least equal to” the benefits provided under the federal system at the time the new personnel system is established.¹⁰

In addition, § 1-213(c) specified that: “Unless otherwise specifically provided in this Act, nothing contained in this Act shall be construed as affecting the applicability to the District government of personnel legislation relating to the District government until such time as the Council may otherwise elect to provide equal or equivalent coverage.”

Pursuant to the 1973 Home Rule Act, the District of Columbia adopted the Comprehensive Merit Personnel Act (CMPA) on October 31, 1978, and it became law on March 3, 1979. In accordance with Congress' intent that the District's new personnel system be separate and autonomous, the Council of the District of Columbia enacted legislation to supersede the applicability of several federal statutes, including the FBPA, to District employees hired on or after January 1, 1980. On September 26, 1980, this legislation was amended and recodified as § 1-633.2 (a)(5)(G). Thus the FBPA provision pertaining to back pay due to unjustified personnel actions, 5 U.S.C. § 5596(a) (5), was superseded for all employees of the District of Columbia government, effective September 26, 1980. Because Employee was hired in 1994, the CMPA, not the FBPA, applied to him. Accordingly, Employee is covered under the CMPA's current permutation, D.C. Code § 1-601.01 *et seq.*, and the rules and regulations affecting personnel for employees of the District of Columbia.

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 See *Anastasio v. Schering Corp.*, 838 F.2d 701, 707-08 (3d Cir.1988); *EEOC v. Service News Co.*, 898 F.2d 958, 963 (4th Cir.1990); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-32, 102 S.Ct. 3057, 3065, 73 L.Ed.2d 721 (1982).

⁹ *Zenian v. Office of Employee Appeals*, 598 A.2d 1161 (D.C. 1991) (citing *District of Columbia v. Thompson*, 593 A.2d 621, 632 (D.C. 1991)).

¹⁰ *Id.*

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.”¹¹ Additionally, the Court also held that “minimal efforts to seek employment . . . [are] not reasonably diligent.”¹²

Based on the statute itself and the case law from the D.C. Court of Appeals, I therefore find that Employee has an 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 until he was reinstated. The discussion now turns to Employee’s entitlement, if any, to

¹¹ *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.

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

additional back pay. The pertinent question now becomes whether or not Employee exercised reasonable and sufficient diligence thereafter.

Summary of testimony.

1. Employee (Transcript Vol. 1, pgs. 44-200; Transcript Vol. 2, pgs. 343-376): 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.

Addressing the issue of mitigation of damages, Employee testified that he made reasonable efforts to mitigate them. From the time of his removal in November 1996 until he was reinstated recently 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. 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.

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, on cross-examination, Employee admitted that after he was terminated, he did not look for another job from August 1996 to December 1996, as he spent 100% of his time working on his OEA appeal.

Employee testified that starting in 1997, he sent out 10 to 15 applications a week in addition to his weekly four to five online job searches at Monster.com, HeadHunter.com, Job.com, USAjobs.gov, and CareerBuilder.com. 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.

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. (Tr. Vol. 1, p. 78). 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." (Tr. Vol. 2, p. 358). 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. (See Tr. Vol. 2, p. 360-361). Instead, Employee tried to explain it by saying that his “guesses” are better today. (Transcript Vol. 2, page 350-351). He insisted that his testimony at the hearing purporting a significantly higher number of job applications was the more accurate one.

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 indicated to him in 1997 that his negative reference from the D.C. Government caused his rejection.

Employee made various attempts to earn income outside the telecommunications field after having little success in gaining employment following his removal in November 1996. In 1997, Employee started a home improvement business from which he grossed approximately \$8,000 from its inception to 2003. Employee Ex. 24 contains documents pertaining to “Walker Home Improvements”. 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 testified that he began an internet-based company in 1999. In 1999, Employee developed the “African-American Business Directory (AABD),” which is an online directory for African-American businesses. 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. Although the website is still online as of the date of the hearing, Employee had yet to make any income from this venture.

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.

Between 1999 and 2000 up until 2003¹³, Employee started selling memberships for Pre-Paid Legal, an organization which provides reduced legal fees to its members. Employee Ex. 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. Tr. Vol. I at 89. Employee also stated that in all that time, he made only \$700. Tr. Vol. I at 90. During cross-examination, he modified this estimate to between \$500 to \$700.

In 2001, 2002, or 2003,¹⁴ 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 that business, he netted only \$5,500 from its incorporation to its demise in 2008. On cross-examination, he contradicted his earlier testimony by asserting that this business still exists today.¹⁵

In 2006, Employee started “Thomas Walker and Company,” a construction company and an authorized dealer of American Elite Homes. Although the goal of this business was to build low income housing, he was never able to build a single house. For operating this venture from 2006 through 2009, he received a profit of approximately \$10,000.00. 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. 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.

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.¹⁶ The couple was already dating before Employee lost his D.C. government job.

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.¹⁷ Employee also said

¹³ 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 Tr. Vol. 1, Pgs. 93-94.

¹⁴ Employee gave different start dates at different points in his testimony.

¹⁵ Tr. Vol. 2, page 365.

¹⁶ When pressed, Employee seemed unsure what year he got married.

¹⁷ Tr. Vol. 1, page 147. Although it was never stated explicitly, one can presume Thomas is now his

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.

2. Truman Pewitt (Transcript Vol. 1, pgs. 202-218): Mr. Pewitt is the Deputy Chief Technology Officer for OCTO, and has been in that position since July 2000. He admitted that he read Judge Hollis's findings from the previous 2003 hearing that Agency Representative Buchholz provided to him. Upon Employee's objection to this witness and my expressed concern that Mr. Pewitt's knowledge of what parts of his testimony was significant to a judge's decision, this witness was disqualified.

3. Debbie Moreau (Transcript Vol. 2, pgs. 231-311): Ms. Moreau is a licensed vocational counselor equipped to assist people return to work. She 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. Agency Exhibit No. 12 lists her resume. Ms. Moreau 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 testified that 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. To do 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 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, Ms. 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. 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%. See Agency Exhibit 13.

wife.

Ms. Moreau then 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 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."

4. Glen Carter (Transcript Vol. 2, pgs. 311-343): A current vice-president of Engineering and Operations at a private company, Mr. 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 could not get back in to update his account.

Findings of Fact

Based on their courtroom demeanor, consistency of testimony, corroboration with the documentary exhibits, I find the testimony of Ms. Moreau and Mr. Carter to be more credible than that of Employee. 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 undisputed.

Moreau testified that Employee had numerous transferable skills and employability assets. Further, based on her research, she testified that the number of individuals hired in the D.C. area in Employee's area of information technology 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. What is notable is that Employee does not dispute this.

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.

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.¹⁸ 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.¹⁹ 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 1996²⁰ to late 1998, in order to adequately represent himself in this wrongful termination case,²¹ or when he devoted all his time and efforts to his business ventures.

This is not to say that Employee was not trying to mitigate his damages by starting his own businesses, but the glaring fact that none of his ventures over the years made hardly any money should have goaded him into at least devoting more time and effort into his job search. The procedural history of this matter shows that Employee refused several positions that Agency offered him that he considered beneath him. This is not a picture of a man desperate for work.

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. They currently live in said house.

Equally damaging is Employee's admission that he hid most of his liquid assets from his bankruptcy trustee.

¹⁸ “[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.

¹⁹ Since Employee's own testimony demonstrate that he netted approximately only \$19,700 in the 10 years he ran his businesses, these attempts at self-employment were obviously unsuccessful.

²⁰ At various points of his testimony, Employee gave different dates for the same event.

²¹ I note that since November 2002 Employee has been represented by one of several lawyers that he has hired through the years.

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.

Indeed, 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, I gave Employee 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.

I find the testimony of Ms. Moreau and Mr. Carter to be much more credible than that of Employee. Employee's testimony was self-serving, inconsistent and uncorroborated, whereas the other witnesses had no stake in the outcome of this case. Additionally, there is no demonstrated motive for them to have fabricated their testimony. In short, I find Employee to be incredible. He left me with no basis to award him any back pay.

Therefore, I find that Employee did not exercise reasonable and sufficient diligence in attempting to find alternative employment after his termination. Thus, he has failed to meet his burden of proof that he tried to mitigate his damages. As a result of his failure to mitigate, I conclude that "the denial of any [additional] back pay is appropriate." *Wisconsin Avenue Nursing Home, supra*, 527 A.2d at 292; *Sangster, supra*, 633 F.2d at 868.

ORDER

It is hereby ORDERED that this Appeal is dismissed.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge