THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
JOCELYN BRYANT[1] **Employee**	**OEA Matter 2401-0171-04**
v.	**Date of Issuance: January 31, 2006**
	Rohulamin Quander, Esq. Senior Administrative Judge
DISTRICT OF COLUMBIA PUBLIC SCHOOLS Agency	

F. Douglas Hartnett, Esq., Employee Representative
Harriet Segar, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

On July 26, 2004, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals (the "Office"), challenging her termination as an ET-15 English Teacher in the District of Columbia Public Schools (the "Agency"). The essence of her case is that when a reduction in force (the "RIF") was conducted by the Agency, Agency violated its own regulations when it failed to properly evaluate her credentials for determination of whether she should be one of the teachers who would be retained, once the RIF was implemented. The effective date of her termination was June 30, 2004. In a letter dated August 19, 2004, Employee was directed by Agency to report to the McKinley Technology High School, where she was to be reassigned as an ET-15 English Teacher. This reassignment would have reinstated Employee without a break in service, or loss of salary and

[1] The Employee directed the Office of Employee Appeals to refer to her as "Jocelyn Bryant". However, a number of the documents in the file refer to Employee as "Jocelyn Bryant Harden." At her request, she will be noted as Jocelyn Bryant.

benefits. When she reported to the new assignment, she discovered that Agency claimed to have erred in sending her a reinstatement letter, accompanied by verbal indications that she had not been reassigned to that school.

Employee mitigated the extent of her job loss by locating temporary employment with the Montgomery County, Maryland, Public Schools (the "MCPS"), effective August 18, 2004, and was hired under a contract as an English teacher in that educational system on or about March 22, 2005. She worked through the balance of school year 2004-2005. Under the terms of her employment contract, she was obligated to this educational system for two academic years, i.e., the balance of school year 2004-2005, and for school year 2005-2006. Although Employee is interested in returning to Agency as a teacher, where she could capitalize on her seniority and more than 17 years of teaching experience, she asserted that due to contractual obligations entered into with MCPS, she cannot return to Agency until her present contractual obligations are fulfilled.

This matter was assigned to this Administrative Judge (the "AJ") on April 15, 2005. On May 10, 2005, I convened a Status Conference, and was prepared to convene an evidentiary hearing, if necessary. After investigating the components of the allegations contained in Employee's appeal, Agency admitted that certain procedural and administrative errors had occurred. Agency offered immediate reinstatement to Employee in a letter dated August 12, 2005, and directed her to report to work on August 22, 2005, to begin teaching English at Johnson Junior High School. Further, although both the name and address on the heading of the letter were directed to Employee, the content of the letter was directed to a "Ms. Okezie", raising a question of whether all of the elements mentioned in the letter were intended to be applicable to Employee.

When Employee declined to report as directed, Agency threatened to file a motion to dismiss with the Office, based upon the assertion that Agency had admitted to its error, had corrected the problem, but that Employee refused to accept Agency's reasonable offer. Agency then concluded the matter by emphasizing that it would do no more on behalf of Employee, and that Agency feels that it had fully met all of its obligations to Employee in this matter. Despite its threat of filing a motion to dismiss, no such motion was ever filed.

Because the basis of the dispute between Agency and Employee revolved around whether Agency was responsible to hold a position open for Employee until her contractual obligation with MCPS ends, on October 31, 2005, this AJ issued an *Order Directing the Parties to Submit a Memorandum of Law on Mitigation.* Both Agency and Employee, through counsel, responded. The record is now closed.

JURISDICTION

The Office has jurisdiction over Employee's appeal pursuant to D.C. Official Code § 1-606.03(a) (2001).

ISSUE

The issues to be decided are:

1. The scope of Agency's obligation to Employee who is offered reinstatement when Agency has admitted that it erred in separating Employee as a result of a RIF.
2. Agency's continuing obligation, if any, if Employee is willing to accept reinstatement, but maintains that she must first complete contractual obligations incurred elsewhere as a result of Employee having mitigated her monetary and professional damages, as required by law.
3. Whether Employee's declining to accept Agency's offer for immediate reinstatement constitutes a forfeiture of her right to be reinstated by Agency upon completion of the contract entered into as a part of the mitigation effort.
4. The long term legal effect upon Agency, if any, should Employee seek to postpone accepting the offer of reinstatement until completion of the contracted mitigation activity obtained as a result of Agency's initial error.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

In accordance with long established legal precedent and principles, Employee took reasonable and foreseeable measures to mitigate damages caused her when Agency improperly terminated her, effective June 30, 2004. Having mitigated her losses, she maintains that Agency cannot now punish her by arguing that her declining to immediately accept Agency's reinstatement offer constitutes a forfeiture of her right to entitlement to a full remedy in this case.

The following facts are not in dispute:

1. On June 30, 2004, Agency improperly abolished Employee's teaching position. She fought the decision through internal administrative processes without success, and was separated from employment, effective on the above-noted date. She timely filed the instant appeal on July 26, 2004.
2. In an effort to mitigate her damages, on August 18, 2004, Employee began working for MCPS on a temporary basis. Later, on March 22, 2005, she contracted with MCPS, and was awarded a two-year contract for a teaching position, albeit at a significant decrease in salary, benefits, and seniority from her position of over 17 years as a successful Agency employee.
3. On or about August 19, 2004, Agency sent Employee a reinstatement offer, which was later rescinded when it was learned that no properly authorized offer had been made to Employee, as only the principal at McKinley Technology High School was authorized to extend an offer to a prospective new teacher and he had not done so.
4. Section (a) of the employment contract with MCPS stipulated that Employee had until May, 1, 2005, to notify MCPS, if she elected to remove herself from the obligations of the second year of her teaching contract with MCPS.
5. The first year of Employee's contract with MCPS was well underway by the time Agency

responded to the appeal, and was completed by the time Agency acknowledged its mistake and rescinded the abolishment of her position. On several occasions during the adjudication of her claim, and well in advance of the May 1, 2005, deadline for notifying MCPS of an election to terminate the second year of her contract, Employee, both in written and verbal form, made the notification date of its MCPS contract known to both Agency and the Office.

6. Although Employee requested that the matter be resolved in a timely fashion so that she could notify MCPS that she was electing to return to Agency, Agency neglected to act expeditiously. Not until August 12, 2005, just 10 days before her reporting date, did Agency issue a letter informing Employee that she had been reinstated and reassigned to teach English at Johnson Junior High School.

Other factual considerations:

When Employee failed to report on August 22, 2005, as directed, Agency requested that the Office dismiss the instant appeal. Agency claimed that its obligation to Employee had been fully completed and that Agency was now discharged from any further responsibility, by making the above-noted reinstatement offer.

Pursuant to this AJ's Order of October 31, 2005, I now address the four questions relating to the scope of the Agency's obligation to an employee and an employee's obligation to mitigate damages.

1. The scope of Agency's obligation to Employee who is offered reinstatement after Agency has admitted that it erred in separating Employee as a result of a RIF.

Agency readily admits that it is liable to Employee for all back pay and benefits, minus deductions for actual wages earned and related required employee contributions to retirement plans and health insurance premiums, including credit for time served for the purpose of calculating future retirement benefits.[2] This remedy would make Employee "whole", and return her to the position she would have been in, had the improper RIF action by Agency never occurred. The implementation of this remedy will restore to Employee nothing more than the damages that flowed from Agency's admittedly erroneous actions, offset in part by Employee's good faith actions, in accordance with her legal obligation to mitigate her losses.

By delaying its addressing of this matter, Agency's unnecessarily delayed attention to correcting the wrong. Therefore, the scope of Employee's mitigation obligation was likewise expanded, in order to offset her continuously increasing damages, as was the eventual scope of Agency's obligation to Employee, which expanded to assure that all of her foreseeable loses were addressed as a part of the eventual determination in this matter.

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[2] *See* D.C. Personnel Manual, § 8.1, Legal Basis [for back pay].

2. Agency's continuing obligation to Employee who is willing to accept reinstatement, but maintains that she cannot accept immediately due to contractual obligations incurred elsewhere as a result of Employee's mitigation efforts, as required by law.

This question captures the conflict between two fundamental legal principles at stake, i.e., the right to full relief from illegal Agency/Employer actions; and the duty of Employee to mitigate the damages at issue. Agency, citing *Wilson v. Ohse Foods*, 1992 U.S. District, Lexis 8751 (D. Kansas March 11, 1992), asserts that employees' only option is to mitigate their damages, and that they cannot decide on a case by case basis when and how they will act to mitigate their damages. However, placed into a grander context, I find that *Wilson* stands simply for the proposition that an employee is *obligated* to do everything reasonable to mitigate damages, rather than any sort of choice of whether or when to act in mitigation. Based upon the total record before me, I find that Employee herein did exactly what she was required to do under the principles that apply to her position in this dispute.[3]

The general rule for mitigation in the District of Columbia is the *Doctrine of Avoidable Consequences,* also known as the duty to mitigate damages. The Doctrine bars recovery for losses suffered by a non-breaching party that could have been avoided by reasonable effort without risk of substantial loss or injury. See *Edward M. Crough, Inc. v. Dep't of Gen. Serv. Of DC*, 572 A.2d 457, 464 (D.C. 1990). Employee is the "non-breaching party," as it was Agency which improperly abolished her position. While Agency has asserted that mitigation of damages is the obligation of an employee, Agency muddles the picture by arguing that this Employee is powerless to determine what steps she must take and how she should act to mitigate her damages.

Who then is to decide how a wrongfully terminated employee is to mitigate her damages? Agency, the same entity whose improper termination gave rise to this claim and the damages, suggests that this decision is entirely up to it, as its obligation to consider mitigation and to remedy the non-breaching party's damages, only reaches as far as it decides. The extension of this reasoning is that if Employee sat home for the life of this dispute, and took no steps to mitigate her losses, Agency would argue that, because of the *Doctrine of Avoidable Consequences,* it had no further obligations to her. Likewise, if an employee could locate only part-time employment, perhaps working in a convenience store or at a fast food restaurant, what would Agency's position be regarding the "quality" of the substitute employment Employee obtained during the pendency of the matter.

The assertion and reasoning that Agency employs would allow Agency *alone* to evaluate the worth of an employee's non employment or underemployment status. This position is both legally and logically flawed, as Agency has turned Employee's obligation to mitigate into a weapon, which Agency now seeks to use against her. Agency would have this AJ believe that it cannot be held liable for the consequences of Employee's mitigation efforts, which Agency occasioned to be necessary in the first place, if they pose an inconvenience to Agency.

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[3] *See* D.C. Personnel Manual, § 8.1, Mitigation of Damages.

I find that the correct legal standard for determining whether Employee properly mitigated her damages has been previously articulated by the D.C. Courts as foreseeability and reasonableness. Applied, this simply means that damages are those that the part[ies] "should have foreseen and could have avoided by reasonable effort." See *Crough*, at 464. Employee found like employment in Montgomery County, Maryland, when Agency improperly terminated her.

Agency argues that its obligation to bring an employee back to duty cannot be based upon the personal issues facing each individual employee, as such a situation would create a new cause of action by employees, based upon when that particular employee "subjectively" concludes that s/he can return to duty. Other than this bare assertion, Agency has cited no law, regulation, legal opinion, or court holding to support such a position based upon supposed subjectivity. Rather, it is clear to this AJ, and I so find, that Employee's decision on when she could legally return to work at Agency was not *subjective*, but rather was *objectively* based upon her clearly defined and previously noted contractual obligations to MCPS, which likewise contained specifically defined terms which declared her potential availability for returning to Agency, upon completion of the 2005-2006 school year with MCPS.

Further, I find no merit in Agency's assertion that to allow Employee to return to Agency after she declined to report on or about August 22, 2005, would set a dangerous precedent and will open potential floodgates for other RIFed employees to follow. Agency is not free to unilaterally mandate that its RIFed employees must foreseeably and reasonably mitigate their damages to avoid being denied any potential later claims for recovery, but then to also claim that said employees reasonable efforts to offset their losses must only fit into a tight parameter that Agency, alone, decides is acceptable. Like it or not, each employee's case is an individualized matter, and where Agency has committed a gross error in how it handled the separated employee, said employee is likewise entitled to individualized consideration, which will also potentially include a remedy that is specifically tailored to that employee. This Employee is one such individual.

I find that Agency's demand that Employee must accept the offer of August 12, 2005, and report to her new assignment on August 22, 2005, was not made in good faith, as the sole reason for her inability to accept the "offer" was the natural consequence of Agency's own improper actions. Employee was not legally free to accept the offer, and the circumstances surrounding why she was not yet available were all Agency's creation. Whether wittingly or otherwise, Agency's actions set a trap. Now Agency takes a hard line and an unreasonable position when it declined to extend the offer and to hold it open for one additional academic year, until August 2006.

I find that in the event of a future RIF action at Agency that might result in Employee being laid off, if she had previously abandoned her legal obligation, i.e., the same mitigation contract she entered into to offset her current damages, she would most likely be foreclosed from being rehired by MCPS, due to a "departed not in good standing" record. Further, there is also a great likelihood that Employee would be "blacklisted" from working for MCPS and elsewhere, once it was known that she had abandoned her contractual obligation with MCPS, just days before she was legally mandated

to begin teaching for school year 2005-2006.

I find that it is entirely foreseeable that a terminated teacher would seek teaching work rather than some other type of employment, and that her losses would be compounded by *not* seeking other teaching opportunities. For Agency to contend otherwise is disingenuous, as the probable circumstances of how Employee might reduce her losses were entirely foreseeable to Agency, as a teacher with more than 17 years experience is more likely to seek and find such a position with another reputable public school system. This was the most immediate and logical way of mitigating her lost wages and to maintain her professional standing.

3. Whether Employee's declining to accept Agency's offer for immediate reinstatement constitutes a forfeiture of her right to be reinstated upon completion of the contract entered into as a part of the mitigation effort.

In its *Submission on Mitigation*, Agency cited no legal authority or precedent to support the proposition that Employee's declining to accept an offer that would require her to breach a contract entered into solely for the purpose of mitigating damages caused her by Agency, constitutes a forfeiture of her rights to reinstatement. Similarly, this AJ found no legal holding on this point which would support Agency's position. As such, I find that to endorse such a contention would be contrary to longstanding and well established legal principles and sound public policy behind the requirement that plaintiffs must mitigate damages.

Agency mischaracterizes Employee's position as requiring that Agency, ". . .ensure that a position is available for the Employee when and if she is ready and willing to take the position." This is an inflammatory overstatement, as Employee's request is only that Agency hold open employment for her for a school year. I find that Employee never requested that a *particular position* be set aside for her. Considering the turnover of English teachers within Agency's system, Agency remains free to assign her to whatever available position she qualifies for at the termination of her mitigation contract, without Agency being mandated to specifically hold open or set aside a specific position for Employee.

4. The long term legal effect upon Agency, if any, should Employee seek to postpone accepting the offer of reinstatement until completion of the mitigation activity obtained in an effort to offset the loss sustained.

Each year multiple teaching positions become available as a natural and predictable consequence of Agency's mission and practices. Agency has suggested that allowing Employee's claim would encumber Agency with new legal obligations, creating a new cause of action for employees similarly situated as Employee in this case. Agency argues that this Employee's effort to mitigate damages and to fulfill the terms of her mitigation contract with MCPS before returning to work at Agency, would, " ... create a new right to sue by employees based on when the employee subjectively concludes that they [sic] can return to duty." Yet, Agency does not explain this assertion, nor offer any legal support for it.

However, it is only because of Agency's own actions which violated Employee's substantive employment rights that have caused Agency to argue about the scope of its liability for damages and the long term effect upon Agency. I find that Agency's initial error, complemented by a sustained refusal to timely address and correct the problem, gave rise to the sustained pursuit of this remedy. As noted above, I further find that when Agency created an individualized error in the wrongful dismissal of Employee, Agency was likewise obligated to devote individualized attention to crafting a timely remedy.

Over time, Agency may incur additional costs if it is ordered to delay reinstatement to Employee until school year 2006-2007, but the mitigation actions taken by Employee to recover the bulk of her salary and benefits from another jurisdiction significantly outstrip Agency's back pay and benefits obligations.

Conclusions of Law

Having reviewed the total record created in this matter, and evaluated the respective legal positions of the parties, I conclude that longstanding legal precedent and sound public policy considerations dictate that Employee has the right to protect her future employability and to likewise not have the scope of her damages to be now limited because she made a diligent and successful effort to mitigate the losses she incurred at Employer's hands. I further conclude that her actions were reasonable and foreseeable to both parties, and comport with her obligations under District of Columbia law to limit her damages.

Agency has cited no legal authority for the position that it can abrogate its duty to a wrongfully separated employee by making an offer of employment it knows she cannot accept. Nor does Agency offer any objective evidence supporting the argument that Agency would be harmed by allowing Employee to fulfill the obligations she undertook solely as a result of Agency's initial action which violated Employee's rights. Offering a full remedy, which must be accepted immediately, would force her to breach her legal contract with a third party, and thereby forfeit future employment rights, without any guarantee that she will not again be laid off by Agency. I conclude that if she capitulated to Agency's demand, she would needlessly and gratuitously compound the damages she has suffered as a result of Agency's admitted wrongful separation. I further conclude that to hold otherwise, would not only be manifestly unjust, but would also be contrary to both legal and public policy considerations.

ORDER

The foregoing having been considered, it is hereby

ORDERED, that Agency reinstate Employee to the position of ET-15 English teacher, plus restore all of her retirement and other benefits without a break in service, retroactive to June 30 2004; and it is

FURTHER ORDERED that Employee shall have the option of delaying the beginning of her active reinstatement, provided she notify Agency in writing, within thirty (30) days of the date of this Order, that she elects to return to Agency as an ET-15 English teacher at the beginning of school year 2006-2007; and, it is

FURTHER ORDERED that Agency file with this Office, within thirty (30) days from the date on which this decision becomes final, documents showing compliance with the terms of this Order.

FOR THE OFFICE

ROHULAMIN QUANDER
Senior Administrative Judge