

## "Mitigation of Wrongful Termination Damages"

by

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**ABSTRACT:** Mitigation of damages is a "duty", but its contours are influenced by market conditions. Theoretically, markets provide ample opportunities for mitigation via substitute performance. However, the actual market that the plaintiff enters might be barren and/or full of friction. Additionally, expert estimation of damages is routinely based upon market condition data that describe that market at its mean; whereas the plaintiff might present outlier characteristics. When the damages to be measured are lost employment compensation, what are the criteria for successful mitigation of those damages?

### INTRODUCTION:

Like all intensely nuanced questions in the law, mitigation is very easy to define. For example, from *Black's Law Dictionary*, **mitigate** is "to make less severe or intense <the fired employee mitigated her damage for wrongful termination by accepting a new job>." If a legal question is sufficiently nuanced, then it might very well rise to the stature of a doctrine. Again from *Black's Law Dictionary*, "**mitigation-of-damages doctrine**. (1978) The principle requiring a plaintiff, after an injury or breach of contract, to make reasonable efforts to alleviate the effects of the injury or breach. \* If the defendant can show that the plaintiff failed to mitigate damages, then plaintiff's recovery may be reduced. -- Also termed *avoidable-consequences doctrine*."

The devil, however, is in the details. For a mitigation example, see, *Black's Law Dictionary*, and its second entry under **doctrine of constructive service**, which reads "2. Employment law. The principle that a person who contracts to work for a definite period and is wrongfully discharged after beginning work may wait until the contract period expires and then sue on the contract for the wages that the person would have earned between the of the discharge and the expiration of the contract. \* In a jurisdiction that has adopted this principle, it is an exception to the mitigation -of-damages doctrine. -- Often shortened to *constructive service*." Clearly, this is analogous to the nonbreaching party's election of remedies under anticipatory breach of contract.

It is a bit of a misnomer to refer to a duty to mitigate damages, but that phrase does capture much of the idea of mitigation. From *Black's Law Dictionary*, **duty to mitigate**, "(1891) A nonbreaching party's or tort victim's duty to make reasonable efforts to limit losses resulting from the other party's breach or tort. \* Not doing so precludes the party from collecting damages that might have been avoided." Further from *Black's Law Dictionary*, **duty** is "A legal obligation that is owed or due to another

and that needs to be satisfied; an obligation for which somebody else has a corresponding right." Thus, a duty ordinarily connotes an obligation for which another has the right to compel completion. Such is not the nature of a duty to mitigate.

The duty to mitigate damages merely frees the defendant from liable for avoidable consequences the plaintiff did not avoid when it was reasonable to so avoid. That is far removed from the defendant has the legal authority to compel the plaintiff to engage in an action. The duty to mitigate damages is more analogous to a rule of evidence.<sup>1</sup>

The duty to mitigate damages requires, as elements of its proof both the plaintiff provided magnitude of damages claimed to be suffered as well as proof the defendant provided that the wronged party failed to take reasonable steps to constrain the magnitude of damages. Is there any word more flexible in the lexicon of the law than the word "reasonable"?<sup>2</sup> Not surprisingly, the duty to mitigate is stated as a question of law but is implemented as a question of fact.

Generically, in a wrongful termination case the wronged party must attempt, but need not succeed, in obtaining replacement paid service.<sup>3</sup> Because the duty to mitigate as implemented requires calibration of reasonable, expert witnesses routinely are engaged both for fact testimony<sup>4</sup> and for opinion testimony.<sup>5</sup>

#### **SOME GRAPHICAL INFORMATION**

In the context of wrongful termination there is one question upon which this paper will focus. "How long may unemployment last before continued unemployment is not reasonable for a wrongful termination plaintiff?" One metric an expert might use in answering that question is the median number of weeks of unemployment. The graph<sup>6</sup> on the next page displays the relationship between calendar time on the horizontal axis and the median weeks of unemployment (using national data) on the vertical axis. One calibration question an expert often needs to answer is: "When does a difference in degree become a difference in kind?".

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<sup>1</sup> From *Black's Law Dictionary*, the fourth definition of **evidence** is "The body of law regulating the admissibility of what is offered as proof into the record of a legal proceeding <under the rules of evidence, the witness's statement is inadmissible hearsay that is not subject to any exception>."

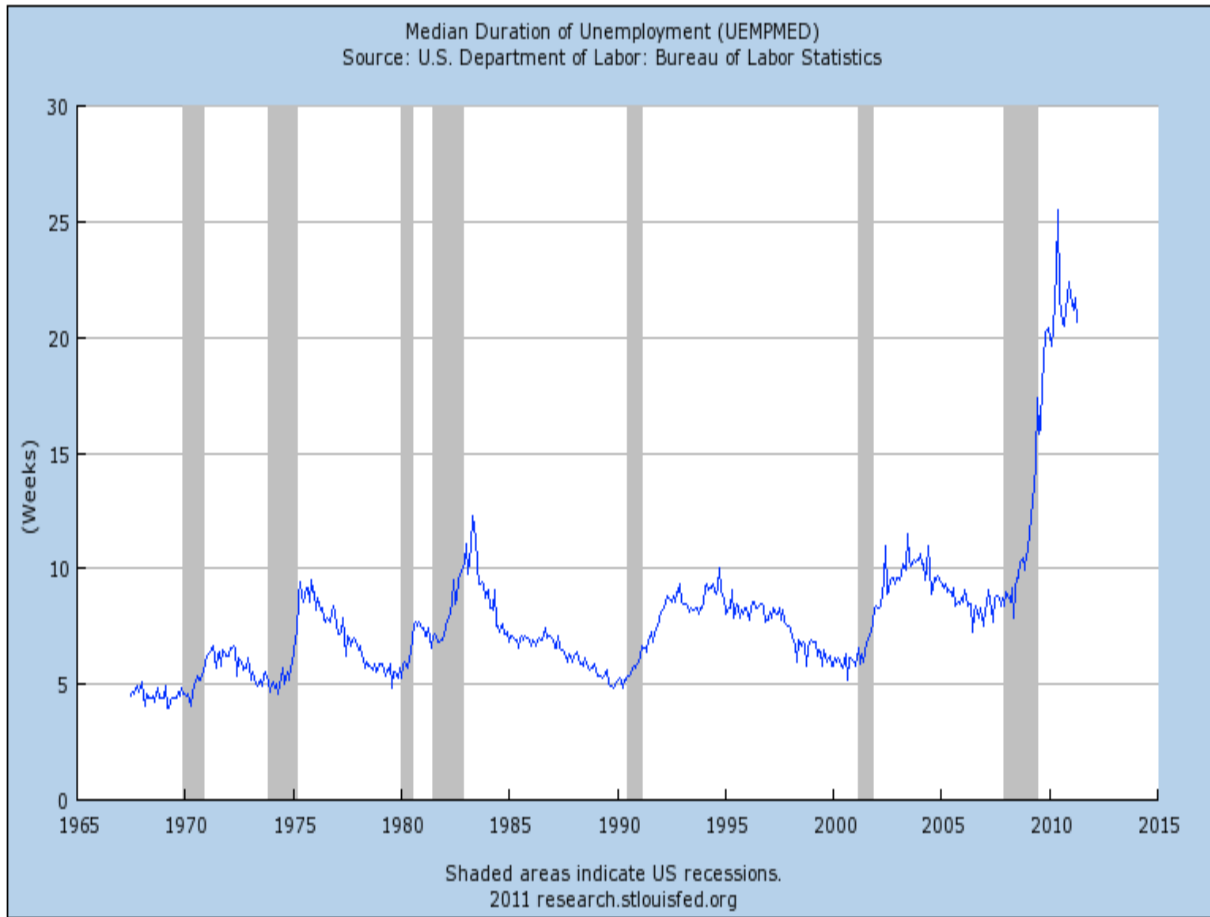
<sup>2</sup> From *Black's Law Dictionary*, the first definition of **reasonable** is "Fair, proper, or moderate under the circumstances <reasonable pay>."

<sup>3</sup> *Airport Inn, Inc. v. Nebraska Equal Opportunity Commission*, 217 Neb. 852, 353 N.W.2d 727 (Neb. 1984).

<sup>4</sup> *Federal Rules of Evidence*, Rule 703, "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. "

<sup>5</sup> *Federal Rules of Evidence*, Rule 702, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

<sup>6</sup> "Median Duration of Unemployment (UEMPMED), U.S. Department of Labor: Bureau of Labor Statistics" from the St. Louis Federal Reserve Bank's website, <http://research.stlouisfed.org/fred2/series/UEMPMED>



Prior to the current Great Recession, given the St. Louis Fed graph displayed above it would not be surprising if an expert asked to estimate a reasonably long period of unemployment that was "more likely than not" would respond with an upper bound of 12 weeks.

Technically,<sup>7</sup> the Great Recession started December 2007 and ended June 2009. However, the average person on the street does not focus on the full panoply of economic variables used by the NBER. Instead, the average person on the street focuses most on employment. Accordingly, the sentiment afoot in the country is that the Great Recession started with the September 2008 financial crash<sup>8</sup> and today the Great Recession is far from over.

Contentious as a descriptor would hardly capture the political mood of the country on the question of a reasonable period of unemployment in this market. But, in a lame duck session of Congress, the maximum weeks of benefits was (again) extended from 26 weeks to 52 weeks.<sup>9</sup> Also, the Bureau of Labor Statistics (BLS), for the first time, started tracking unemployment durations beyond 99 weeks during this Great Recession.

As an example of contention is how to interpret the St. Louis Fed graph on the preceding page in light of the BLS graph on the next page. Does the BLS graph below mean that 12 weeks still is a good metric of reasonable; or, alternatively, does the BLS graph below mean that the wrongfully discharging employer might be liable for loss of an entire remaining career when replacement employment is not secured within those 12 weeks? In short, given the existing labor market is the reasonable action of the wronged plaintiff to exit the labor force?

As noted above, contentious hardly captures the mood of the vigorous debate swirling around the country. Since a picture is worth a thousand words, and since everyone has been forewarned regarding "Lies, damn lies, and statistics.",<sup>10</sup> it ought to be no surprise that contention attaches to what is graphed and how it is graphed. But, even when a graph<sup>11</sup> is contentious<sup>12</sup> it still may reveal a useful truth. Seeking a useful truth is the purpose of this paper's use of a graph from a *Wall Street Journal* editorial.

As noted above, the technical start date and end date of the Great Recession are, respectively, December 2007 and June 2009. On the page following the BLS graph is the *WSJ* graph. The *WSJ* graph below uses a different date (hence: "peak" in the title of the graph) to graph job recovery. Invictus' contention is that the date picked is peculiar. That is, ordinarily the trough date is picked. Invictus asserts the *WSJ* picked the peak date to paint a political picture rather than for journalistic reasons. Be that as it may, the graph does reveal a truth useful to this paper.

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<sup>7</sup> That is, as defined by the congressionally specified official dating committee of the National Bureau of Economic Research. <http://www.nber.org/cycles/cyclesmain.html>

<sup>8</sup> [http://en.wikipedia.org/wiki/Late-2000s\\_financial\\_crisis](http://en.wikipedia.org/wiki/Late-2000s_financial_crisis)

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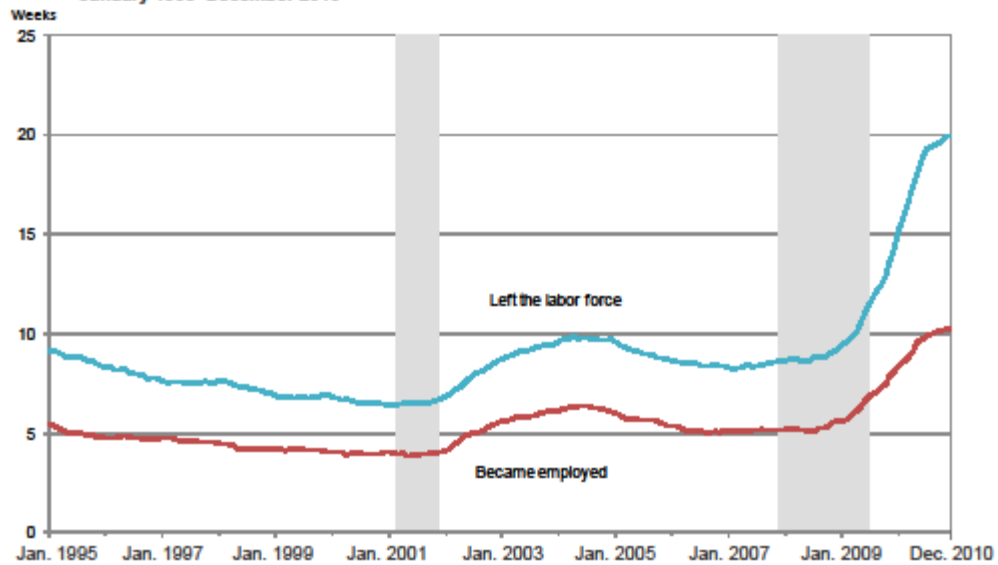
[http://en.wikipedia.org/wiki/Tax\\_Relief,\\_Unemployment\\_Insurance\\_Reauthorization,\\_and\\_Job\\_Creation\\_Act\\_of\\_2010](http://en.wikipedia.org/wiki/Tax_Relief,_Unemployment_Insurance_Reauthorization,_and_Job_Creation_Act_of_2010)

<sup>10</sup> [http://en.wikipedia.org/wiki/Lies,\\_damned\\_lies,\\_and\\_statistics](http://en.wikipedia.org/wiki/Lies,_damned_lies,_and_statistics)

<sup>11</sup> <http://www.ritholtz.com/blog/wp-content/uploads/2011/04/calc-risk-employment-graph.jpg>

<sup>12</sup> Under the pseudonym "Invictus" the *Wall Street Journal's* April 2, 2011 editorial is called out for this graph's artful choice of dates. <http://www.ritholtz.com/blog/2011/04/attention-wsj-correction-needed/> Link last visited July 1, 2011.

Chart 1. Median duration of unemployment for persons who became employed or left the labor force in the subsequent month, not seasonally adjusted 12-month moving average, January 1995–December 2010



NOTE: Shaded areas represent recessions as determined by the National Bureau of Economic Research (NBER). Duration is based on the number of weeks unemployed in the month before becoming employed or leaving the labor force and, therefore, is somewhat understated.

Since color lines do not reproduce readably in black-and-white, do note that the sequence of recession years reaching recovery of jobs is as follows: at 9 months 1980; then 1974; followed by 1969; 1960; 1948; 1953; 1958; at 28 months is 1981; at 31 months is 1990; next is 2001 which needed 46 months to recover all lost jobs; and, at month 41 and obviously still many months away from recovering all lost jobs is the 2007 Great Recession.

From the first graph of this paper, the St. Louis Fed graph of median duration of unemployment, that duration was relatively stable between 5 weeks and 12 weeks between 1970 and 2009. Then something changed. That process of change is made more visible in the WSJ months needed for job recovery graph. Whatever process is involved, it clearly started sooner than the Great Recession, but became undeniable in the Great Recession. How does this change influence what is reasonable from the perspective of mitigation?

If a job recovery graph is drawn using the ordinary date, the trough date, then the job recovery of the Great Recession is lack luster and clearly near the bottom of post-WWII recoveries.<sup>13</sup> The ordinary graph is included in the *Monthly Labor Review* and is displayed on the page following the *WSJ* graph. The ordinary job recovery graph does not, however, reveal the process that so unsettles the population: a sense of no jobs. The months from peak graph vividly portrays the reality that is so stimulating the population.

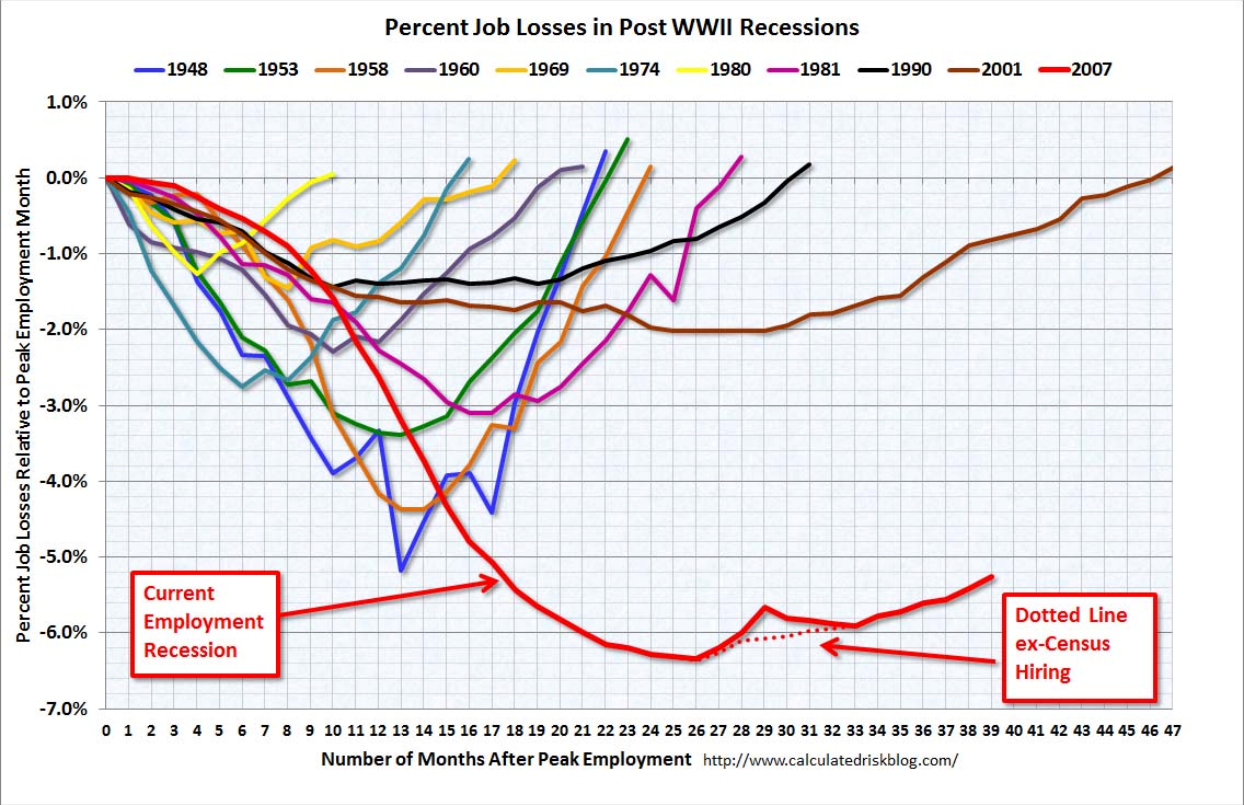
For this paper a central question is "What is a reasonable duration of unemployment?". The *WSJ* months from peak graph helps answer that question. What use to be ordinary, in the past, no longer is a reasonably expected duration.

Do note that duration of unemployment is but one metric of reasonable. The core question is whether the plaintiff is seeking, not whether the plaintiff is obtaining, substitute employment. The duration of employment offers some insight as to genuineness of the plaintiff's efforts.

However, also recall the expert's penchant for point estimates rather than bandwidth estimates as the expert seeks to opine on more likely than not. The defendant is entitled to mitigation by the plaintiff. The defendant is not entitled to mitigation by the median job seeker, but the median might be relevant evidence that assists the trier of fact.

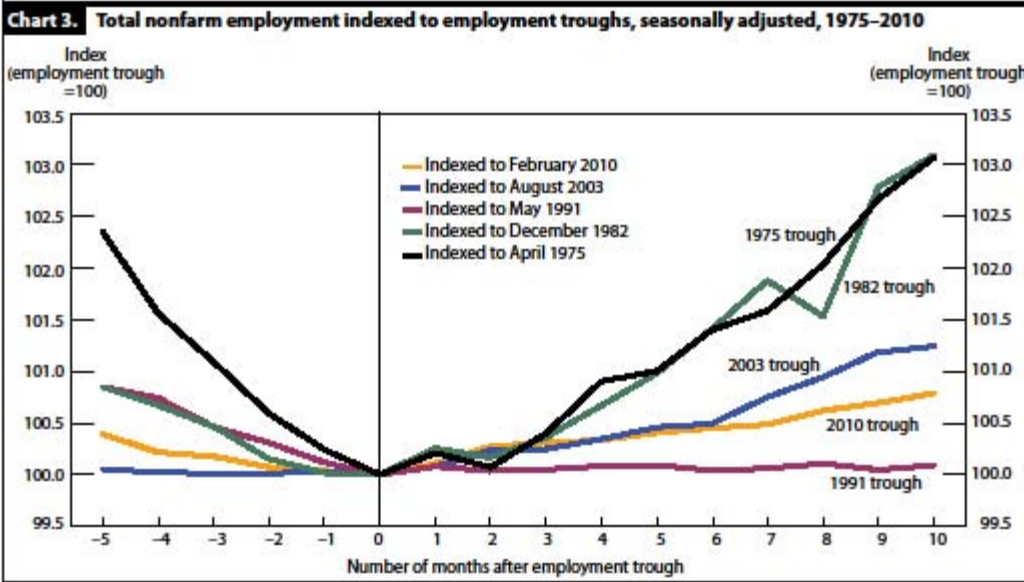
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<sup>13</sup> Eddlemon, John P. "Payroll employment turns the corner in 2010: Nonfarm payroll employment reached a low point in February 2010, and modest job growth continued throughout the rest of the year", Payroll Employment in 2010 series, *Monthly Labor Review*, May 2010, pp. 23-32. See particularly, "Chart 3. Total nonfarm employment indexed to employment troughs, seasonally adjusted, 1975-2010" on page 25.



Business cycle	Employment trough	Number of months from business cycle trough to employment trough	Net change in employment 10 months after employment trough	Percent change in employment 10 months after employment trough
November 1973–March 1975.....	April 1975	1	2,354	3.1
January 1980–November 1982 <sup>1</sup> .....	December 1982	1	2,746	3.1
July 1990–March 1991.....	May 1991	2	100	.1
March 2001–November 2001.....	August 2003	21	1,620	1.2
Average over past 4 cycles.....	...	6	1,705	1.9
December 2007–June 2009.....	February 2010	8	1,053	.8

<sup>1</sup> Combined January 1980–July 1980 and July 1981–November 1982 business cycles.



March 2009. Firms typically increase the hours of their current employees before hiring new workers, so average weekly hours traditionally have been seen as a leading indicator of economic activity. Temporary help services employment, traditionally a leading indicator of nonfarm job growth, reached a trough in August 2009—6 months before nonfarm employment reached its employment trough—and continued to grow in 2010. (See chart 4.) Firms tend to utilize temporary help services workers in times of economic uncertainty in order to manage fluctuations in labor demand that may not be sustained over a longer period.

In 2010, average weekly hours for all employees in the private sector increased by 0.3 hour, to 34.2 hours, up 0.5 hour from a low in June 2009. The index of aggregate

weekly hours<sup>7</sup> rose 2.0 percent in 2010, but in December 2010 was 7.8 percentage points below the peak in June 2007.

Average hourly earnings of all employees in the private sector increased by 38 cents, to \$22.77, in 2010. Over the year, average hourly earnings for all employees rose by 1.7 percent, while the index of aggregate weekly payrolls<sup>8</sup> for all employees increased by 4.0 percent. As of December 2010, this index was 1.8 percent below its June 2008 high.

### Job losses moderate

Construction employment fell by 149,000 in 2010, with most of the loss occurring in the first 2 months of the year. After February, employment losses averaged 4,000

## **TERMINATION OF WHAT?**

Frequently the phrase "wrongful termination" evokes thoughts of employment. But, wrongful termination has a far broader sweep. Any of the three agency relationships (i.e., principal and agent; principal and independent contractor; and employer and employee) is susceptible to wrongful termination. However, the scope is far broader than just those three relationships. "Agency" may be, but need not be, a contractual relationship. Wrongful termination of a contractual relationship has its own rubric of damages. Wrongful termination of an employment agreement is not the same as wrongful termination of an employment contract. And, sometimes written contracts permit damages that oral contracts do not. Additionally, tort, rather than contract might be the basis for damages. As but two examples of contract versus tort consider the contract cause of action for interference with contractual relationships as a cause of action distinctly separate from the tort cause of action for intentional interference with business relationships.

In the realm employment wrongful termination the likelihood of a legislatively created cause of action is greater. The common law of employment in the USA is "at will".<sup>14</sup>

In an "at will" employment relationship termination lawfully may be for no reason or for nearly any reason. That is, in an at will employment context it is difficult for a termination to be wrongful. However, while it always is true that each party to an at will employment agreement has the power to immediately terminate, there are contexts where the non-terminating party has a reasonable expectation of continuation (e.g., hired for a fixed duration). In that context, the existence of the legal power to terminate must not be confused with lawful exercise of that power. A contractual employment relationship, with its more firmly enforced legally reasonable expectations, is going to offer more contexts wherein a termination might be wrongful.

Statutory and constitutional constraints on the parties' liberty might, however, render wrongful a far broader array of particular terminations that are wrongful (e.g., antidiscrimination laws; whistle blower laws). The primary importance of a statutory origin for a cause of action is the near universal pattern of a companion statutory definition of legally recoverable damages (e.g., attorney fees). Far less frequently such statutes give any guidance on mitigation.

## **MITIGATION OF WHAT?**

To an extent, hat is wrongful does define the scope of recoverable damages (e.g., statutory prohibition on discrimination routinely authorizes recovery of attorney fees). But, this paper's focus is on mitigation. Mitigation rules are more stable across causes of action (e.g., tort, contract, statutory, etc.) than are the elements of the cause of action themselves. The variation of mitigation rules will track the variation of required elements qua elements rather than qua cause of action. For example, mitigation for a tort of libel would include the plaintiff not expanding the scope of publication of the defamatory statement; whereas, mitigation of damages flowing from the tort of malpractice would not include a similar duty of quietude.

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<sup>14</sup> USA *Constitution*, Amendment XIII, "  
Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.  
Section 2. Congress shall have power to enforce this article by appropriate legislation."

## **SOME ECONOMIC THEORY**

The economic expert witness seeks to apply theory to facts so as to make the facts assist the trier of fact. What would happen if a plaintiff made reasonable efforts to mitigate a wrongful termination?

There are multiple vectors of loss for such a plaintiff. Employers are reticent to employ the unemployed. Employers are reticent to employ the terminated. Also, adding insult to injury, employers are reticent to employ "employees who sue employers". And what are some of the consequences of a wrongful termination? The wronged employee is unemployed, terminated, and suing a former employer. All of the legally recognized multiple vectors of loss for a wrongfully terminated plaintiff will become unified in the litigation. And, each influences what is reasonable mitigation.

Economists evaluate the market within which the wrongfully terminated employee is seeking to engage in mitigation. Some market conditions will favor rapid achievement of substitute employment (e.g., low friction market that is experiencing rapid growth). However, the expert may be allowed to opine using a theoretical market even when all agree there is no actual market within which transactions are occurring.<sup>15</sup> Importantly, as friction increases in a labor market and as job growth slows in a labor market the effectiveness of any mitigation efforts will decrease. Also note, the attributes of friction and job growth prevalent in the entire labor market are relevant evidence that will assist the trier of fact; but, most important are those attributes in the segment of the labor market that contains employment that is a sufficient substitute for the wrongfully terminated job.

Economic theory leans heavily on the concept of substitutes. Economists distinguish between close substitutes and substitutes. The competitive linkages in the market are greater for close substitutes. A truck driver for cross-county delivery is a far closer substitute for a truck driver for in-city deliveries than is a cab driver for either.

Mitigation focuses upon substitutes. However, the law's substitute is not identical with the economist's substitute. The job itself, its wages, hours, and terms of employment attributes, and its location attributes each are relevant to whether two jobs economically are substitutes. However, to economists the universal substitute is money. Not so for the law. Accordingly, while an economist would see as a close substitute a local job and a job requiring both relocation and a substantial increase in commute time as long as the monetary reimbursement was sufficient to compensate for those unfavorable attributes, the law would be less sanguine in seeing a close substitute. That said, some labor markets inherently are national in nature (e.g., nuclear engineers) and relocation would be presumed agreeable by the selection of profession.

Economics assumes rational expectations drive human behavior. The law favors reasonable over rational.

Mitigation requires the plaintiff to engage in reasonable avoidance of avoidable consequences. From a rational expectations perspective, when labor market friction soars and job openings vaporize, does a worker rationally refrain from obviously fruitless job searches? Yes, these are "discouraged workers".<sup>16</sup> The ebb and flow of the

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<sup>15</sup> O'Hara, Michael J. "Pecuniary Damage", *The Earnings Analyst*, Vol. XI, 2010.

<sup>16</sup> A discouraged worker is unemployed, desires employment, and has not actively looked for employment in the last four weeks because the worker perceives no jobs as being available. Reporting numbers in thousands of persons, the average annual number of discouraged workers between 2001 and

number of discourage workers often generates odd motions in "the" unemployment rate. If the number of discourage workers grows faster than the number of newly unemployed, then the most commonly reported unemployment rate drops. When a defendant employer sees the unemployment rate drop it is unlikely that the defendant employer is going to see "rational behavior" by a wrongfully discharged employee who has become a discouraged worker and has exited the labor market. The law of mitigation will tend to favor the defendant employer at least to the extent of requiring the plaintiff to seek substitute employment even though the plaintiff rationally believes such a search is sure to be fruitless. A rational person would not look, but a reasonable person would look.

Economic data invariable is lagged. Data has to be collected and reported. Accordingly, data on market conditions in August 2011 are not likely to be available in any form until months after August 2011.<sup>17</sup> This is but one reason why forecasting is so difficult. But, more to the point of mitigation, necessarily, it is difficult for an expert to opine on the reasonableness of the plaintiff's most recent mitigation efforts since the expert will have a difficult time accurately seeing the relevant market conditions.

#### **MITIGATION FROM THE PERSPECTIVE OF DEFENSES**

Generically, the defendant's defenses to the plaintiff's cause of action for wrongful termination are irrelevant to the question of mitigation. Mitigation is a duty that presupposes the defendant's liability; whereas defenses (other than mitigation itself) would go towards extinguishing the defendant's liability that triggers the plaintiff's duty to mitigate. However, there are some pertinent instances.

The plaintiff bears the burden of proof both with respect to the existence of damages and as to the magnitude of damages. However, those two burdens are not identical. The former presents a far higher bar than the latter. Once the plaintiff proves the existence of damages (typically, but not always) by the preponderance of the evidence the court is far more welcoming as to proof of magnitude. Especially if any of the difficulty hampering the plaintiff's proving magnitude of damages is due to the defendant's wrongful actions, then the court can be very tolerant. The defendant will not be heard to complain that the plaintiff could not clear an evidentiary hurdle erected by the wrongful defendant. Once the plaintiff proves up damages the defendant may rebut that proof. The defendant must plead and prove that the plaintiff failed to discharge the plaintiff's duty to mitigate damages. Mitigation is one form of the defendant's rebuttal of the plaintiff's proof of damages.

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2009 was 408. In 2010 it was 778 and in 2011 the annual number of discourage workers was 1,173. Data from BLS website.

<sup>17</sup> Our perception of what is possible for data collection is skewed by the routinely, richly detailed data of the financial markets. However, there are two key attributes of such financial data that create that skew. First, the time horizon of financial data often can be measured in minutes whereas the economic market data often is measured in months. Yes, end-of-day stock market data is widely available. However, relative to the time horizon of those markets, the data is arriving many, many time horizons after the close of the market. Adjusting for the differences in time horizon, economic market data might, in fact, be more prompt than stock market data is. Second, the immediacy of profit opportunities associated with more timely data is far greater and far more obvious with stock market data as compared with economic market data. Accordingly, private collection of and private reporting of financial market data is the norm; whereas, economic market data far more frequently is generated as a public good.

That all said, damages may not be speculative. One goal of the defense counsel is to render speculative the plaintiff's proof of magnitude and/or of existence of damages. The defendant pressing on the plaintiff's duty to mitigate can serve this purpose.

A very simple (in some circumstances [recall the potential for a multiplicity of vectors of loss], a grossly over simplified) upper bound on the wrongfully terminated plaintiff's damages would be the compensation that would have been paid but for the wrongful termination from the date of termination to the date of trial. Let's start by ignoring all defenses that might render "not wrongful" the defendant's termination of the plaintiff. Instead, focus on mitigation. How can the defendant lower that very simple upper bound?

Most obviously, that upper bound is lowered by perfectly substitutable employment. The plaintiff is under no duty to accept alternative employment that is not a reasonable substitute; but, reasonableness of mitigation is question of fact.

Would a reasonable plaintiff accept part-time work to replace full-time work wrongfully denied? That depends. Clearly, the plaintiff may do so; far less clear is when the duty to mitigate requires doing so. For example, if the skills of the plaintiff require continual use and updating, then the plaintiff must engage in *some* method of preserving the plaintiff's human capital. Part-time employment might serve that end. However, if the labor market is segmented in such a way that transition between full-time and part-time employment is, in reality, only a one-way street (e.g., rarely does one who leaves full-time for part-time ever get to return to full-time), then resort to part-time substitute employment might magnify rather than mitigate damages. This is an example of where the defendant will not be heard to complain. If the defendant's wrongful actions create a financial exigency for the plaintiff that necessitates the plaintiff sacrificing a portion of the plaintiff's human capital (e.g., initiate a permanent downgrade in employment status) in order to make ends meet until a favorable conclusion to litigation, then the defendant does not get to claim failure to mitigate. However, quite frequently, part-time employment would bolster rather than degrade subsequent employment opportunities. Accordingly, the reasonableness of the plaintiff's mitigation efforts might be safely challenged by a defendant when the plaintiff refuses all offers of less than perfect substitute employment.<sup>18</sup>

An expert's opinion must be reasonably reliable and must substantially assist the trier of fact; or, it is inadmissible.<sup>19</sup> These requirements are companions to the requirement that damages not be speculative. An expert exploring the reasonableness of the plaintiff's mitigation as well as exploring both the existence of and the magnitude of the plaintiff's damages independent of those mitigation efforts might encounter this limitation.

Forecasts of business profits often encounter a challenge of speculation. There is a defense to damages that does not challenge the propriety of the plaintiff's claim of wrongful termination. That simplistic upper bound discussed earlier presupposes that the defendant employer still is in existence; and, thus, the job would exist with an occupant other than the plaintiff. However, what entails if the defendant's continued

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<sup>18</sup> Obviously, this defendant gambit will tend to be less successful in a bench trial and will tend to be more successful when the plaintiff is unsympathetic and the trier of fact is jury.

<sup>19</sup> Note, it is often erroneously asserted that an expert's opinion must be "reasonably certain" or must be given when the opinion is held to a "reasonable (insert profession) certainty". That is not what is required by the rules of evidence. See, *supra*, footnote 4 and footnote 5.

existence is fractionally attributable to the wrongful termination? For example, what damages are owed the wrongfully terminated employee if a discriminatory employer materially lowers operating costs and thereby avoids its compelled exit from the market as an employer?

If a market is experiencing significant contraction, then economic theory would expect all factors of production to suffer reduced valuations. In such a context, both the existence of and the magnitude of the simplistically estimated damages would be called into question. The plaintiff wrongfully terminated by a firm confronting inevitable exit over estimates "damages" with that simplistic metric. Further, a contracting market has implication for which actions by the wronged plaintiff are reasonable mitigation efforts. Emotionally, the plaintiff's view of the plaintiff may no longer find economic validation in the market of today.

While a rational person might exit the labor market, would a reasonable person do so? Or, would a reasonable person mitigate losses by acknowledging that the market has changed fundamentally? That is, when does mitigation require the plaintiff to acknowledge that "that job" is gone and never is coming back?

#### REFERENCES:

1. *Airport Inn, Inc. v. Nebraska Equal Opportunity Commission*, 217 Neb. 852, 353 N.W.2d 727 (Neb. 1984).
2. *Black's Law Dictionary*. Ninth Edition. Bryan A. Garner, Editor in Chief. St. Paul, MN: Thomson Reuters: 2009.
3. *Browning Ferris Industries of Nebraska, Inc. v. Eating Establishment-90th & Fort, Inc.*, 6 Neb.App. 608, 575 N.W.2d 885 (Neb.App. 1998).
4. Bureau of Labor Statistics. "How long before the unemployed find jobs or quit looking?", Issues in Labor Statistics, May 2011, Summary 11-1. <http://www.bls.gov/opub/ils/pdf/opbils89.pdf> Especially note, "Chart 1. Median duration of unemployment for persons who became employed or left the labor force in the subsequent month, not seasonally adjusted 12-month moving average, January 1995-December 2010." at page 3 of 6.
5. *Di Salvo v. Chamber of Commerce of Greater Kansas City*, 568 F.2d 593 (C.A.8 1978).
6. *Drain v. Board of Education of Frontier County School District No. 46*, 244 Neb. 551, 508 N.W.2d 255 (Neb. 1993).
7. Eddlemon, John P. "Payroll employment turns the corner in 2010: Nonfarm payroll employment reached a low point in February 2010, and modest job growth continued throughout the rest of the year", Payroll Employment in 2010 series, *Monthly Labor Review*, May 2010, pp. 23-32.
8. *Edwards v. School Bd. of City of Norton, Va.*, 658 F.2d 951 (C.A.Va., 1981).
9. Ellwood, David T. "Teenage Unemployment: Permanent Scars or Temporary Blemishes?", chapter 10 of *The Youth labor Market Problem: Its Nature, Causes, and Consequences*, edited by Richard B. Freeman and David A. Wise. University of Chicago Press: Chicago, 1982. <http://nber.org/chapters/c7878>
10. Farber, Henry S. "Job Loss in the Great Recession: Historical [sic] Perspective from the Displaced Workers Survey, 1984-2010", NBER Working Paper Series, Working Paper 17040, May 2011. <http://www.nber.org/papers/w17040>

11. *Fauss v. Norfolk Big Red Bottle Shop, Inc.*, 2000 Neb. App. LEXIS 330 (Neb.App. 2000).
12. Federal Reserve Bank of Cleveland, "What's Up with the Unemployment Rate?", *Economic Trends*, May 2011, pp.23-26.
13. *Freeburg v. Artistic Woven Labels, Inc.*, Not Reported in N.W.2d, 1997 WL 817831 (Neb.App. 1997).
14. *Fuller v. Little*, 61 Ill. 21, 1871 WL 8193 (Ill. 1871).
15. *Helwig v. Aulabaugh*, 83 Neb. 542, 120 N.W. 162 (Neb. 1909).
16. *Howard Sales Co., Inc. v. Bradley*, Not Reported in N.W.2d, 2008 WL 2930197 (Neb.App., 2008).
17. *Kozlik v. Emelco, Inc.*, 240 Neb. 525, 483 N.W.2d 114 (Neb. 1992).
18. *Kring v. School Dist. No. 3, Harlan County*, 105 Neb. 864, 182 N.W. 481 (Neb. 1921).
19. *Lee v. Ralston School Dist., Douglas County*, 180 Neb. 784, 145 N.W.2d 919 (Neb. 1966).
20. O'Hara, Michael J. "Pecuniary Damage", *The Earnings Analyst*, Vol. XI, 2010.
21. *Reedy v. City of Omaha*, 1994 Neb. App. LEXIS 349 (Neb.App. 1994).
22. *Ridenour v. Kuker*, 185 Neb. 321, 175 N.W.2d 287 (Neb. 1970).
23. *Schlueter v. School Dist. No. 42 of Madison County*, 168 Neb. 443, 96 N.W.2d 203 (Neb. 1959).
24. *Stiles v. Skylark Meats, Inc.*, 231 Neb. 863, 438 N.W.2d 494 (Neb. 1989).
25. *Stoffel v. Metcalfe Const. Co.*, 145 Neb. 450, 17 N.W.2d 3 (Neb. 1945).
26. *Sullivan v. David City Bank*, 181 Neb. 395, 148 N.W.2d 844 (Neb. 1967).
27. *Vredeveld v. Clark*, 244 Neb. 46, 504 N.W.2d 292 (Neb. 1993).
28. *U.S. v. Lee Way Motor Freight, Inc.*, 625 F.2d 918 (C.A.Okl., 1979).
29. Wolff, Edward N. "Computerization and Rising Unemployment Duration", *Eastern Economic Journal*, vol. 31, no. 4, Fall 2005, pp. 507-536.
30. *World's Columbian Exposition v. Richards*, 57 Ill.App. 601, 1894 WL 3036 (Ill.App. 1 Dist. 1894).