IN THE SUPREME COURT OF GUAM

ALAN F. HAEUSER
Petitioner-Appellee

vs.

DEPARTMENT OF LAW, GOVERNMENT OF GUAM
and THE CIVIL SERVICE COMMISSION OF GUAM
Respondents-Appellants

OPINION

Supreme Court Case No. CVA98-009
Superior Court Case No. SP0003-92

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Appeal from the Superior Court of Guam
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Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, Chief Justice[1]; JANET HEALY WEEKS, and BENJAMIN J.F. CRUZ., Associate Justices.

SIGUENZA, C.J:

[1] Appellants Department of Law, Government of Guam, and the Civil Service Commission of Guam appeal the trial court's award of monetary damages for back pay to Appellee Alan F. Haeuser. Appellants argue that the back pay was erroneous because appellee failed to mitigate damages. Appellants also seek a remand on the issue of the amount of damages. In addition, appellants also appeal the trial court's denial of the Department of Law's motion to compel production of the defendants' tax returns.

I.

[2] Appellee Alan Haeuser (hereinafter Haeuser) was hired as an Assistant Attorney General with the Guam Department of Law in February 1990. Haeuser was hired as an unclassified employee for a probationary term of two years. On or about 1April 1991, Haeuser was terminated from employment. Haeuser filed an appeal with the Civil Service Commission of Guam and the appeal was dismissed by the Commission for lack of jurisdiction, because Haeuser was an unclassified employee, pursuant to 4 GCA § 6208.1 (1998).

[3] Shortly thereafter, Haeuser petitioned for a writ of mandate from the Superior Court of Guam alleging that 4 GCA § 6208.1 violated the Equal Protection Clause and the Organic Act. After hearing the matter, the Superior Court found no equal protection violation, but did not explicitly

[1]The signatures in this opinion reflect the titles of the justices at the time this matter was considered and determined.

address the Organic Act violation. Haeuser appealed the ruling to the Appellate Division of the District Court, which affirmed the Superior Court findings and held that there was no violation of the Organic Act.

[4] Haeuser filed an appeal to the Ninth Circuit pursuing only the Organic Act violation. The Ninth Circuit agreed with Haeuser and held the statute exempting Assistant Attorney Generals from the merit protections of classified service violated the Organic Act. The Ninth Circuit issued its mandate to the appellate division, which in turn issued a mandate to the Superior Court.[2]

[5] On or about 8 May 1997, the Superior Court granted Haeuser's motion for summary judgment and ordered the government to reinstate Haeuser as an Assistant Attorney General. Haeuser returned to work for the Department of Law on 24 June 1997 and is currently a full-time employee. On 5 September 1997, the Superior Court issued an order denying the government's motion to compel production of Haeuser's income tax returns.

[6] A trial was held in early October 1997 regarding issues of back pay and mitigation. The Superior Court awarded back pay to Haeuser, with setoff for money earned and for failure to mitigate. The government filed a motion to make additional findings of fact and conclusions of law which was subsequently denied by the trial court. The government now appeals the trial court's decision awarding back pay and the denial of the government's motion to compel production of documents.

[2]Although we recognize the Ninth Circuit's decision that the exemption for assistant attorney generals from the merit protections of classified service is inorganic, we render no opinion regarding the merits of that decision in applying our analysis in this matter.

II.

[7] The government raises two issues for the court's consideration. First is whether the trial court erred in its findings that Haeuser made reasonable in his efforts at finding employment within the legal field and that Haeuser made a reasonably diligent effort to mitigate his damages.

[8] The second issue is whether the trial court erred in not requiring Haeuser to produce his income tax returns.

III.

[9] This court has jurisdiction pursuant to 7 GCA §§ 3107 and 3108 (1994).

IV.

[10] The government assigns error to the trial court's finding that Haeuser's attempts at finding work in the legal field was reasonable and that Haeuser's efforts to mitigate damages were also reasonable.

[11] It is well-settled that any injured party, who is entitled to damages, is required to mitigate those damages. In the case of an award for back pay due to an aggrieved employee, that employee is under a duty to mitigate damages. *Sangster v. United Air Lines, Inc.*, 633 F.2d 864, 868 (9th Cir. 1980). The employer has the burden of showing that the employee has not mitigated damages. *Id*.

[12] In order for an employer to meet the burden that an employee failed to mitigate damages, he must show: a) there were substantially equivalent jobs available during the time in question; b) that the employee could have obtained an equivalent job; c) and the employee failed to use

reasonable diligence in seeking one. *Odima v. Westin Tucson Hotel*, 53 F.3d 1484, 1497 (9th Cir. 1995). Other courts have chosen to apply an alternative burden on employers to show a failure to mitigate on the part of an employee. An employer is released from a duty to establish the availability of comparable employment if he can prove that the employee made no reasonable efforts to seek such employment. *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 54 (2nd Cir. 1998); *see Tubari Ltd., Inc. v. National Labor Relations Board*, 959 F.2d 451, 458 (3rd Cir. 1992); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1527 (11th Cir. 1991); *Sellers v. Delgado College*, 902 F.2d 1189, 1193 (5th Cir. 1990). This alternative burden does not discard or replace the old rule of "substantially equivalent employment", but allows employers to meet their burden by a showing that the employee failed to make reasonable efforts to obtain work.

[13] We believe that the appropriate rule to apply to the current issue before the Court would be to examine whether the government, at trial, met either the burden of showing the availability of "substantially equivalent" jobs or showing that Haeuser failed to make reasonable efforts to find employment.

[14] A trial court's findings on mitigation of damages are subject to a clearly erroneous standard of review. *Sellers v. Delgado College*, 902 F.2d 1189, 1194 (5th Cir. 1990). "If the [trial] court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Merchant v. Nanyo Realty*, 1998 Guam 26, ¶ 12. An appellate court must accept the lower court's findings of fact unless upon review the appellate court is left with the definite and firm conviction that a mistake has been committed. *Id.* We will review the entire record to determine whether the trial court's finding that Haeuser reasonably mitigated his damages

is clearly erroneous.

[15] We begin our review from the time period that Haeuser was terminated from his employment with the Department of Law. The trial court found that after Haeuser was terminated in April 1991, he applied for a staff attorney position with Guam Legal Services with the Superior Court of Guam. In both instances, he was not hired. In September 1991, Haeuser applied for an attorney position with the Department of Administration after seeing an advertisement in the newspaper about a position. He did not receive any notification regarding his application and clearly was not hired.

[16] Approximately one year later around October 1992, Haeuser submitted another application to the Department of Administration and was informed that the Department of Administration was not accepting general applications. He was advised to apply to individual agencies in the Government of Guam. Several months later, Haeuser applied for an attorney position with the Public Defender Service Corporation, but he was not accepted for the position and was told that funding was not available. In 1993 or 1994, Haeuser applied for a position with the Guam Power Authority, but he was never notified about any action on his application.

[17] Haeuser also applied for a an attorney position with the Advocacy Office but was not hired by that agency. In September 1996, Haeuser applied for an attorney position with the Department of Education. He later received a letter informing him that he was not selected for the position.

[18] During the period of six (6) years from the date of Haeuser's termination to his reinstatement with the Department of Law in 1997, Haeuser applied for a total of seven (7) attorney positions, all with various government agencies. Haeuser did not apply for a position with any of the private law firms on Guam.

[19] The trial court concluded that "based upon the testimony of the Petitioner as well as the other

witnesses in this regard, coupled with a common sense view on this issue", Haueser's failure to apply for employment with a private firm did not constitute a failure to mitigate his damages.[3] The trial court "presumed that many, if not all, employers would find Petitioner's previous termination a negative factor when weighing whether or not to hire him for positions within their respective offices."[4]

[20] Based on our review of the record below, it is our belief that the trial court's presumptions and conclusions are unsupported by the record. We are unable to find the evidentiary basis for the trial court's presumption that Haeuser's attempts to find employment with any private law firm would have been unsuccessful. The trial court relied upon the testimony of the hiring partners of two large law firms on the island, who stated that based upon the qualifications of Haeuser, it was unlikely that Haeuser would have been hired for their respective firms. Although it was unlikely that Haeuser would have been employed by these particular firms, no other evidence was presented that Haeuser would not have been hired by other private firms. The court takes note of Exhibit "O" introduced during the trial,[5] which shows that during the six year period between Haeuser's termination and his reinstatement, no fewer than ten (10) attorneys were hired by private law firms each year. The fact that Haeuser did not apply at any private law firms immediately raises serious concerns with the trial court's findings.

[21] While a trial court can use a common sense approach in making a factual determination of Haeuser's efforts to mitigate, its presumptions and the basis for its findings must be contained in the

[3] *See* Appellants' Excerpts of Record, Subsection 4, page 26.

[4] *Id.* at 24.

[5] *See* Appellants' Supplemental Excerpts of Record.

record. We are unable to find the evidentiary support for the trial court's conclusion that Haeuser would not have been hired by any private law firm. Perhaps, if Haeuser had tried to apply to just one private firm and was not hired, the trial court's conclusion would be plausible, in light of the record. But in the absence of such evidence, it is difficult for this court to find that the trial court's presumptions about private law firms on Guam were in fact valid.

[22] We are left with a definite and firm conviction that the trial court committed a mistake in its conclusions that Haeuser had reasonably mitigated his damages. The trial court's disregard of the fact that Haeuser did not apply for even one position with a private law firm is a very troubling aspect of the factual findings of the trial court. We have not conducted a review of the evidence as presented to the trial court, but rather we have examined the basis of the trial court's conclusions regarding the efforts of Haeuser to mitigate his damages and we find that these conclusions were not plausible in light of the entire record. Accordingly, we reverse the decision of the trial court finding that Haeuser reasonably mitigated his damages and remand this matter for findings consistent with this opinion.

V.

[23] The second issue raised by the government is whether the trial court erred in denying their motion to compel production of Haeuser's income tax returns. During discovery, the government served upon Haeuser a request to produce documents, namely Haeuser's income tax returns for the years 1991 to 1996. Haeuser did not comply with the request. A motion to compel production was then brought by the government. The trial court issued a decision and order denying the motion finding that the government had already obtained the information in the documents from other

sources. We review a trial court's decision regarding discovery for abuse of discretion. *Sopcak v. Northern Mountain Helicopter Serv.*, 52 F.3d 817, 818 (9th Cir. 1995)(citations omitted); *see also People v. Tuncap*, 1998 Guam 13 (adopting the same standard of review for discovery decisions in a criminal case).

[24] The United States Supreme Court and the Ninth Circuit have recognized that tax returns are privileged documents, but do not enjoy an absolute privilege from discovery. *See St. Regis Paper Co. v. United States*, 368 U.S. 208, 219, 82 S.Ct. 289, 295-296 (1961); *Premium Service Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225, 229 (9th Cir. 1975). A public policy exists against unnecessary disclosure in order to encourage taxpayers to file complete and accurate returns. *Premium Service Corp.*, 511 F.2d at 229 (citations omitted). The Ninth Circuit is silent, however, on how to determine when disclosure of tax returns is appropriate.

[25] One jurisdiction has formulated a rule to determine whether tax returns should be disclosed in discovery. Under this test, a court must determine whether: 1) the tax return is relevant to the subject matter in dispute; and 2) a compelling need exists for the return because the information sought is not obtainable from other sources. *Terwilliger v. York Int'l. Corporation*, 176 F.R.D. 214, 216-217 (W.D.Va. 1997). The party seeking discovery of tax returns bears the burden of establishing its relevance, while the resisting party has the task of identifying an alternative source for information. *Id.*

[26] The government cites several cases in which trial courts have ordered parties to produce tax returns. The government relies mainly upon *Young v. United States*, 149 F.R.D. 199 (S.D. Cal. 1993), in which a district court ordered the production of tax returns of the plaintiff, finding that the disclosure of the tax returns were reasonably necessary and appropriate for discovery in light of the

claim. In another case, *Shearson Lehman Hutton, Inc. v. Lambros*, 135 F.R.D. 195 (M.D. Fla. 1990), another federal district court ordered disclosure of a party's tax returns citing only that the documents were relevant and ignoring the privileged status of this class of documents. In these cases however, the respective courts made specific findings that the tax returns were needed by the requesting parties.

[27] We have determined that adopting the two-pronged test articulated in *Terwilleger* presents an approach that balances the discovery needs of a party against the public policy favoring non-disclosure.

[28] The trial court ruled that the tax returns did not have to be produced because there were other sources from which to draw the information in those documents. Essentially, the trial court said that there was no need for them. The trial court is in a better position to determine the need for these documents in this case. Nothing in the record seems to even suggest that there was information in these tax returns that was not obtainable from other sources. The government presents only general assertions of relevance and do not offer any other arguments to justify reversing the trial judge's determination that these documents were not needed. We find no abuse of discretion and, therefore, affirm the trial court's decision denying appellant's motion to compel.

VI.

[29] The trial court's finding that Haeuser had reasonably mitigated his damages, is REVERSED and REMANDED for findings consistent with this opinion. As for the error assigned to the trial court's denial of the government's trial motion to compel the production of Haeuser's tax returns, that decision is AFFIRMED.

JANET HEALY WEEKS
Associate Justice

BENJAMIN J.F. CRUZ
Associate Justice

PETER C. SIGUENZA
Chief Justice