

**IN THE SUPREME COURT OF GUAM**

**ALAN F. HAEUSER,**  
Petitioner-Appellant,

**v.**

**DEPARTMENT OF LAW,**  
Respondent-Appellee.

**OPINION**

**Filed: September 12, 2005**

**Cite as: 2005 Guam 14**

Supreme Court Case No.: CVA00-021  
Superior Court Case No.: SP0003-92

Appeal from the Superior Court of Guam  
Submitted on the briefs on June 15, 2004  
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, JR., Associate Justice; ALEXANDRO C. CASTRO, Justice *Pro Tempore*.

**CARBULLIDO, C.J.:**

[1] This matter is before the court for the third time, and is presently before us on remand from the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed this court’s prior decisions holding that Petitioner-Appellant Alan F. Haeuser (“Haeuser”) failed to mitigate his damages thereby precluding an award of back pay in his claim for wrongful termination against Respondent-Appellee Department of Law (“Department”). Upon consideration of the matter on remand, we hereby affirm the trial court’s original award of back pay and its decision that Haeuser mitigated his damages during the period in which he was wrongfully terminated.

**I.**

[2] In 1990, Haeuser was hired as an Assistant Attorney General with the Department for a two-year probationary period. Haeuser was terminated from his position in 1991. Haeuser filed an appeal with the Civil Service Commission (“CSC”), which dismissed the appeal on the ground that it lacked jurisdiction because Haeuser was an unclassified employee under Title 4 GCA § 6208.1.<sup>1</sup> Haeuser thereafter filed a petition for writ of mandate in the Superior Court, arguing that he was terminated in violation of the Organic Act of Guam and personnel

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<sup>1</sup> Section 6208.1 provides:

§ 6208.1. Recruitment of Assistant Attorneys General. Notwithstanding any other provision of law, the Attorney General may hire Assistant Attorneys General necessary for the operation of the department. Attorneys shall be hired for an initial two-year probationary period in the unclassified service, which shall by the term of the appointment expire two years from the date of the appointment if not sooner terminated by the appointing authority. Attorneys reappointed after completion of their probationary period shall be employed in the unclassified service as provided under Section 4102(16) of Chapter 4 of this Title and may be removed only for cause. Attorneys presently in the classified service shall remain classified.

regulations because he was fired “without right of appeal and without right of being given reasons or charges in writing.” Pet’r Excerpts of Record (“ER”), tab 1, p. 2 (Pet. for Alternative Writ of Mandate/Review). Haeuser sought reinstatement to his position and back pay. Haeuser’s prayer for reinstatement was grounded in the argument that section 6208.1 violated the Equal Protection (“EP”) Clause and the Organic Act of Guam. The Superior Court denied the petition, finding no EP violation, but not ruling on the Organic Act claim. Haeuser appealed the Superior Court decision to the Appellate Division, which affirmed the lower court’s decision on the EP claim, and which further held that there was no Organic Act violation. Haeuser appealed this decision to the Ninth Circuit. The Ninth Circuit reversed, finding that section 6208.1, which exempted Assistant Attorneys General from the merit protections of classified service, was in violation of the Organic Act. The case was remanded to the Appellate Division, and then to the Superior Court.

[3] On remand, Haeuser filed a motion for summary judgment, seeking reinstatement. The trial court granted Haeuser’s motion. Haeuser thereafter filed a motion seeking an award of back pay and benefits. The trial court held a hearing on the issue of back wages and mitigation. The trial court held in favor of Haeuser in a Decision and Order filed on October 14, 1997, finding that Haeuser was entitled to back pay, and that Haeuser “did not fail to mitigate his damages to an extent which would preclude an award of back pay.” Pet’r ER, tab 4, p. 27 (Decision and Order, Oct. 14, 1997). After off-setting income Haeuser received during the period of his wrongful termination, the trial court awarded him back pay in the amount of \$334,109.09.

[4] The Department of Law appealed the trial court’s decision to this court. This court reversed the October 14, 1997 decision in an opinion filed on April 30, 1999, *Haeuser v. Dep’t of Law*, 1999 Guam 12 (“*Haeuser I*”). In *Haeuser I*, this court held that the trial court erred in

finding that Haeuser mitigated his damages. The court remanded the matter to the trial court for findings consistent with the court's opinion.

[5] On remand, the trial court entered a judgment denying Haeuser an award of back pay. Citing this court's opinion and mandate in *Haeuser I*, the trial court found that Haeuser failed to mitigate damages and therefore was not entitled to damages for back pay. The trial court's decision was filed on April 27, 2000. A new judgment was entered on April 27, 2000, reflecting the court's decision. Haeuser filed a motion for a new trial, which the trial court denied.

[6] Haeuser thereafter appealed the trial court's judgment and order denying his motion for a new trial. In an opinion filed on June 27, 2002, *Haeuser v. Dep't of Law*, 2002 Guam 8 ("*Haeuser II*"), this court affirmed the trial court's judgment that was entered on remand following the *Haeuser I* mandate.

[7] Haeuser filed a Petition for Writ of Certiorari of *Haeuser II* to the Ninth Circuit, and in an order filed on September 13, 2002, the Ninth Circuit granted Haeuser's Petition. On May 24, 2004, the Ninth Circuit issued an opinion in the case, *Haeuser v. Dep't of Law*, 368 F.3d 1091 ("*Haeuser III*"), reversing both *Haeuser I* and *Haeuser II*. The Ninth Circuit's judgment was filed on June 15, 2004.

[8] The present proceedings are on remand from the Ninth Circuit. The matter was considered and is herein decided on remand based on the existing record, and without further briefing or arguments from the parties.

## II.

[9] The Department in *Haeuser I*, and Haeuser in *Haeuser II*, appealed the trial court's respective judgments on the issue of back pay. This court had jurisdiction over the prior appeals from the judgments entered in the Superior Court pursuant to Title 7 GCA § 3107(b), and the

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court's present jurisdiction over a final judgment is pursuant to 48 U.S.C. § 1424-1(a)(2) and Title 7 GCA § 3107(b). When a case in which this court validly has jurisdiction is appealed, such jurisdiction is restored upon reversal and remand from the appellate court. *Cf. Carroll v. State*, 74 S.W.3d 414, 415 (Tex. App. 2002) (“[W]hen a case is remanded to a lower appellate court, the jurisdiction originally granted to the court by constitutional and statutory mandate is fully restored by the order of abatement and remand.”) (quoting *Adkins v. State*, 764 S.W.2d 782, 784 (Tex. Crim. App. 1988)); *Hermann v. Brownell*, 274 F.2d 842, 843 (9th Cir. 1960) (“When a case is appealed from this Court to the Supreme Court, this Court completely loses jurisdiction of the cause. Thereafter, our jurisdiction can be revived only upon the mandate of the Supreme Court itself, and even upon such restoration, the jurisdiction of this Court is rigidly limited to those points, and those points only, specifically consigned to our consideration by the Supreme Court.”). We therefore have jurisdiction over this matter on remand from the Ninth Circuit.

### III.

#### A. Scope of Review on Remand

[10] In determining the scope of our review on remand, it is necessary to outline in further detail this court's prior decisions in *Haeuser I* and *Haeuser II*, as well as the Ninth Circuit's decision in *Haeuser III*.

[11] In *Haeuser I*, this court reviewed whether the trial court erred in determining that Haeuser's failure to mitigate damages was reasonable. *Haeuser I*, 1999 Guam 12 at ¶ 10. In reviewing the issue, the *Haeuser I* court explained the rules governing mitigation as follows:

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. The employer has the burden of showing that the employee has not mitigated damages.

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*Haeuser I*, 1999 Guam 12 at ¶ 11 (citations omitted). The court further set forth alternative tests for showing a failure to mitigate, stating that an employer may meet its burden of proving that an employee failed to mitigate by showing: “a) there were substantially similar 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.” *Id.* at ¶ 12. The court noted that, alternatively, the employer may be “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.” *Id.* Based on these standards, the court determined that it would review the issue on appeal to determine “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.” *Id.* at ¶ 13.

[12] The *Haeuser I* court thereafter set forth the evidence in the record, which showed that during the six years from the date of his termination to his reinstatement, Haeuser applied for seven (7) attorney positions, all with various government agencies. The court also found that under the evidence, Haeuser did not apply for a position with a private law firm. *Id.* at ¶ 18. The court further recognized the trial court’s determination that “Haeuser’s failure to apply for employment with a private firm did not constitute a failure to mitigate his damages,” as well as the trial court’s presumption 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.” *Id.* at ¶ 19. Viewing the evidence against the trial court’s findings and conclusion, the *Haeuser I* court held:

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.

*Id.* at ¶ 20. The court explained that there was no “evidentiary support for the trial court’s conclusion that Haeuser would not have been hired by any private law firm.” *Id.* at ¶ 21.

Ultimately, the *Haeuser I* court reversed the trial court’s decision, stating:

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.

*Id.* at ¶ 22.

[13] On remand from *Haeuser I*, the trial court revisited its prior decision that Haeuser did not fail to mitigate his damages. The court found that based on this court’s decision in *Haeuser I*, a failure to look for work with a private law firm constituted a failure to mitigate damages. The trial court reviewed the six years between the time Haeuser was terminated and reinstated, and found that Haeuser did not look for a job with a private law firm during any of those years. The court determined that Haeuser therefore did not mitigate his damages during any of the six years, and recalculated the damages award based on this finding.

[14] On appeal of the trial court’s decision in *Haeuser II*, Haeuser argued that the trial court erred in failing to award back pay in light of the *Haeuser I* opinion. The *Haeuser II* court disagreed, finding that while “*Haeuser I* did not expressly hold that Haeuser was not entitled to back pay award[,] . . . the back pay award issue was disposed of by implication.” *Id.* at ¶ 18. The court stated that “it would then be a fair implication of the *Haeuser I* opinion that Haeuser was not entitled to damages because he did not reasonably mitigate his damages.” *Haeuser II*,

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2002 Guam 8, ¶ 18. The court found that under the law of the case doctrine, this court's determination in *Haeuser I* that Haeuser failed to mitigate his damages was binding on the trial court on remand. *Id.* at ¶¶ 24-25. The court held that "when the law of the case doctrine is applied to this case, Haeuser's claim that the trial court erred when it reversed the award of back pay fails." *Id.* at ¶ 25. Overall, the *Haeuser II* court affirmed the lower court's decision made on remand of *Haeuser I*. *Id.*

[15] On appeal of *Haeuser II* to the Ninth Circuit, Haeuser challenged this court's findings in both *Haeuser I* and *Haeuser II*. *Haeuser III*, 368 F.3d at 1095. In reviewing the case, the Ninth Circuit first found that it had the jurisdiction to review both *Haeuser I* and *Haeuser II*. *Id.* The issue before the court was whether this court in *Haeuser I* manifestly or clearly erred in overturning the trial court's factual finding that Haeuser did not fail to mitigate his damages. *Id.* at 1093, 1097. The Ninth Circuit recognized the Superior Court's original conclusion that "[a]lthough Haeuser did not apply for a position in the private sector during his unemployment, . . . this did not constitute a failure to mitigate damages because it was highly unlikely Haeuser would have been hired." *Id.* at 1100. The court further recognized the *Haeuser I* court's decision, reversing the Superior Court's finding on the issue of mitigation on the ground that "the Superior Court's finding that Haeuser mitigated his damages, despite his failure to apply to a single private sector position, 'was not plausible in light of the entire record.'" *Id.* at 1100-1101.

The Ninth Circuit observed:

However, in reaching its conclusion that Haeuser had not mitigated his damages, the Guam Supreme Court [in *Haeuser I*] noted that it had not "conducted a review of the evidence presented to the trial court." *Id.* at ¶ 20-22. Acknowledging this, it then decided that there was no "evidentiary support for the trial court's conclusion that Haeuser would not have been hired by any private law firm." *Id.*

*Id.* at 1101. The Ninth circuit explained:



[W]e cannot uphold the Supreme Court's decision to reverse the lower court's ultimate factual determinations in the absence of its having reviewed the evidentiary record upon which those determinations are based. Before deciding whether the lower court's finding was plausible, the Supreme Court was required, under the very standard it announced earlier in its opinion, to review 'the record ... in its entirety,' and then apply the law to the facts.

*Id.* (citation omitted). After surveying this evidence in the record, the Ninth Circuit concluded:

In light of this evidence as well as the Supreme Court's own admission [in *Haeuser I*] that it did not review the evidence as presented in trial, we conclude that it was manifest error for the Supreme Court to reverse the Superior Court's findings, made after hearing four days of testimony about the unique circumstances facing lawyers attempting to obtain work in Guam's insular legal market.

*Id.* The court thus reversed *Haeuser I*, and further found that because *Haeuser II* was decided in reliance on *Haeuser I*, then its reversal of *Haeuser I* mandated a reversal of *Haeuser II*. *Id.*

[16] Considering the Ninth Circuit's reversal of *Haeuser I*, and because this court relied on *Haeuser I* in its decision made in *Haeuser II*, it is necessary in the present remand to revisit the holding of *Haeuser I*. Furthermore, the Ninth Circuit specifically explained that "the Guam Supreme Court must reconsider its decision in *Haeuser I* after completing a full review of the record." *Haeuser III*, 368 F.3d at 1101. It is therefore clear that the reversals of *Haeuser I* and *Haeuser II* do not direct this court to summarily affirm the lower court's decision which was appealed in *Haeuser I*. Rather, we are required to conduct a full review and analysis of the issues raised in *Haeuser I*. We thus proceed herein as if we were sitting in the position of the *Haeuser I* court.

## **B. Mitigation of Damages**

[17] In *Haeuser I*, the Department appealed the lower court's award of back pay. On appeal, the Department argued that the lower court erred in its finding that Haeuser mitigated his damages.

[18] The *Haeuser I* court determined that a finding on mitigation is one of fact which is reviewed for clear error. *Haeuser I*, 1999 Guam 12 at ¶ 14; cf. *Guam United Warehouse Corp. v. DeWitt Transp. Serv., Inc.*, 2003 Guam 20, ¶ 26 (reviewing the issue of mitigation in a breach of lease context, and stating “[W]hether the injured party violated his duty to mitigate damages is a question of fact for the trier of fact, when there is conflicting evidence on the question.”) (citation omitted). Other courts are uniform in similarly characterizing the question of mitigation, and, specifically, whether an employee made reasonable efforts to mitigate his losses, to be one of fact and therefore reviewed on appeal under a clearly erroneous standard. See *Texas Animal Health Comm’n v. Garza*, 27 S.W.3d 54, 62 (Tex. App. 2000) (“Mitigation of damages is ordinarily a question of fact for the jury. In a wrongful termination case, the adequacy of an employee’s efforts to mitigate and the reasonableness of an employee’s explanation for rejecting a job offer are fact questions properly left to the jury.”) (citation omitted); *Payne v. Security Sav. & Loan Ass’n, F.A.*, 924 F.2d 109, 111 (7th Cir. 1991) (“Because the question of mitigation is a factual one, we will not overturn the district court’s finding unless it was clearly erroneous.”); *Higgins v. Lawrence*, 309 N.W.2d 194, 195-96 (Mich. Ct. App. 1981) (“Whether or not an employee is reasonable in not seeking or accepting particular employment is a question for the trier of fact.”); *United Protective Workers of America, Local No. 2 v. Ford Motor Co.*, 223 F.2d 49, 52 (7th Cir. 1955) (“[W]here the discharged employee has not used ‘reasonable diligence’ to find other suitable work, the judgment will be reduced by the amount he would have been able to earn if he had used ‘reasonable diligence.’ . . . The exercise of due or reasonable diligence is a question of fact . . .”) (citations omitted).

[19] We agree here that the clearly erroneous standard applies in reviewing a finding on mitigation.

A finding is clearly erroneous when, even though some evidence supports it, the entire record produces the definite and firm conviction that the court below committed a mistake. The appellate court accords particular weight to the trial judge's assessment of conflicting or ambiguous evidence. The applicable standard of appellate review is narrow; the test is whether the lower court rationally could have found as it did, rather than whether the reviewing court would have ruled differently.

*Yang v. Hong*, 1998 Guam 9, ¶ 7 (quoting *People v. Chargualaf*, Crim. No. 88-00068A, 1989 WL 265040 (D. Guam App. Div. Sept. 26, 1989)).

[20] In determining whether the lower court clearly erred in its determination on the issue of mitigation, it is necessary to first discuss the law pertaining to mitigation.

[21] As a general rule, courts must determine whether the employee reasonably mitigated or avoided his damages during the time period for which the employee seeks recovery.<sup>2</sup> In the employment context, the logic of the mitigation rule is this:

Although it has been said that a plaintiff is ordinarily under a duty to mitigate damages, this is not strictly true, since there are no damages for breach of the duty; rather, the plaintiff simply cannot recover those damages that it could have avoided. Damages which the plaintiff might have avoided with reasonable effort without undue risk, expense, burden, or humiliation will be considered either as not having been caused by the defendant's wrong or as not being chargeable against the defendant.

*United Sav. Bank, F.S.B. v. United States*, 59 Fed. Cl. 126, 149 (2003) (quoting Richard A. Lord, *Williston on Contracts*, § 64:27 (4th ed. 2003)).

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<sup>2</sup> In the employment context, several authorities have characterized the employee's duties after a breach in terms of avoidable consequences, rather than the duty to mitigate; the use of the term duty has been viewed as inaccurate because the mitigation rule fails to compensate employees for damages that could have been avoided rather than punishing them for breaching a duty to mitigate. *See Stewart v. Board of Ed. of Ritenour Consol. School Dist., R-3*, 630 S.W.2d 130, 133 (Mo. Ct. App. 1982) (quoting 5 Corbin on Contracts s 1039 (1954)).

[22] It is generally agreed that mitigation is an affirmative defense to defeat the employee's claim for recovery, and it is thus the employer's burden to prove mitigation. *See, McAleer v. McNally Pittsburg Mfg. Co.*, 329 F.2d 273, 275-6 (3d Cir. 1964) ("All evidence in mitigation is for a defendant to give. In its nature it is affirmative, and hence it is for him to prove who asserts it.") (quoting *King v. Steinen*, 44 Pa. 99, 105, 1862 WL 5202, at \*5 (pa. 1862)); *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 16 (1st Cir. 1999) ("As long as the claimant has made some effort to secure other employment, the burden to prove failure to mitigate normally resides with the defendant-employer . . . ."); *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 53 (2d Cir. 1998) ("A discharged employee must 'use reasonable diligence in finding other suitable employment,' which need not be comparable to their previous positions. Typically, the employer has the burden to demonstrate that suitable work existed in the marketplace and that its former employee made no reasonable effort to find it.") (quoting *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231, 102 S. Ct. 3057, 3065 (1982)); *Odima v. Westin Tucson Hotel*, 53 F.3d 1484, 1497 (9th Cir. 1995) ("[The law] requires the claimant to use reasonable diligence in finding other suitable employment. However, [the employer] Westin has the burden of proving that [the employee] Odima failed to mitigate his damages.") (citations omitted); *Stewart v. Bd. of Educ.*, 630 S.W.2d 130, 133 (Mo. Ct. App. 1982) ("Missouri law is in clear agreement with that of the overwhelming majority or jurisdictions to the effect that the [employer] has the burden of proving that [the employee] could have mitigated her damages."). We agree with the *Haeuser I* court's adoption of rule that the burden of proof on the issue of mitigation rests with the employer. *See Haeuser I*, 1999 Guam 12 at ¶ 11.

[23] In determining the question of mitigation, most courts have set forth a "reasonable diligence" test. *See Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1427 (7th Cir. 1986) ("The

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test in employment discrimination cases is reasonable diligence.”); *United Protective Workers of America, Local No. 2 v. Ford Motor Co.*, 223 F.2d 49, 52 (7th Cir. 1955) (“The correct rule is that where the discharged employee has not used ‘reasonable diligence’ to find other suitable work, the judgment will be reduced by the amount he would have been able to earn if he had used ‘reasonable diligence.’”).

[24] The reasonable diligence standard originated in Title VII unlawful employment practices cases in light of the existence of the standard in the relevant Title VII statute.<sup>3</sup> See 42 U.S.C. § 2000e-5(g)(1) (“Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or *amounts earnable with reasonable diligence* by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.”) (emphasis added). The standard has been extended to cases where the claims for back pay are based on other theories of recovery. See Richard J. Gonzales, *Satisfying the Duty to Mitigate in Employment Cases: A Survey and Guide*, 69 MISS. L.J. 749, 753 (1999) (“Although not express in other federal employment discrimination statutes, courts have generally relied upon Title VII mitigation case law to hold other claimants to the same reasonable diligence standard.”) (footnotes omitted); see also *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231, 102 S. Ct. 3057, 3065 (1982) (“An unemployed or underemployed claimant, like all other Title VII claimants, is subject to the statutory duty to minimize damages set out in §

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<sup>3</sup> Title VII of the Civil Rights Act of 1964 addresses employment discrimination and makes it unlawful for employers to make employment decisions based on a person’s “race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2. The Act provides for the recovery of equitable relief. See *Great American Federal Sav. & Loan Ass’n v. Novotny*, 442 U.S. 366, 374-375, 99 S. Ct. 2345, 2350 (1979) (“The Act provides for injunctive relief, specifically including backpay relief. The majority of the federal courts have held that the Act does not allow a court to award general or punitive damages. The Act expressly allows the prevailing party to recover his attorney’s fees, and, in some cases, provides that a district court may appoint counsel for a plaintiff. Because the Act expressly authorizes only equitable remedies, the courts have consistently held that neither party has a right to a jury trial.”) (footnotes omitted).

706(g). *This duty, rooted in an ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment.*”) (emphasis added) (footnotes omitted).

[25] Courts have set forth differing articulations of the burden to show that the plaintiff failed to exercise reasonable diligence to mitigate his damages. This court in *Haeuser I* adopted alternative tests to prove a failure to mitigate. Citing the Ninth Circuit, the court found that an employer can sustain its burden by showing: “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.” *Haeuser I*, 1999 Guam 12 at ¶ 12. The court discussed an exception to the above-stated requirements, recognized in the Second Circuit, in instances where the employer can “prove that the employee made no reasonable efforts to seek such employment.” *Id.* In such cases, the employer is relieved of its burden to prove the existence of substantially similar employment. Citing these two standards, the *Haeuser I* court held that the appropriate rule to apply in reviewing the issue before it would be to determine whether the government met “either the burden of showing the availability of ‘substantially equivalent’ jobs or showing that Haeuser failed to make reasonable efforts to find employment.” *Id.* at ¶ 13.

[26] We adhere to these alternative standards for proving a failure to mitigate as expressed in *Haeuser I*. The rationale for the exception to the general rule requiring a proof of similar employment was explained by the Second Circuit, which stated:

This rule provides an appropriate exception to the usual requirement that the employer prove that suitable work exists *and* that the employee has not made reasonable efforts to find it. The underlying rationale is that an employer should not be saddled by a requirement that *it* show other suitable employment in fact existed--the threat being that if it does not, the employee will be found to have mitigated his damages--when the employee, who is capable of finding replacement work, failed to pursue employment at all.

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*Greenway*, 143 F.3d at 54.

[27] We are persuaded by the rationale supporting the exception, and clarify that the exception applies only in instances where the plaintiff failed to seek *any* employment during the period in question. See *Quint*, 172 F.3d at 16 (adopting the rule which “relieve[s] the defendant-employer of the burden to prove the availability of substantially equivalent jobs in the relevant geographic area once it has been shown that the former employee *made no effort to secure suitable employment*”) (emphasis added); *Gonzales, supra*, at 751 (“[S]everal circuits have carved out an exception to the general rule of how an employer can satisfy its burden of proof. These courts have held that where an employer can prove that the claimant made *no reasonable effort to seek any kind of employment*, the employer will be absolved from the burden of demonstrating that suitable employment was available to the claimant.”) (emphasis added). We thus hold that for the exception to apply, the employer must show that the employee failed to make any effort to secure employment. In the more common case where the employee does seek employment, the employer must prove that “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.” *Haeuser I*, 1999 Guam 12 at ¶ 12.<sup>4</sup>

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<sup>4</sup> On the issue of the *Haeuser I* court’s adoption of these standards, the Ninth Circuit in *Haeuser III* commented:

We are not certain whether, in citing to the conflicting mitigation standards from the Second and Ninth Circuit, the Guam Supreme Court intended to create its own, distinct, mitigation rule or to construe our rule in *Odima*. Recognizing that the appropriate mitigation standard is a matter of local law, we will assume, without deciding, that the Guam Supreme Court intended to create and apply its own mitigation standard.

*Haeuser III*, 368 F.3d at 1100 n.9. We do not believe, as the Ninth Circuit suggested in *Haeuser III*, that the Ninth Circuit’s rule in *Odima* and the Second Circuit’s rule in *Greenway* are “conflicting mitigation standards.”

The First Circuit recently explained these standards in *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 16 (1st Cir. 1999). In *Quint*, the court acknowledged the general rule that “[a]s long as the claimant has made some effort to secure other employment, the burden to prove failure to mitigate normally resides with the defendant-employer, . . . which then must show that (i) though substantially equivalent jobs were available in the relevant geographic area, (ii) the claimant failed to use reasonable diligence to secure suitable employment.” *Id.* The employer urged the

[28] A review of the evidence shows that the exception to the general rule of proving the existence of substantially similar employment does not apply in this case. Here, as was recognized in *Haeuser I*, there was evidence in the record that Haeuser applied for seven jobs during the six years in question. This is not the rare case where the employee did not seek any employment during the period in question. See *Gonzales, supra*, at 751 (“Cases are rare, however, where the claimant did absolutely nothing after the adverse employment decision. Most often the issue will focus on whether the claimant’s actions were sufficient to satisfy his or her duty to mitigate.”). Accordingly, in determining whether the lower court erred in determining that Haeuser mitigated his damages, the question is whether the record supports a finding that the Department failed to prove that: a) there were substantially equivalent jobs during the period that Haeuser was wrongfully terminated; b) Haeuser could have obtained a similar job; and c) Haeuser failed to use reasonable diligence in seeking an equivalent job.

*Haeuser I*, 1999 Guam 12 at ¶ 12.

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court to adopt an exception to the rule in instances where the employee failed to make any effort to secure employment. Under this exception, “once an employer has shown that the claimant sought no jobs, it should be relieved of any burden to prove the existence of substantially equivalent positions.” *Id.* The court noted that some courts, including the Ninth Circuit, have not recognized this exception, and require the employer to prove both above-stated elements notwithstanding that the employee failed to seek employment. *Id.* The court noted, however, that in these cases, including *Odima*, the applicability of the exception was not in issue. The First Circuit further noted that other courts squarely confronted with the issue “uniformly have relieved the defendant-employer of the burden to prove the availability of substantially equivalent jobs in the relevant geographic area once it has been shown that the former employee made no effort to secure suitable employment.” *Id.* The *Quint* court similarly adopted the exception as applicable in the case before it. *Id.* (“We likewise opt for the mitigation-defense exception adopted in these cases.”).

As the First Circuit in *Quint* explained, the *Odima* court was not confronted with the issue of whether the exception was applicable. Thus, it is not clear that the Ninth Circuit has squarely rejected the exception in instances where the employee failed to seek employment. *Quint*, 172 F.3d at 16. Moreover, the exception works to relieve the employer of proving the existence of substantially equivalent positions, and the exception is triggered only where the employer proves the employee failed to seek any employment. In the absence of such proof, the general rule requiring proof of substantially similar employment applies. We see no inconsistency between the two rules. They are simply alternative manners of proving a failure to mitigate, and are not conflicting standards as suggested by *Haeuser III*.



### **C. Elements of Proving a Failure to Mitigate**

[29] We must review the lower court’s decision and the evidence supporting that decision in light of the elements necessary to prove a failure to mitigate.

#### **1. Substantially Similar Employment**

[30] The inquiry under the first element centers on whether jobs substantially similar to Haeuser’s position as an Assistant Attorney General existed on Guam during the time period in question.

[31] The Department argued on appeal that the lower court erred in finding that Haeuser’s failure to seek employment outside the government, in a small firm or as a solo practitioner, did not constitute a failure to mitigate. Although not clearly articulated, it is apparent that the Department equates private practice work and work as a solo practitioner as “substantially equivalent employment” which Haeuser failed to make any efforts at seeking.

[32] There was evidence in the record that both government and private practice attorney positions existed on Guam during the time period in question. Attorney R. Todd Thompson, hiring partner for Mair, Mair, Spade & Thompson, testified that his firm hired seven attorneys since 1992. Attorney Meredith Sayre, a partner at Carlsmith Ball, LLP, testified that the firm receives many resumes and periodically searches for attorneys. In addition, she testified that her firm hired six new attorneys between 1991 and 1996. Haeuser himself testified that he was ads for government attorney positions in the newspaper. There was also testimony that it was possible for an attorney to start a solo practice on Guam. Curtis Van de Veld testified that after working for the law firm of Del Priore and Gumataotao, he started a solo practice in 1992. Thus, and as the lower court impliedly found, attorney positions existed on Guam from 1991 to 1997.

The pertinent question is whether jobs in private practice and solo practice were substantially equivalent to Haeuser's job as a government attorney.

[33] The lower court held that "it is well settled that a wrongfully terminated employee need seek only substantially similar employment in order to satisfy his or her burden to mitigate damages." Resp't ER, tab. A, p. 27 (Decision and Order, Oct. 14, 1997). The court explained further: "In other words, in the present case, Petitioner is an attorney and thus he is expected and has a duty to seek other attorney positions, or some reasonably related type of work. Petitioner is not expected to obtain employment at MacDonalds [sic] in order to satisfy his burden to mitigate." Resp't ER, tab. A, p. 27 (Decision and Order, Oct. 14, 1997).

[34] The lower court correctly construed the standard underlying a determination of substantially similar employment. As expressed by one commentator, courts have clarified the meaning of substantially equivalent employment by focusing on what is not substantially equivalent. *See Gonzales, supra*, at 760. "The Supreme Court, in discussing the statutory duty of Title VII claimants to minimize their damages, noted that an unemployed claimant need not accept a lesser or dissimilar position. Nor is a claimant required to continue in an inferior position that she has already accepted." *United States v. City of Chicago*, 853 F.2d 572, 578-79 (7th Cir. 1988) (Citation and footnotes omitted). Furthermore, in the context of a Title VII plaintiff, the court in *Booker v. Taylor Milk Co.*, 64 F.3d 860, 866 (3d Cir. 1995), clarified that

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

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*Id.* (quoting *Sellers v. Delgado College*, 902 F.2d 1189, 1193 (5th Cir. 1990)) (citation omitted); *see also Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983) (applying the same definition of “substantially equivalent employment”).

[35] With regard to private practice, there was little evidence on promotional opportunities and status, while there was some evidence on compensation and job responsibilities. Attorney Curtis Van de Veld testified that while an associate for the law firm of Del Priore and Gumataoao, he worked moderately long hours, generally until at 8:00 or 9:00 at night. From the perspective of work load, the evidence suggests that there would not have been a substantial difference between a private attorney position and Haeuser’s position. Haeuser testified that while working for the office of the Attorney General prior to being terminated, his work load was extremely heavy. From a workload perspective, private practice was no more onerous than the government position. With regard to compensation, from the period immediately after he was fired in 1991, Haeuser’s salary would have been \$59,329.00. Attorney Van De Veld testified that his first year working for the Del Priore and Gumataoao firm was around \$43,000. Attorney Thomas Parker also testified that he worked for the government as an attorney in 1990, with a starting salary of \$37,000 per year, and that he started in the Zamsky law firm in 1995 making approximately \$2000 per pay period, which was changed to \$55,000.00 per year at the time of trial in 1997. He also testified that unlike the government position, the Zamsky firm did not offer a retirement plan.

[36] Based on the evidence, the trial court could have found that private practice employment was substantially equivalent to Haeuser’s government position. Though the benefits such as a retirement plan were not the same, the compensation appears to be commensurate with experience as an attorney, and the work load did not appear to be more onerous. There was

enough evidence in the record to support a finding that work as an associate in a small law firm and work as a government attorney were substantially similar. The question of solo practice results in the opposite conclusion.

[37] In its decision, the trial court cited Haeuser's testimony that he did not attempt to open his own practice because he lacked the sufficient capital, and he was concerned with the issue of finding attorneys to take over his cases in the event he returned to work at the AG's Office. The court later concluded that based on the testimony, Haeuser's "failure . . . to open up his own practice did not constitute a failure to mitigate his damages . . . ." Resp't ER, tab A, p. 26 (Decision and Order, Oct. 14, 1997). The trial court essentially found that it was reasonable for Haeuser to forego opening a solo practice as part of his efforts to mitigate.

[38] The finding by the trial court regarding the reasonableness of going into solo practice logically goes to the question of substantially similar employment. The trial court's finding that it was reasonable for Haeuser to not pursue a solo practice carries an implication that the court did not view opening a practice to be substantially similar type of employment as working for the government. Such a conclusion does find support in the evidence. With regard to being a solo practitioner, Attorney Van de Veld testified that his work as a solo practitioner was very demanding, requiring many more hours of work than at the law firm. Attorney Van de Veld testified that it cost him approximately \$30,000.00 to start up his solo practice. He testified that his salary during the first year in solo practice was under \$50,000, but that at the time of trial, it was over \$50,000. He further indicated that the time demand is the most significant problem with being a solo practitioner, as well as not having anyone else to carry the work load. He testified that there was no retirement plan in solo practice, and he was required to pay private health insurance. Finally, he testified that working for someone else has advantages because

there is no risk of losing money, and as an employee you do not have to worry about the time-consuming administrative aspects of running a business. This evidence supports a finding that solo practice is not substantially similar to working as a government lawyer. Unlike Haeuser's government attorney position, the hours are much more onerous, there are fewer benefits such as retirement and health insurance, and the risks of failure are present.

[39] While the trial court did not make an explicit finding on whether private and solo practice constituted substantially similar employment to Haeuser's position as a government attorney, we review this element of proving a failure to mitigate in light of the evidence and the inferences which can be drawn from the trial court's decision. Here, it can be reasonably inferred from the trial court's decision that private practice did constitute "substantially similar employment," but that solo practice did not. These findings are supported by the record and are therefore not clearly erroneous. We must next determine whether the record supports a finding that Haeuser could have obtained substantially equivalent employment as a private attorney.

## **2. Whether Haeuser could have obtained substantially similar employment.**

[40] In the appeal of *Haeuser I*, the Department argued that the trial court erred in finding that Haeuser made reasonable efforts at finding legal employment and in mitigating his damages. The Department contended that considering the evidence in the record, the trial court erred in concluding that Haeuser would not have been hired by a private law firm.

[41] In reversing the lower court's decision, the *Haeuser I* court focused on the lower court's presumptions that Haeuser would not be able to find work in the private sector. The *Haeuser I* court agreed with the Department, and found that there simply was no basis in the record, considering that Haeuser had not even applied for one private sector job, that would support a presumption that Haeuser would not have been able to obtain a private law firm job. In *Haeuser*

III, the Ninth Circuit criticized this holding of *Haeuser I*, stating that there was evidence in the record which supported the trial court's presumptions, including testimony from partners in local law firms which indicated that someone in Haeuser's position would not be viewed favorably. Upon review of the record, we agree that the evidence supported the trial court's inference regarding the likely futility of any attempts Haeuser could have made at finding employment in private practice.

[42] In determining mitigation, other courts have made inferences and presumptions regarding the possibility of obtaining employment based on the evidence. In *Ryan v. Superintendent of Schools*, 373 N.E.2d 1178 (Mass. 1978), the terminated employee was an art teacher. The evidence showed that there was more supply for art teachers than the demand, the director of the art department for the school district would not recommend the employee for a position, and the employee was 59 years old. *Id.* at 1182 Referencing these facts in the record, the appellate court stated:

The central dispute in this case concerns whether it was reasonably likely that Ryan could have obtained a comparable job. . . . These subsidiary findings by the master clearly show that there was a limited and competitive market for art teaching positions. [The director of the art department]'s opinion of Ryan's work, his failure to recommend her for the full time position, and the school committee's intention to discharge her for cause lead to the reasonable inference that she would not have received favorable recommendations had she sought other employment. *It is also reasonable to conclude* that Ryan's age, though not determinative in any hiring decision, would probably not have been viewed favorably by prospective employers. We conclude that *on the basis of these inferences* the trial judge was correct in deciding that it would have been virtually impossible for Ryan to obtain another teaching position.

*Id.* at 67(emphasis added).

[43] Similarly, in *Stewart*, 630 S.W.2d 130, the court agreed with the trial court that the employer failed to prove a failure to mitigate. *Id.* at 134. There, the employee, Stewart, was a teacher in St. Louis and evidence showed that teaching positions for which Stewart was qualified

were available in the area during the five-year period in question. *Id.* The testimony also showed that for each respective year during the period in question, the number of applications exceeded the number of vacancies, and teaching positions in the employees' field were competitive. *Id.* "The witnesses further testified that from 1974 to 1979 none of their districts had hired a teacher in Stewart's age bracket, with Stewart's qualifications, who had been discharged from another district." *Id.* Furthermore, the court observed that the evidence did not indicate "that there was a reasonable likelihood that Stewart could have received a teaching position" and that "the evidence indicated that Stewart's chances of finding a teaching job were slim at best." *Id.* In further reviewing the issue, the court acknowledged that while the employer did not have to conclusively show that Stewart would have obtained a comparable job, "it did have to show that it as reasonably likely that she would have obtained such a job." *Id.* The court recognized Stewart's presentation of evidence that she would not have obtained a teaching position. Overall, the court held:

Viewing the record in its entirety, we conclude that the Board did not meet its burden of proof. Our holding should not be construed to constitute our approval of a discharged employee's reaping a "reward" as a consequence of her failure to make a reasonable effort to mitigate her damages. Our holding is simply a result of the Board's failure to carry its burden of proof, i.e., of showing there was a reasonable likelihood that Stewart could have obtained one of the available positions. Therefore, we affirm the trial court's decision that Stewart's recovery should not be reduced for her failure to mitigate.

*Id.*

[44] In the present case, there was evidence in the record which supports the trial court's presumption that Haeuser would not have been hired by a private law firm. Two witnesses, Attorneys R. Todd Thompson and Meredith Sayre, offered testimony relevant to the issue. Attorney Sayre, a partner of the law firm Carlsmith Ball, LLP that handled hiring matters, testified that if Haeuser applied to her firm, the fact that he was fired and was suing his former

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employer would not necessarily cause her to rule him out as an applicant. By contrast, Attorney R. Todd Thompson, the hiring partner of the law firm of Mair, Mair, Spade & Thompson, testified that a person in Haeuser's circumstances, having been fired by the Department of Law and suing them, would not be viewed favorably for a position within the law firm. Furthermore, Louis Baza, a Personnel Management Specialist for the Civil Service Commission ("CSC"), testified that in his opinion, most individuals do not have jobs by the time the CSC hears their case, and that being fired is like an "economic death sentence." Tr. vol. I, p. 59 (Evidentiary Hr'g, Oct. 2, 1997). He further testified that in his opinion, people that get fired have a difficult time finding jobs. The trial court's decision that Haeuser probably would not have been hired by a private law firm is supported by the testimony of R. Todd Thompson and Louis Baza. While there was contrary evidence, it was the trial court's duty to consider and weigh any conflicting or ambiguous evidence. This court may only reverse a factual finding if a review of "the entire record produces the definite and firm conviction that the court below committed a mistake." *Yang*, 1998 Guam 9 at ¶ 7 (quoting *People v. Chargualaf*, Crim. No. 88-00068A, 1989 WL 265040 (D. Guam App. Div. Sept. 26, 1989)). Because the testimony in the record supported the trial court's decision that it was unlikely that Haeuser would have obtained a private law firm job, we cannot conclude that the lower court's decision was clearly erroneous.

[45] Because the lower court did not clearly err in determining that Haeuser probably would not have been hired at a private law firm, the trial court appropriately concluded that Haeuser's failure to apply for private law firm jobs did not amount to a failure to mitigate damages.

[46] The final issue we consider is whether the government proved that Haeuser was not reasonably diligent in seeking equivalent employment where he applied to only seven government positions during the period in question.



### 3. Reasonable Diligence

[47] In reviewing a finding pertaining to “reasonable diligence”, courts have made clear that the burden is not high and is determined by the facts of each case. The Third Circuit explained:

The reasonableness of a . . . claimant’s diligence should be evaluated in light of the individual characteristics of the claimant and the job market. Generally, a plaintiff may satisfy the “reasonable diligence” requirement by demonstrating a continuing commitment to be a member of the work force and by remaining ready, willing, and available to accept employment.

*Booker*, 64 F.3d at 865 (citations omitted). The Sixth Circuit further clarified:

A claimant is only required to make reasonable efforts to mitigate damages, and is not held to the highest standards of diligence. The claimant’s burden is not onerous, and does not require him to be successful in mitigation. The reasonableness of the effort to find substantially equivalent employment should be evaluated in light of the individual characteristics of the claimant and the job market.

*Rasimas*, 714 F.2d at 624 (citations omitted).

[48] Here, Haeuser testified as to his efforts to seek employment.<sup>5</sup> This testimony revealed that Haeuser did not immediately seek employment because he thought he would appeal his termination to the Civil Service Commission, and would be reinstated after six months to one year. Haeuser testified that on September 26, 1991, he submitted an application with the Department of Administration (“DOA”). Prior to May 18, 1992, Haeuser applied for an administrative hearing officer position in the Superior Court, but was not hired. He further testified that upon the one year expiration of his application with DOA, on October 27, 1992, he submitted another application to DOA but was informed that they were no longer receiving applications and that applications must be submitted directly through the agencies. Haeuser testified that he applied with the Public Defender Corporation in 1992 or 1993, and interviewed with Hank Parker. Haeuser applied for a position with Guam Legal Service on October 6, 1993,

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<sup>5</sup> See Tr. Vol. II (Continued Evidentiary Hr’g, Oct. 3, 1997).

and was interviewed but not hired. He also applied to the Guam Power Authority in response to a newspaper ad and re-advertisement sometime between 1993 and 1994, but was not interviewed. He also testified to applying for a job in response to an ad at the Advocacy Office, which is federally funded, between 1994 and 1995, and that he was interviewed by the director, but was not hired. Finally, he applied for an advertised position with the Department of Education on September 16, 1996, and interviewed with Roland Taimanglo and several key personnel, but was not selected for the position. Haeuser also testified that he read the newspaper every day and applied for all government positions that he was aware of.

[49] The trial court found these efforts to be sufficient. As indicated earlier, “[a] claimant is only required to make reasonable efforts to mitigate damages, and is not held to the highest standards of diligence.” *Rasimas*, 714 F.2d at 624. Here, Haeuser testified that he checked the ads in the newspaper and applied for every government position of which he was aware. The Department did not offer any evidence as to whether there were any other government positions available during the time that Haeuser was wrongfully discharged. “The reasonableness of the effort to find substantially equivalent employment should be evaluated in light of the individual characteristics of the claimant and the job market.” *Id.* The evidence in the record, coupled by the Department’s failure to show that the market for government attorneys encompassed positions which Haeuser failed to explore, supports a finding that Haeuser was reasonably diligent in seeking employment during the period in question.

[50] In *Haeuser I*, the Department cited *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986), in support of its argument that Haeuser failed to act reasonably diligent in seeking similar employment. In *Allis-Chalmers*, 797 F.2d 1417 (7th Cir. 1986), the employee, living in the Chicago area, lost his job in 1979. Writing for the court, Circuit Judge Posner recounted the

evidence at trial, stating that during the five years in question, the employee did not work during the first three and a half. *Id.* at 1427. Subsequent to that he had four jobs, three of which he left after very short periods of time, and the fourth one being seasonal. *Id.* At trial, the employee testified that “he kept looking for full time work throughout this period.” *Id.* The court stated that “[a]lthough he might have had difficulty finding a job because of the ground on which he had been fired (falsifying records), his efforts at seeking work were not sufficiently assiduous to test this hypothesis.” *Id.* at 1427-28. Specifically, the court noted that the employee was “[a] skilled worker, young during the period relevant to this case (he was born in 1950), in good health, he lives only 45 minutes from downtown Chicago, which has one of the largest concentrations of employers in the world; but he could only remember having applied to 16 employers (other than the four he got jobs with) during five years.” *Id.* at 1428. Based on this evidence, the court reversed the trial court’s decision that the employee was reasonably diligent in finding equivalent employment. The court concluded by holding that based on the record, and “giving every benefit of the doubt to the district judge,” the maximum period for which the employee could be found to have been reasonably diligent was three years. *Id.* The court advised that “[a]t some point people must put their legal troubles behind them and get on with their lives.” *Id.*

[51] The instant case is distinguishable from *Allis-Chalmers Corp.* There, the employee lived outside Chicago, which, according to the court “has one of the largest concentrations of employers in the world.” *Id.* at 1428. Guam, by contrast, is a much smaller community, with fewer jobs in the legal field generally, and government legal positions specifically. Unlike in *Allis-Chalmers Corp.*, the evidence in this case suggests that Haeuser looked for a government position shortly after losing his job, and applied for all positions of which he was aware.

Considering the market and Haeuser's efforts, we cannot conclude from the evidence that Haeuser's efforts were not reasonably diligent.

**IV.**

[52] Viewing separately the elements for proving a failure to mitigate, we find that the trial court's original decision that Haeuser did not fail to mitigate his damages is supported by the evidence in the record. We therefore hold that the court's original decision, filed on October 14, 1997, was not clearly erroneous, and the decision is hereby **AFFIRMED**. The matter is remanded for the entry of judgment in favor of Haeuser consistent with this opinion.