

**IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION III**

No. 29912-1-III

MARK FEY

Respondent/ Cross-Appellant

vs.

**STATE OF WASHINGTON;
COMMUNITY COLLEGES OF SPOKANE**

Appellant/Cross-Respondent.

RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF

**Genevieve Mann
William J. Powell
POWELL, KUZNETZ & PARKER, P.S.
316 W. Boone, Ste. 380
Rock Pointe Tower
Spokane, WA 99201-2346
(509) 455-4151
ATTORNEYS FOR RESPONDENT/CROSS APPELLANT**

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. PERTINENT FACTS	1-2
III. ARGUMENT.....	2-6
A. Mr. Fey Was Not Required To Leave His Position And Seek Alternate Employment.....	2-4
B. CCS Failed To Present Sufficient Evidence To Warrant An Instruction On Mitigation To Go To The Jury.....	4-6
IV. CONCLUSION	6-7

TABLE OF AUTHORITIES

	Page
<i>Bernsen v. Big Bend Elec. Co-op., Inc.</i> , 68 Wash.App. 427, 842 P.2d 1047 (1993)	5
<i>Burnside v. Simpson Paper Co.</i> , 66 Wn.App. 510, 832 P.2d 537 (1992)	5
<i>Dean v. METRO</i> , 104 Wn.2d 627, 708 P.2d 393 (1985)	3
<i>Hall v. Corporation of Catholic Archbishop</i> , 80 Wash. 2d 797, 498 P.2d 844 (1972).....	4
<i>Jaeger v. Cleaver Construction, Inc.</i> , 148 Wash.App. 698, 201 P.3d 1028 (2009)	4
<i>Koker v. Armstrong Cork, Inc.</i> , 60 Wash.App. 466, 804 P.2d 659 (1991)	4
<i>Kloss v. Honeywell, Inc.</i> , 77 Wn. App. 294, 890 P.2d 480 (1995)	5
<i>Labriola v. Pollard Group, Inc.</i> , 152 Wash.2d 828, 100 P.3d 791 (2004)	2, 4
<i>McCurdy v. Union Pacific Railroad Co.</i> , 68 Wash. 2d 457, 413 P.2d 617 (1966).....	4, 5
<i>Sutton v. Shufelberger</i> , 31 Wash.App. 579, 643 P.2d 920 (1982)	2, 3

I. INTRODUCTION

This Reply brief responds to the sole Assignment of Error Respondent/Cross-Appellant, Mark Fey, contends was made by the trial court. If this Court orders a new trial, Mr. Fey respectfully requests that the jury not be instructed on mitigation.

II. PERTINENT FACTS

Mr. Fey enjoyed his job in the grounds department and wanted to promote to the highest level of his classification. RP 355. As a GNS3, the only position higher in the grounds department than his current job was GNS4. He sought promotion to that level on two occasions. RP 337. The sole reason CCS refused to consider him for promotion was because he could not get a CDL. RP 274, 910.

Mr. Fey likes tending to plants and trees, being outside, and working with his hands to make things grow. RP 278, 376. He is a trained arborist and he has worked doing grounds work, sprinkler maintenance, gardening, and snow plowing most of his adult life. RP 217-222, 374. He is proud of the work he does and enjoys working with his hands. RP 376. While he likes his work, he also wants to advance as any worker would desire. RP 278-79.

Mr. Fey applied for a maintenance mechanic position at CCS in the past as the position offered more money. RP 336-37, 744. He did not get the position. The maintenance mechanic position is different from a grounds position as it performs general maintenance and repair work inside the buildings. RP 478, 734-35, 741-42. It

is not the grounds work that Mr. Fey enjoys. He wanted to promote in his field and area of expertise. RP 278. The fact that Mr. Fey in the past applied for that position has no bearing on the fact that he was not considered for a promotion in the grounds department.

III. ARGUMENT

A. Mr. Fey Was Not Required To Leave His Position And Seek Alternate Employment.

CCS argues that Mr. Fey was required to make reasonable efforts to replace lost promotional wages by looking for comparable positions “elsewhere”. Appellant Reply/Response Brief at 46. No cases were cited holding that an employed plaintiff has a duty to leave his current job to search for a higher paying position or one that is outside of his field of expertise. Such a claim is illogical and contrary to the law on mitigation.

A plaintiff has a duty to make reasonable efforts to minimize damages so as to prevent an injured party from recovering avoidable damages. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 840, 100 P.3d 791 (2004). Mitigation is the duty to attempt to earn wages at another occupation rather than remaining unemployed. *Sutton v. Shufelberger*, 31 Wn.App. 579, 581, 643 P.2d 920 (1982). Mr. Fey had nothing to mitigate. He had a job and had no duty to quit to look for other work.

The duty to mitigate only requires that a plaintiff make reasonable, diligent efforts. It is not an absolute duty as success is not required nor is the failure to earn a substantial income dispositive¹. *Id.* at 582.

Only the conduct of a reasonable man is required of him. If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.

Hogland v. Klein, 49 Wash.2d 216, 298 P.2d 1099 (1956) (quoting Charles T. McCormick, *Handbook on the Law of Damages* 35, at 134 (1935)).

It was not a reasonable option for Mr. Fey to quit his job to look for something more lucrative to decrease any claim for lost wages against CCS. The defendant, as the wrongdoer, does not get to argue that choice as a viable option. Since the duty to mitigate only requires a person to take reasonable steps, it is error to instruct the jury that the duty to mitigate requires him to take unreasonable steps such as quitting a job in order to obtain another one. *Sutton*, 31 Wash.App. at 581. Mr. Fey is entitled to any damages that resulted from the defendant's discrimination in failing to consider him for the promotion. *Dean v. METRO*, 104 Wn.2d 627, 641, 708 P.2d 393 (1985). The duty to mitigate simply did not arise.

¹ CCS argues in its Response/Reply brief that "*Mr. Fey could have mitigated his damages by improving his performance and seeking comparable pay in other jobs.*" Appellant Reply/Response Brief at 14. Mitigation does not require or contemplate whether an employee can improve his performance.

Even if there was a duty to mitigate, Mr. Fey's damage award was already reduced by what he earned in his current position. RP 617. Instructing the jury on an additional duty to mitigate was error as it imposed a heightened duty on Mr. Fey.

B. CCS Failed To Present Sufficient Evidence To Warrant An Instruction On Mitigation To Go To The Jury.

"Where [jury] instructions are inconsistent or contradictory on a given material point, their use is prejudicial, for the reason that it is impossible to know what effect they may have on the verdict." *Hall v. Corporation of Catholic Archbishop*, 80 Wash.2d 797, 804, 498 P.2d 844 (1972). Instructing the jury on mitigation was contradictory to the evidence presented and negatively impacted the jury verdict. Court's Instruction No. 16, CP 589, WPI 330.83 attached as App. 1 to Respondent's Opening brief. Not only was mitigation improper as a matter of law, but CCS failed to produce evidence in support of a mitigation defense.

Courts have refused to instruct on mitigation where the defense is not supported by evidence. *Labriola*, 152 Wash.2d 828; *Jaeger v. Cleaver Construction, Inc.*, 148 Wash.App. 698, 717, 201 P.3d 1028 (2009); *McCurdy v. Union Pacific Railroad Co.*, 68 Wash.2d 457, 466-67, 413 P.2d 617 (1966). A party is prejudiced by an instruction which permits the jury to act on a theory for which there is no proof in evidence. *Koker v. Armstrong Cork, Inc.* 60 Wash.App. 466, 804 P.2d 659 (1991). The jury in this case was improperly instructed that Mr. Fey had a mandatory duty to mitigate even though he remained employed.

It is well settled that the wrongdoer has the burden of proving mitigation of damages. *McCurdy*, 68 Wash.App. at 466. This burden has two parts, availability of suitable alternative employment, and failure of Plaintiff to make reasonable efforts in seeking it. *Burnside v. Simpson Paper Co.*, 66 Wn. App. 510, 529, 832 P.2d 537 (1992), *aff'd*, 123 Wn.2d 93, 864 P.2d 937 (1994); accord *Kloss v. Honeywell, Inc.*, 77 Wn. App. 294, 301, 890 P.2d 480 (1995). Since Defendant did not proffer evidence of the former, inquiry into the latter has no relevance.

Mitigation should not have been offered as a limiting defense to the jury as it was not supported by substantial evidence. *Bernsen v. Big Bend Elec. Co-op., Inc.*, 68 Wn.App. 427, 434-435, 842 P.2d 1047, 1052 (1993). CCS presented no evidence of comparable employment and should have been prohibited from arguing that the plaintiff had failed to mitigate.

Counsel falsely argued that Mr. Fey “lost six promotional opportunities” and that there were other grounds positions all over the state available to him. RP 1029, 1036-37, 1038, 1052. None of this was supported by the evidence. The evidence demonstrated that Mr. Fey twice applied for a maintenance mechanic position which he did not get. Mitigation does not require that he receive the position. Defendant offered no expert to opine about the job market or available positions. Instead, the jury was left to speculate about whether Mr. Fey could have obtained a better paying position elsewhere.

Mr. Fey did not claim, as CCS asserts, that *“he was so happy with his GNS3 position, he should not have to look for any job with equivalent pay to the GNS4 promotion”*². Appellant Reply/Response Brief at 46. The duty to mitigate did not arise as Mr. Fey had no obligation to look for alternate work. Even if the duty did arise, there was no evidence of available positions or that Mr. Fey failed to make diligent or reasonable efforts to find other work.

In closing argument, counsel argued that Mr. Fey had a duty to “look for other jobs elsewhere”. RP 1055. He did not have such a duty and such argument confused the jury and allowed jurors to speculate about Mr. Fey’s responsibility when he was not promoted.

IV. CONCLUSION

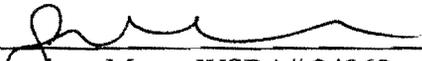
Should this Court find that a new trial is necessary, the jury should not be instructed on mitigation. The jury found that the defendant discriminated against Mr. Fey based on his disability. Now, he is stuck in his current position with no possibility of being promoted in the grounds department. Instructing the jury on mitigation was error as Mr. Fey had no duty. The jury was forced to speculate as to whether Mr. Fey should have left his position for a higher paying one. There was no evidence to support such a theory of mitigation.

² No cite to the record was made in Appellant’s brief as this statement is not supported by evidence.

DATED: March 30, 2012

Respectfully submitted:

POWELL, KUZNETZ & PARKER

By 
Genevieve Mann, WSBA# 34968
Attorneys for Respondent/Cross-Appellant

By 
William J. Powell, WSBA#672
Attorneys for Respondent/Cross-Appellant