that he is inclined to grant the motion to set aside the September 19, 2007 summary judgment as void under Chuuk Civil Procedure Rule 60(b)(5). We shall give him that opportunity.

III. Conclusion

We therefore remand the case to the trial division so that Justice Marar can, if he is so inclined, re-enter his order vacating the summary judgment. That should leave no loose ends and will let all parties know where they stand in the matter so that they may take whatever steps seem appropriate.

* * * *

FSM SUPREME COURT TRIAL DIVISION

KENTRICKSON MANUEL, Plaintiff, vs. FEDERATED STATES OF MICRONESIA, Defendant.	)	CIVIL ACTION NO. 2010-020

FINDINGS, CONCLUSIONS OF LAW, AND DECISION

Beauleen Carl-Worswick
Associate Justice

Trial: July 31-August 2, 2013
Submitted: August 16, 2013
Decided: May 2, 2014

APPEARANCES:

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* * * *

HEADNOTES

Administrative Law; Public Officers and Employees – Termination

52 F.S.M.C. 146 does not provide for administrative remedies or administrative appeals of any kind in abandonment of employment cases. Manuel v. FSM, 19 FSM R. 382, 386 (Pon. 2014).

Administrative Law – Judicial Review; Public Officers and Employees – Termination

Since an employee who abandons his position does not have the right to an administrative appeal, a court reviewing an agency decision to terminate a plaintiff's employment for reason of abandonment will be unable to limit its role to reviewing factual findings developed during an administrative appeal. A court evaluating the merits of an abandonment claim must instead conduct a trial *de novo* to determine whether there is substantial evidence to support an agency decision to terminate a plaintiff's employment for reason of abandonment. Manuel v. FSM, 19 FSM R. 382, 386 (Pon. 2014).

Administrative Law; Public Officers and Employees – Termination

The Public Service System Act delineates procedures that must be followed in terminating an employee for unsatisfactory performance and mandates that no dismissal or demotion of a permanent employee is effective until the management official transmits to the employee a written notice setting forth the specific reasons for the dismissal or demotion and the employee's rights of appeal and it further mandates that any regular employee who is dismissed may appeal through an administrative review process. A crucial part of the administrative review process is a hearing before an ad hoc committee, and subsequent preparation of a full written statement of findings of fact. Manuel v. FSM, 19 FSM R. 382, 386 (Pon. 2014).

Administrative Law – Judicial Review; Public Officers and Employees – Termination

In reviewing a government employee's termination under Title 52, the FSM Supreme Court will review factual findings insofar as necessary to determine whether there is evidence to establish that there were grounds for discipline. Manuel v. FSM, 19 FSM R. 382, 386 (Pon. 2014).

Administrative Law – Judicial Review; Public Officers and Employees – Termination

Under Title 52, since the FSM Supreme Court's review is for the sole purpose of preventing statutory, regulatory and constitutional violations, review of the factual findings is limited to determining whether substantial evidence in the record supports the administrative official's conclusion that a violation of the kind justifying termination has occurred. The statute evinces a clear congressional intent that the courts avoid serving as finders of fact. When there are non-frivolous disputes about the grounds for termination, the decision of the ad hoc committee should identify and address those grounds with specificity, and when they have not, the court will remand the case to the ad hoc committee to prepare a full written statement of its findings of fact. Manuel v. FSM, 19 FSM R. 382, 386-87 (Pon. 2014).

Administrative Law – Judicial Review; Public Officers and Employees – Termination

When a discharged employee was denied an opportunity to engage in the administrative review process, the court is left without a record to review, and therefore the government's decision to terminate the plaintiff's employment on the grounds of unsatisfactory performance is not supported by substantial evidence in the record. Manuel v. FSM, 19 FSM R. 382, 387 (Pon. 2014).

Administrative Law – Judicial Review; Public Officers and Employees

The court's role is not to serve as a finder of fact substituting its judgment for that of the ad hoc committee and the President. Rather, the court's role is to determine whether the administrative review process was conducted in accordance with statutory guidelines and in a manner that protects the

plaintiff's right to due process. Manuel v. FSM, 19 FSM R. 382, 387 n.2 (Pon. 2014).

Administrative Law – Judicial Review; Public Officers and Employees – Termination

If the government wants to terminate an employee for unsatisfactory job performance, it must follow the procedures established in the National Public Service System Act and accompanying regulations, including providing the employee with notice of his right to file an administrative appeal. If, after an administrative appeal, the employee is terminated for unsatisfactory performance then the employee may appeal to the FSM Supreme Court, and the court will evaluate the administrative appeal's record to determine if the decision to terminate the employee for unsatisfactory job performance is supported by substantial evidence. Manuel v. FSM, 19 FSM R. 382, 387 n.3 (Pon. 2014).

Public Officers and Employees – Termination

If an employee ceases work without explanation for not less than six consecutive working days, the management official shall file with the personnel officer a statement showing termination of employment because of abandonment of position. Manuel v. FSM, 19 FSM R. 382, 389 (Pon. 2014).

Public Officers and Employees – Termination

When an employee's supervisor is contacted with a request for leave due to illness, the supervisor is on notice that the requesting employee is absent for a reason other than a desire to abandon his employment; when any senior management official who read the departmental attendance log and saw LWOP beside the employee's name should have understood that the employee did not wish to resign, but rather that his absences were approved; when it is clear that the employee did not cease work without explanation for six consecutive days and at worst only four of the six absences were without explanation, the employee did not cease work without explanation for six consecutive days and the court must conclude that a finding that the employee abandoned his employment is not supported by substantial evidence. Manuel v. FSM, 19 FSM R. 382, 389-90 (Pon. 2014).

Constitutional Law – Due Process – Notice and Hearing; Public Officers and Employees

The National Public Service System Act and the Public Service System Regulations establish continued employment for non-probationary national government employees by limiting the permissible grounds, and specifying the necessary procedures for their dismissal. This is sufficient protection of the right to continued employment to establish a property interest for non-probationary employees which may not be taken without due process, including notice and an opportunity to be heard. Manuel v. FSM, 19 FSM R. 382, 390 (Pon. 2014).

Constitutional Law – Due Process

The fundamental concept of procedural due process is that the government may not strip a citizen of life, liberty, or property in an unfair, arbitrary manner. Before such important individual interests are exposed to possible governmental taking or deprivation the Constitution requires that the government follow procedures calculated to ensure a fair and rational decision making process. Manuel v. FSM, 19 FSM R. 382, 390-91 (Pon. 2014).

Public Officers and Employees – Termination; Torts – Damages – Mitigation of

It is well established that a plaintiff seeking an award of back pay as damages for wrongful termination has a duty to mitigate damages by actively seeking alternative employment. Manuel v. FSM, 19 FSM R. 382, 391 (Pon. 2014).

Employer-Employee – Wrongful Discharge; Public Officers and Employees – Termination; Torts – Damages – Mitigation of

The failure to mitigate damages is an affirmative defense for which the defendant bears the burden of proof. The common law rule establishing failure to mitigate damages as an affirmative

defense is sound because to hold otherwise would be to impose a burdensome requirement upon every plaintiff in a wrongful termination case and because a holding that failure to mitigate damages is an affirmative defense puts the burden of proof on defendants, who presumably would refrain from litigating this issue unless the question of failure to mitigate damages is actually in dispute. Manuel v. FSM, 19 FSM R. 382, 391 (Pon. 2014).

Public Officers and Employees – Termination; Remedies; Torts – Damages

Reinstatement to his former position and back pay from the date of termination to the date of reinstatement are remedies generally available to an employee who has shown wrongful discharge. However, the amount of back pay must be reduced to the extent that the plaintiff has mitigated his damages by securing other employment. Manuel v. FSM, 19 FSM R. 382, 391-92 (Pon. 2014).

Public Officers and Employees – Termination; Remedies

A wrongfully discharged employee is entitled to the equitable remedy of reinstatement to his former position. Reinstatement is appropriate even if the position has been filled by another employee since, if a replacement's existence constituted a complete defense against reinstatement, then reinstatement could be effectively blocked in every case simply by immediately hiring an innocent third-party after the unlawful discharge has occurred, thus rendering the reinstatement remedy's deterrent effect a nullity. Manuel v. FSM, 19 FSM R. 382, 392 (Pon. 2014).

Attorney's Fees – Court-Awarded – Statutory; Civil Rights – Remedies and Damages

Attorney's fees can be awarded under 11 F.S.M.C. 701(3) even when the attorneys are from a non-profit legal services corporation. The right to a reasonable attorneys' fees award is the client's not the attorney's, and the amount that the client actually pays (or whether the client actually pays) is irrelevant. Manuel v. FSM, 19 FSM R. 382, 392 (Pon. 2014).

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COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

I. Background

Trial in this matter was held from July 31, 2013 through August 2, 2013. The Plaintiff Kentrickson Manuel was represented by Salomon M. Saimon, Esq. of the Micronesian Legal Services Corporation (MLSC). The Defendant Federated States of Micronesia (FSM) Government was represented by Joses R. Gallen, Esq. and Josephine Joseph, Assistant Attorneys General.

At the conclusion of the trial, the parties agreed to the submission of written closing arguments. Plaintiff's closing arguments were filed on August 16, 2013, and Defendant's closing arguments were filed on the same day.

The Court having reviewed the exhibits that were stipulated to, or otherwise entered into evidence at trial, as well as the arguments of counsel, and having reviewed the parties' closing arguments and other briefs, now finds and determines as follows:

II. Preliminary Matters

Defendant has advanced two distinct theories to justify the termination of Plaintiff's employment as a police officer. The first theory advanced by Defendant is that Plaintiff's actions satisfy the

statutory definition of abandonment found in the National Public Service System Act.[1] 52 F.S.M.C. 146 does not provide for administrative remedies or administrative appeals of any kind in abandonment cases. The logic underscoring the denial of an administrative appeal is that abandonment is a form of resignation, a voluntary relinquishment through non-user. Klavasru v. Kosrae, 7 FSM Intrm. 86, 90 (Kos. 1995).

Since an employee who abandons his position does not have the right to an administrative appeal, a court reviewing an agency decision to terminate the employment of a plaintiff for reason of abandonment will not be able to limit its role to reviewing factual findings developed during the course of an administrative appeal. *See e.g.*, Semes v. FSM, 4 FSM Intrm. 66, 72 (App. 1989) (under Public Service System Act [judicial] review of factual findings is limited to determining whether substantial evidence on the record supports the conclusion that a violation justifying termination has occurred). A court evaluating the merits of an abandonment claim must instead conduct a trial *de novo* to determine whether there is substantial evidence to support an agency decision to terminate a plaintiff's employment for reason of abandonment. *See id.* at 71; Dabchur v. Yap, 3 FSM Intrm. 203, 208 (Yap S. Ct. App. 1987) (an employee who contests the factual allegation of voluntary abandonment is not entitled to any administrative remedies or administrative appeal, and has recourse only in the court).

The second theory advanced by Defendant to justify the termination of Plaintiff's employment is that Plaintiff's work performance was unsatisfactory. The Public Service System Act delineates procedures which must be followed in terminating an employee for unsatisfactory performance. The Act mandates that "No dismissal or demotion of a permanent employee shall be effective . . . until the management official transmits to the employee . . . a written notice setting forth the specific reasons for the dismissal or demotion and the employee's rights of appeal." 52 F.S.M.C. 152. The Public Service System Act further mandates that any regular employee who is dismissed may appeal through an administrative review process. 52 F.S.M.C. 154. A crucial part of the administrative review process is the holding of a hearing before an ad hoc committee, and subsequent preparation of a full written statement of findings of fact. 52 F.S.M.C. 155, 156. Finally, the Public Service System Act states that, "Disciplinary Actions taken in conformance with this Subchapter shall in no case be subject to review in the courts until the administrative remedies prescribed herein have been exhausted . . . ." 52 F.S.M.C. 157.

This court has established that in reviewing the termination of government employees under Title 52, "the FSM Supreme Court will review factual findings insofar as necessary to determine whether there is evidence to establish that there were grounds for discipline." Semes v. FSM, 4 FSM Intrm. at 71. In Semes, the court stated that:

> The judicial review provisions of 52 F.S.M.C. 157 is written in restrictive form, permitting judicial review of factual findings only by implication and then only so far as necessary to determine whether there has been a violation of law or regulation or denial of due process. This limiting language is sufficiently "explicit" to prevent the expansive judicial review of findings normally available under the [Administrative Procedures Act], which authorizes the court to "make its own factual determinations." Olter v. National Election Commissioner, 3 FSM Intrm. 123, 131 (App. 1987). Under [Title 52], where [the FSM Supreme Court's] review is for the sole purpose of preventing statutory,

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[1] Under the heading of "Resignation," the Public Service System Act states that "if an employee ceases work without explanation for not less than six consecutive working days, the management official shall file with the Personnel Officer a statement showing termination of employment because of abandonment of position." 52 F.S.M.C. 146.

> regulatory and constitutional violations, review of the factual findings is limited to determining whether substantial evidence in the record supports the conclusion of the administrative official that a violation of the kind justifying termination has occurred.

Semes v. FSM, 4 FSM Intrm. At 72.

The statute, 52 F.S.M.C. evinces a clear congressional intent that the courts avoid serving as finders of fact. When there are non-frivolous disputes about the grounds for termination, the decision of the ad hoc committee should identify and address those grounds with specificity, and when they have not, the court will remand the case to the ad hoc committee to prepare a full written statement of its findings of fact. Maradol v. Department of Foreign Affairs, 13 FSM Intrm. 51, 54-55 (Pon. 2004). In accordance with the Semes and Maradol decisions, this Court's review of Plaintiff's dismissal for unsatisfactory performance should proceed only insofar as is necessary to determine whether substantial evidence in the administrative appeal record supports the decision to terminate Plaintiff's employment.

In the matter before this Court, it is undisputed that Plaintiff was denied an opportunity to file an administrative appeal against the termination of his employment on the grounds of unsatisfactory performance. Indeed, the July 2, 2008 letter of termination firmly closed the door on Plaintiff's right to appeal in stating that "in abandonment of work type cases the employee does not have the right to appeal." As Plaintiff was denied an opportunity to engage in the administrative review process, this Court is left without a record to review. Therefore, it is clear that the decision to terminate Plaintiff's employment on the grounds of unsatisfactory performance is not supported by substantial evidence in the record.[2] As it is clear that Defendant FSM Government will not prevail on the issue of unsatisfactory job performance as a matter of law, this Court's findings of fact will be limited to those facts relevant to the issue of abandonment.[3]

III. The Record and Findings

From a thorough review of the stipulated to, or entered exhibits of both parties, the submissions and briefs of both parties, the relevant arguments of counsel, and the record in this matter, the court makes the following determinations as to whether there is substantial evidence in the record to support the conclusion that Plaintiff abandoned his position as a National Police Officer (I). The evidence admitted during trial going to the alleged constitutional due process violation and/or damages were as follows:

1) Plaintiff was employed by the government of the Federated States of Micronesia ("government") in the position of 'Police Officer 1' from May 1, 2006 until July 2, 2008 at a salary of $232.86

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[2] Evidence relating to Plaintiff's job performance was presented at trial. However, as explained *supra*, this Court's role is not to serve as a finder of fact substituting its judgment for that of the ad hoc committee and the President. Rather, this Court's role is to determine whether the administrative review process was conducted in accordance with statutory guidelines and in a manner that protects Plaintiff's right to due process.

[3] If Defendant would like to terminate Plaintiff for unsatisfactory job performance, then Defendant must follow the procedures established in the National Public Service System Act and accompanying regulations, including providing Plaintiff with notice of his right to file an administrative appeal. If, after an administrative appeal, Plaintiff is terminated for unsatisfactory performance then Plaintiff may appeal to this Court, and this Court will evaluate the record of the administrative appeal to determine if the decision to terminate Plaintiff for unsatisfactory job performance is supported by substantial evidence.

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2) Plaintiff's status upon hire was "probationary." Plaintiff's personnel file does not contain a personnel action form indicating that he was made a permanent employee. Plaintiff's personnel file also does not contain a personnel action form effectuating his termination on July 2, 2008 or a prior suspension in February 25, 2008.

3) Although the personnel file does not contain a personnel action form elevating Plaintiff to the status of a permanent employee, he nonetheless became a permanent employee within six months to a year of being hired.

4) Plaintiff suffers from sporadic back pain. He sought treatment at Genesis Hospital for a spasm of the neck muscle on June 26, 2008, and was treated as an outpatient with analgesic medication and given a doctor's slip for three (3) days bed rest.

5) Plaintiff missed six (6) consecutive days of work from June 25, 2008 through June 30, 2008.

6) The National Police departmental attendance log, Def. Ex. 11, shows that Plaintiff was marked leave without pay (LWOP) on June 25 and June 28. Plaintiff was marked absent without leave (AWOL) on June 26, 27, 29, and 30.

7) AWOL is a notation reserved for those employees who are absent from work without appropriate authorization from a supervisor. An employee can be marked AWOL if he fails to request leave, or if leave was requested but permission for leave was denied.

8) LWOP is a notation reserved for an employee who requests permission, in advance, to be absent from work, and is granted permission for such an absence, but does not earn compensation while absent, because the leave requested does not qualify for Leave With Pay under Public Service System Regulation 10.3.

9) In the context of the National Police, it was common practice for a sick employee to call in as soon as possible to request leave, but to wait to file the requisite forms until returning to work.

10) Plaintiff's personnel file does not include a written request for leave between June 25, 2008 and June 30, 2008.

11) An employee typically seeks approval for leave from an immediate supervisor. Between June 25, 2008 and June 30, 2008, Plaintiff's immediate supervisor was a shift supervisor. Shift supervisors typically do not have the authority to grant an application for leave. However, in the context of the National Police, a shift supervisor would approve leave for a night shift if a more senior police official were not available.

12) In the context of the National Police, each shift is responsible for its own timekeeping, while the shift supervisor would mark annotations such as LWOP and AWOL to the departmental attendance log.

13) As the departmental attendance log has a notation of LWOP on June 25 and June 28, and such a notation is made only by a supervisor and only when an employee requests leave in advance and such leave is approved; it must be inferred that Plaintiff contacted his supervisor to request leave due to illness on or before June 25, 2008 and on or before June 28, 2008.

14) On July 2, 2008 Plaintiff worked his eight hour shift and then went to his duty station to meet with the Chief of Police with the intent of submitting a formal written request for retroactive leave. At that time he was presented by the Chief of Police with a termination letter. Def. Ex. 9.

15) The termination letter, by its own terms, was effective July 2, 2008. The termination letter mentioned both resignation [abandonment] and unsatisfactory performance as grounds for termination. The termination letter explicitly stated that Plaintiff does not have the right to file an [administrative] appeal.

16) Subsequent to his dismissal from the National Police, Plaintiff experienced difficulty finding alternate sources of employment. At trial Plaintiff testified that he worked for "over one year." The inference to be drawn from this testimony is that Plaintiff worked for no more than two years.

17) Since July 2, 2008, Plaintiff has been employed for less than two years, with a salary starting at $1.50/hour but rising to $2.00/hour. Plaintiff supports his family through fishing, but would welcome reinstatement with the National Police.

IV. Analysis

A. *Abandonment*

Under the heading of "Resignation," the National Public Service System Act states that, "if an employee ceases work without explanation for not less than six consecutive working days, the management official shall file with the Personnel Officer a statement showing termination of employment because of abandonment of position." 52 F.S.M.C. 146. This Court has never before been called upon to interpret the meaning of the word 'explanation' in 52 F.S.M.C. 146. The appellate division of the Yap State Court has held a nearly identical provision in the Yap State Code to require in abandonment cases that "the employee's intention to relinquish his position must be clear" and that "any explanation from the employee, written or verbal, would suffice [to discredit a claim of abandonment] as long as it is communicated to the employer that the employee does not intend to relinquish his position." Dabchur v. Yap, 3 FSM Intrm. 203, 207 (Yap S. Ct. App. 1987).

In Klavasru v. Kosrae, 7 FSM Intrm. 86, 92 (Kos. 1995) this Court declined to adopt a formal interpretation of what constitutes "explanation" in interpreting a nearly identical provision on abandonment found in the Kosrae State Code. In that case the Court held that defining "explanation" under the Kosrae State Code was not necessary in order to find that an explanation was indeed provided. The Klavasru Court held that an explanation was provided because "at all times . . . Plaintiff made clear that she did not intend to take permanent leave of her position." Klavasru at 92.

In the instant matter this Court has found *supra* that Plaintiff contacted his supervisor to request leave due to illness on or before June 25, 2008 and on or before June 28, 2008. A supervisor who is contacted with a request for leave due to illness is on notice that the requesting employee is absent for a reason other than a desire to abandon his employment. Furthermore, any senior management official who read the departmental attendance log and saw LWOP beside Plaintiff's name should have understood that Plaintiff did not wish to resign, but rather that his absences on June 25 and June 28, 2008 were approved.

It is clear that Plaintiff did not cease work without explanation for six consecutive days. At worst only four of the six absences from June 25 through June 30, 2008 were without explanation.

As Plaintiff did not cease work without explanation for six consecutive days as specified in 52 F.S.M.C. 146, this Court must conclude that a finding that Plaintiff abandoned his employment as a National Police officer is not supported by substantial evidence.

B. *Right to Due Process prior to Termination*

The National Public Service System Act and the Public Service System Regulations establish continued employment for non-probationary national government employees by limiting the permissible grounds, and specifying the necessary procedures for their dismissal. Suldan v. FSM (II), 1 FSM Intrm. 339, 351-54 (Pon. 1983). This is sufficient protection of the right to continued employment to establish a property interest for non-probationary employees which may not be taken without due process, including notice and an opportunity to be heard. FSM Const. art. IV, § 3.

Plaintiff contends that as a long time public service system employee he had a constitutionally protected property interest and was entitled to an opportunity to respond to the charges set forth in the termination letter of July 2, 2008 (Def. Ex. 9). In the Semes case, the appellate division discussed in detail the employee's interest versus the government's interest. The Semes court stated that:

> the right to retain governmental employment is of great significance. While this . . . subsistence society . . . ha[s] retained that as the primary way of life, many governmental employees, especially long time ones, would find it difficult to return to the life of a farmer and fisherman. There are no welfare or unemployment compensation programs to provide for basic needs while a dismissed employee awaits the outcome of his appeal. Indeed, outside of government, there is relatively little employmentThe difficulty of finding alternative work surely would be increased by the fact that the applicant has been dismissed from government employment.
>
> The government's interest in immediate termination does not outweigh these interests. The continued salary payments to an employee . . . would be a negligible part of the overall budget. . . .

Semes, 4 FSM Intrm. at 75.

While the Semes decision was handed down over 20 years ago, the circumstances in the FSM are still similar and the discussion in Semes is still applicable to present circumstances. The Semes court concluded that:

> Based upon the balancing of these interests . . . we conclude that constitutional due process requires that a non-probationary employee . . . be given some opportunity to respond to the charges against him before his dismissal may be implemented. We adopt the conclusion of the Lourdermill court: "The opportunity to present reasons, either in person or in writing, why a proposed action should not be taken is a fundamental due process requirement . . . . The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." 470 U.S. at 546, 105 S. Ct. at 1495, 84 L. Ed. 2d at 506. Only when these conditions are fulfilled may dismissal of a tenured employee of the national government be implemented before termination of the employees' appeal rights.

Semes, 4 FSM Intrm. at 76-77.

The fundamental concept of procedural due process is that the government may not strip a citizen of "life, liberty or property" in an unfair, arbitrary manner. Before such important individual interests are exposed to possible governmental taking or deprivation the Constitution requires that the government follow procedures calculated to ensure a fair and rational decision making process. Suldan (III), 1 FSM Intrm. at 354-55; Semes, 4 FSM Intrm. at 74. On July 2, 2008, Plaintiff received a letter of termination via hand delivery from the Chief of Police. In that letter he was explicitly told that "[I]n abandonment of work type cases the employee does not have the right to appeal. Therefore, you are hereby terminated from employment with the FSM National Police effective the date of this letter." Def. Ex. 9. This letter on its face denied Plaintiff his constitutionally protected right to due process prior to being stripped of a property interest in continued employment with Defendant FSM Government.

C. *Affirmative Defense of Failure to Mitigate Damages was Waived*

It is well established in this jurisdiction that a Plaintiff seeking an award of back pay as damages for wrongful termination has a duty to mitigate damages by actively seeking alternative employment. Sandy v. Mori, 17 FSM Intrm. 92, 94 (Chk. 2010); Robert v. Simina, 14 FSM Intrm. 438, 443 (Chk. 2006). However, the case law in this jurisdiction is silent on the question of whether a plaintiff must demonstrate reasonable efforts to secure alternative employment as part of his *prima facie* case, or whether failure to mitigate damages is an affirmative defense. As this question is unresolved in this jurisdiction, the Court will turn to common law decisions of the United States for guidance. *See* FSM v. Ocean Pearl, 3 FSM Intrm. 87, 90-91 (Pon. 1987) (United States common law decisions are an appropriate source of guidance for the FSM Supreme Court for contract issues unresolved by statutes, decisions of constitutional courts or custom and tradition within the Federated States of Micronesia.)

Under U.S. common law, failure to mitigate damages is an affirmative defense for which Defendant bears the burden of proof. *See generally* 82 AM. JUR. 2D *Wrongful Discharge* § 260 (1992); Rasimas v. Michigan Dep't of Health, 714 F.2d 614, 623-24 (6th Cir. 1983) (once a claimant proves his *prima facie* case and damages, the burden of producing sufficient evidence to establish lack of diligence in pursuing alternative employment shifts to defendant); Mason County Bd. of Educ. v. State Superintendent of Schools, 295 S.E.2d 719, 724 W. Va. 1982) (a plaintiff suing for wrongful discharge need only prove the amount he was to earn under the contract and then the burden shifts to defendant to prove what the plaintiff did earn, or by reasonable diligence could have earned, in other employment during that period).

The common law rule establishing failure to mitigate damages as an affirmative defense is sound. To hold otherwise would be to impose a burdensome requirement upon every plaintiff in a wrongful termination case. As part of their *prima facie* case, these plaintiffs would be required to produce evidence of reasonable efforts to secure alternative employment in their chosen profession. At a minimum such a showing would require that each plaintiff produce a list of every appropriate position that was available in the intervening years, and testify as to the efforts made to secure each position. In contrast, a holding that failure to mitigate damages is an affirmative defense puts the burden of proof on defendants, who presumably would refrain from litigating this issue unless the question of failure to mitigate damages is actually in dispute in a particular case. This has the effect of reducing litigation costs and focusing trial on the issues that are actually in dispute.

Since Defendant did not plead the affirmative defense of failure to mitigate damages, it is clear that this affirmative defense must fail.

D. *Back Pay and Reinstatement*

Reinstatement to his former position and back pay from the date of termination to the date of

reinstatement are remedies generally available to an employee who has shown wrongful discharge. Reg v. Falan, 14 FSM Intrm. 426, 436-37 (Yap, 2006); FSM v. Falcam, 9 FSM Intrm. 1, 5 (App. 1999) (back pay must be awarded where employee of FSM government has constitutionally protected interest in continued employment and government failed to provide notice and opportunity to be heard prior to forfeiture); Semes, 4 FSM Intrm. at 77 (termination ineffective until opportunity given to respond to charges). However, the amount of back pay must be reduced to the extent that Plaintiff has mitigated his damages by securing other employment. Kimeuo v. Simina, 15 FSM Intrm. 664, 666 (Chk. 2008); Reg, 14 FSM Intrm. at 436-37. Such a rule is necessary in order to ensure that a plaintiff does not recover a windfall, which would violate the principle of compensatory damages. Robert, 14 FSM Intrm. at 443.

Plaintiff's testimony at trial was vague as to the total remuneration he earned through employment subsequent to his discharge on July 2, 2008. Plaintiff testified that he worked for over one year, and that at some point during that time his salary was increased from $1.50 to $2.00 per hour. There is nothing in this testimony that would allow the court to determine precisely when the salary increase came into effect. Therefore, the Court can only draw the limited inference that Plaintiff earned not more than $2.00 per hour during not more than two years of employment. For that reason, Plaintiff's award must be reduced by two year's salary at $2.00 per hour. Such a salary, calculated at $2.00 per hour multiplied by 40 hours per week, further multiplied by 52 weeks in a year is equal to a total of $4,160. Two years' salary is therefore valued at $8,320.

In addition to back pay, Plaintiff also seeks reinstatement, and it is clear that Plaintiff is entitled to the equitable remedy of reinstatement to his former position with the National Police. Kimeuo, 15 FSM Intrm. at 666; Reg, 14 FSM Intrm. at 436-37. Reinstatement is appropriate in this instance even if the position has been filled by another employee since, "if the existence of a replacement constituted a complete defense against reinstatement, then reinstatement could be effectively blocked in every case simply by immediately hiring an innocent third-party after the unlawful discharge has occurred, thus rendering the reinstatement remedy's deterrent effect a nullity." Sandy, 17 FSM Intrm. at 96 (citing Reeves v. Clairborne County Bd. Of Educ., 828 F.2d 1096, 1102 (5th Cir. 1987)). Therefore, Defendant must reinstate Plaintiff to his former position of National Police Office (I) as soon as is feasible.

As explained (*supra*), Plaintiff shall be awarded back pay from July 2, 2008 until he is reinstated to his former position, with such back pay to be reduced by $8,320, which is the highest estimate of his earnings over the course of his subsequent employment. The FSM government shall also deduct the applicable wage and salary taxes and social security taxes and remit to the appropriate tax authorities. Sandy v. Mori, 17 FSM Intrm. 92, 96 (Chk. 2010); Ponape Transfer & Storage, Inc. v. Wade, 5 FSM Intrm. 354, 356 (Pon. 1992) (payments to appropriate tax authorities to be made from back pay awards).

E. *Attorney's Fees and Costs for Civil Rights Violation*

Plaintiff's third cause of action was for civil rights violations. Attorney's fees can be awarded under 11 F.S.M.C. 701(3) even when the attorneys are from a non-profit legal services corporation. Sandy, 17 FSM Intrm. at 96. The right to a reasonable attorneys' fees award is the client's not the attorney's, and the amount that the client actually pays (or whether the client actually pays) is irrelevant. Bank of the FSM v. Truk Trading Co., 16 FSM Intrm. 467, 471 (Chk. 2009). Since the Court finds a violation of Plaintiff's due process rights, the Court awards Plaintiff his attorney's fees and costs which shall be submitted to the Court within 20 days of service of this decision on him. Defendant shall then have 10 days to respond to the submission.

V. CONCLUSION

A finding that Plaintiff abandoned his employment is not supported by substantial evidence. The attempt to dismiss Plaintiff on July 2, 2008 violated Plaintiff's right to due process and thus remains ineffective. Plaintiff is entitled to reinstatement and back pay from July 2, 2008 until he is reinstated. Such back pay shall be reduced by $8,320, which is the highest estimate of his subsequent earnings, and income and social security taxes shall be withheld and remitted to the proper authorities. Plaintiff prevails on his allegations of a civil rights violation and is therefore awarded attorneys fees and costs which shall be submitted to the Court as directed above.

* * * *

FSM SUPREME COURT APPELLATE DIVISION

GINN P. NENA, Appellant, vs. HAMLIN SAIMON, JOSHAIA SAIMON, and LENORA SIGRAH, Appellees.	APPEAL CASE NO. K7-2013 Civil Action No. 39-2013

ORDER GRANTING $91 IN COSTS

Martin G. Yinug
Chief Justice

Decided: May 7, 2014

APPEARANCES:

For the Appellant: Sasaki L. George, Esq.
P.O. Box 487
Tafunsak, Kosrae FM 96944

* * * *

HEADNOTES

Costs – Procedure

A party who desires costs to be taxed in an appeal case shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment. The appellate clerk will act on the bill of costs, at least when no opposition has been filed; when there is opposition, the matter is usually referred to the court or a judge thereof. Nena v. Saimon, 19 FSM R. 393, 394-95 (App. 2014).