

Discriminatory Opportunism: Why Undertaking Self-Employment to Mitigate Damages Creates Unique Challenges

“The notion that starting one’s own business cannot constitute comparable employment for mitigation purposes not only lacks support in the cases, but has a distinctly un-American ring. . . . [But] [t]he ADEA must not be used as a tool for insuring a plaintiff’s fledgling business while it continues to sustain losses.”¹

I. INTRODUCTION

To sustain a backpay award following a wrongful termination, the terminated employee has a duty to mitigate damages by exercising reasonable diligence in seeking comparable employment.² The net damages award is then calculated by deducting the wages earned in the interim period from the wages the former employee would have continued to earn at the former employer’s business but for the wrongful termination.³ The preferred remedy to make claimants whole is backpay, which is “[t]he wages or salary that an employee should have received but did not because of an employer’s unlawful action in setting or paying the wages or salary.”⁴ Although backpay is an equitable remedy used at the court’s discretion, the Supreme Court has made backpay the presumptive remedy for unlawful employment discrimination.⁵

Mitigation by self-employment, however, creates unique problems that are absent from the more traditional cases, in which the former employee simply

1. *Smith v. Great Am. Rests., Inc.*, 969 F.2d 430, 438-39 (7th Cir. 1992).

2. *See Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982) (describing statutory duty under Title VII to minimize damages by using reasonable diligence). The Court describes the duty to mitigate as rooted in ancient common law. *Id.* If the former employee succeeds in finding new employment, the wages earned from the new employer will be offset against the gross backpay award. *See BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW* 2824 (C. Geoffrey Weirich et al. eds., 4th ed. 2007).

3. *See LINDEMANN & GROSSMAN, supra* note 2, at 2824-25; Mark S. Kende, *Deconstructing Constructive Discharge: The Misapplication of Constructive Discharge Standards in Employment Discrimination Remedies*, 71 NOTRE DAME L. REV. 39, 46 (1995).

4. BLACK’S LAW DICTIONARY 158-59 (9th ed. 2009).

5. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975); LINDEMANN & GROSSMAN, *supra* note 2, at 2755-56 (discussing presumption of backpay as standard remedy in discrimination cases); Sandra Sperino, *The New Calculus of Punitive Damages for Employment Discrimination Cases*, 62 OKLA. L. REV. 701, 705 (2010) (“[B]ack pay under Title VII is equitable in nature because . . . [it is] part of the equitable remedy of reinstatement.”).

searches for comparable work.⁶ Some of the problems inherent in self-employment include the risk of the business failing and uncertainty in determining the mitigating value.⁷ Thus, the critical question is whether the self-employment “is undertaken in good faith and is a reasonable alternative to seeking other comparable employment.”⁸

The statistically low success rates for new small businesses illustrate the problematic uncertainties inherent in mitigation by self-employment.⁹ Only seventy percent of new businesses survive at least two years, and only half last at least five years.¹⁰ Thus, there is a reasonable likelihood that a claimant’s self-employment venture will fail, leaving the former employer to pay the claimant’s full wages through the backpay period without any offsetting mitigation value.¹¹ Another major issue concerns the valuation of the burgeoning business’s profits in the mitigation context.¹² Some courts contend that the reasonable value of services provided by the self-employed should constitute the mitigating value.¹³ Others conclude that the new business’s net profits should be deducted as the mitigating value.¹⁴ Lastly, courts must consider whether employers are essentially insuring their former employee’s self-employment venture.¹⁵

This Note will explore the effects and ramifications when the former

6. See *Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1005 (3d Cir. 1988) (discussing problems arising when former employee mitigates by self-employment).

7. See *id.* at 1005-06 (proposing questions to aid trial court in determining mitigating value); *infra* text accompanying note 88 (listing *Carden*’s proposed questions).

8. Richard J. Gonzalez, *Satisfying the Duty to Mitigate in Employment Cases: A Survey and Guide*, 69 MISS. L.J. 749, 776 (1999); see also Pearl Zuchlewski, *Mitigation Doctrine Does Not Preclude Starting Own Business*, N.Y. L.J., Sept. 19, 2002, at 4 (describing resurgence of self-employment as mitigation tool). “Prevailing plaintiffs, however, cannot satisfy the duty to mitigate by merely asserting that they made some effort to start their own business. The new business venture must be a serious one with a reasonable chance of success.” Zuchlewski, *supra*.

9. See OFFICE OF ADVOCACY, U.S. SMALL BUS. ADMIN., *Frequently Asked Questions*, <http://www.sba.gov/sites/default/files/files/sbfaq.pdf> (last updated Jan. 2011).

10. See *id.* (describing new business survival rates at two, five, ten, and fifteen years). Even though a business may survive these initial years, it is still unlikely that the business will be making substantial profit to provide a meaningful mitigation value. See Gonzalez, *supra* note 8, at 778.

11. See SCOTT A. SHANE, *THE ILLUSIONS OF ENTREPRENEURSHIP* 98 (2008) (“Most new businesses fail. Pretty much all studies agree on that.”).

12. See *Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1005 (3d Cir. 1988) (considering question of how to value self-employment).

13. See Gonzalez, *supra* note 8, at 752-53 (explaining general measure of mitigating damages by self-employment).

14. See *Smith v. Great Am. Rests., Inc.*, 969 F.2d 430, 439 (7th Cir. 1992) (deducting net profits of restaurant as actual earnings). This formulation can become complicated if the self-employed plaintiff reinvests profits back into the business instead of taking them as salary or dividends. See Gonzalez, *supra* note 8, at 778.

15. See *infra* Part III.B; see also *Cornell v. T.V. Dev. Corp.*, 260 N.Y.S.2d 865, 870 (App. Div. 1965) (holding entering own business curtails damages), *rev’d*, 215 N.E.2d 349 (N.Y. 1966). “The corporation, which must fend off [the former employee’s] competition, should not also be required to stand as his surety against any loss thus voluntarily incurred by him.” *Cornell*, 260 N.Y.S.2d at 870.

employee chooses self-employment in an effort to mitigate the damages of the wrongful discharge. It will begin by providing an overview of the history of mitigating damages through self-employment, including an exploration of the different calculation methods used by courts.¹⁶ It will then discuss the current state of the law, relying heavily on cases decided under federal antidiscrimination statutes.¹⁷ Next, this Note will explore plummeting costs of self-employment due to the rise of the internet.¹⁸ Lastly, it will focus on possible ways to prevent former employers from essentially insuring against losses in the self-employed's new venture, and then argue that the reasonable-diligence standard may be too easy to satisfy.¹⁹

II. HISTORY

The law of damages stemming from the employment relationship has evolved significantly over the last two centuries.²⁰ Developing out of common-law contract disputes, damages for wrongful termination have mostly fallen under the purview of congressional antidiscrimination statutes.²¹

A. *The Common Law and the Duty to Mitigate*

In *Ford Motor Co. v. EEOC*,²² the Supreme Court noted that the employee's duty to mitigate is rooted in ancient common law, but the doctrine actually did not appear until the latter part of the nineteenth century.²³ In fact, one early English case, *Gandell v. Pontigny*,²⁴ held that a discharged employee may sue

16. See *infra* Part II.A-C (discussing history of mitigation of damages through self-employment).

17. See *infra* Part II.D (noting current developments in law regarding mitigation by self-employment).

18. See *infra* Part III.A (discussing recent trends in self-employment); see also Josh Quittner, *The New Internet Start-Up Boom: Get Rich Slow*, TIME.COM (Apr. 9, 2009), <http://www.time.com/magazine/article/0,9171,1890387,00.html>; Kelly K. Spors, *How to Sell on Amazon and eBay*, N.Y. TIMES (Dec. 2, 2009), <http://www.nytimes.com/2009/12/03/business/smallbusiness/03marketplaces.html>.

19. See *infra* Part III.B (discussing possible solutions to prevent former employer insuring former employee's new business).

20. Compare *Gandell v. Pontigny*, (1816) 171 Eng. Rep. 119 (K.B.) 120; 4 Campbell 375, 376 (holding suing employee must remain unemployed during backpay period), and *Williams v. Lockett*, 26 So. 967, 968 (Miss. 1899) (following rule set forth in *Gandell*), with *Smith v. Great Am. Rests., Inc.*, 969 F.2d 430, 438 (7th Cir. 1992) (laying out general rule requiring former employee to exercise reasonable diligence in mitigation), *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1468 (5th Cir. 1989) (asserting mitigation requires "plaintiff to use reasonable efforts to obtain other employment" following termination), and *Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1004-05 (3d Cir. 1988) (asserting defendant has burden to prove plaintiff did not use reasonable efforts to mitigate damages).

21. See LINDEMANN & GROSSMAN, *supra* note 2, at 2824 (explaining Title VII's codification of common-law duty to mitigate damages following wrongful termination); Howard C. Eglit, *Damages Mitigation Doctrine in the Statutory Anti-Discrimination Context: Mitigating Its Negative Impact*, 69 U. CIN. L. REV. 7, 9-10 (2000) (discussing negative effects of forcing wrongfully terminated employees to mitigate damages); see also *infra* note 48 (discussing mitigation provisions in congressional antidiscrimination statutes).

22. 458 U.S. 219 (1982).

23. See *id.* at 231; Eglit, *supra* note 21, at 35-36 (discussing historical origins of mitigation doctrine).

24. (1816) 171 Eng. Rep. 119 (K.B.); 4 Campbell 375.

as salary becomes due, provided that the employee remains both unemployed and available to return work for the employer.²⁵ But the mitigation doctrine eventually prevailed: American courts began to impose a positive duty on former employees to mitigate damages, which necessitated a deduction of the interim earnings from the gross backpay award.²⁶ Ultimately, courts determined that discharged employees should not remain idle, because former employees have a moral duty to mitigate damages.²⁷ Although the mitigation principle may not be as ancient as the Supreme Court claimed, by the turn of the twentieth century, courts routinely required the discharged employee to seek reasonably comparable employment before collecting backpay.²⁸

Unsurprisingly, courts eventually faced the issue of applying the mitigation principle when the discharged employee mitigated via self-employment rather than by finding reasonably comparable employment.²⁹ As part of this inquiry, courts struggled to determine the best method for calculating the mitigating value in self-employment cases.³⁰

1. Determining the Reasonableness of Undertaking Self-Employment

Initially, employers asserted that former employees who choose self-employment should not receive backpay because self-employment could not constitute reasonable mitigation.³¹ Courts generally held, however, that self-employment is a reasonable method of mitigation because of the potential benefit to the employer—namely, the elimination of backpay altogether—if the former employee succeeds in the new venture.³² Some courts required the

25. See *id.* at 120; 376 (allowing damages if employee remains unemployed and available to return to work). A minority of American courts initially adopted the position proposed by *Gandell*, which placed no duty on the former employee to mitigate. See Eglit, *supra* note 21, at 36; see also *Lockett*, 26 So. at 968 (following *Gandell*'s method for suing on employment contract).

26. See Eglit, *supra* note 21, at 45-46 (describing how mitigation principle took hold); see also *Mohawk Sausage & Provision Co. v. Hygrade Food Prods. Corp.*, 61 F.2d 425, 427 (1st Cir. 1932) (describing formula for calculating backpay damages); *Williams v. Chicago Coal Co.*, 60 Ill. 149, 155-56 (1871) (describing method of deducting interim earnings); *Stewart Dry Goods Co. v. Hutchison*, 198 S.W. 17, 18 (Ky. 1917) (instructing, on remand, to deduct reasonable value of services from backpay award); *Lee v. Hampton*, 30 So. 721, 722 (Miss. 1901) (holding former employee has duty to mitigate damages after wrongful termination).

27. See *Huntington v. Ogdensburgh & Lake Champlain R.R.*, 33 How. Pr. 416, 418-19 (N.Y. Gen. Term 1867). “But voluntary idleness is regarded as a breach of moral duty, and if he remains willfully idle, for the purpose of charging another, the law regards his act as a fraud upon such other person, which is neither to be countenanced or encouraged.” *Id.*; see also Eglit, *supra* note 21, at 37-46 (discussing morality as main reason for spread of mitigation doctrine).

28. See Eglit, *supra* note 21, at 46 (summarizing creation of mitigation principle).

29. See *Gonzalez*, *supra* note 8, at 778-89 (describing problems arising in self-employment mitigation cases).

30. See 39 C.J. *Master and Servant* § 152 (1925) (describing framework for calculating damages if former employee chooses self-employment).

31. See *Toplitz v. Ullman*, 20 N.Y.S. 863, 864 (Ct. Com. Pl. 1892) (rejecting defendant's contention concerning former employee's decision to engage in self-employment).

32. See *id.* (noting that holding otherwise would punish former employee for acting diligently).

former employee to exhaust his search for comparable employment before entertaining the idea of self-employment.³³ Generally, however, the former employee may freely choose self-employment in the immediate aftermath of a wrongful termination.³⁴

2. Calculating the Mitigating Value

Turn-of-the-century courts next faced the challenging issue of how to calculate the mitigating value to be deducted from backpay in the self-employment context.³⁵ One method deducts the reasonable value of the labor and services—but not capital—that the employee provides to the new business.³⁶ Employers prefer this method because it guarantees the existence of a mitigating value, even in cases in which the self-employed's new venture operates at a loss.³⁷ The second method deducts the net profit actually realized by the self-employed's new business.³⁸ Former employees generally prefer this method because it preserves a greater backpay award due to the smaller—or

33. See *Kramer v. Wolf Cigar Stores Co.*, 91 S.W. 775, 777 (Tex. 1906) (claiming duty to attempt to find comparable employment before entertaining opening own business).

34. See *Ransome Concrete Mach. Co. v. Moody*, 282 F. 29, 36 (2d Cir. 1922) (giving former employee reasonable time to establish his own business).

35. See *Perry v. Simpson Waterproof Mfg. Co.*, 37 Conn. 520, 539-40 (1871) (using test of what former employee actually earned in self-employment); *Lee v. Hampton*, 30 So. 721, 722 (Miss. 1901) (deducting reasonable value of services); *Kramer*, 91 S.W. at 777-78 (settling on reasonable-value-of-services computation).

While there is some difference of opinion as to whether his earnings should be measured by profits or the pecuniary value of his services in that business . . . all the authorities agree that the time of the discharged employé must be profitably occupied, and we have been unable to find any case holding that the damages should be reduced where his services in his own behalf did not result in any profit or pecuniary benefit of any kind.

Stewart Dry Goods Co. v. Hutchison, 198 S.W. 17, 18 (Ky. 1917).

36. See *Lee*, 30 So. at 722 (deducting reasonable value of services to business); *Kramer*, 91 S.W. at 778 (describing reasonable value of services added to business).

The value of his services to himself is not to be understood as meaning what it would have cost to employ him or one like him, but the pecuniary value of that which his services yielded him in the business. This might consist of something more than profits actually received in money. It might happen that while no such profits had been received during the months through which the service with defendant should have extended, yet, that appreciable value had been added to the business by his efforts; and it is this consideration from which we conclude that the measure suggested by plaintiff's counsel might be inadequate for some contingencies and that of the court, when understood as explained, more correct.

Kramer, 91 S.W. at 778.

37. See *Kramer*, 91 S.W. at 777-78 (describing how trial court settled on reasonable-value-of-services test).

38. See *Perry*, 37 Conn. at 539-40 (relating formula deducting actual interim earnings); *Kramer*, 91 S.W. at 778 (describing former employee's argument for measuring damages by profits realized in new business).

even nonexistent—mitigating value.³⁹

A secondary problem under the net-profits-of-the-business method is determining whether the profits belong to the business or to the individual.⁴⁰ One court, adhering to a strict reading of corporate law, refused to deduct the profits of the former employee's wholly owned corporation, reasoning that those profits belonged exclusively to the corporation; they did not belong to the individual unless paid out in dividends or salary.⁴¹ Most courts, however, have refrained from such a strict reading and instead have attempted to compute a fair mitigating value attributable to the former employee based on the net profits of the business.⁴² Furthermore, most courts apply the collateral-source rule, whereby profits derived from passive capital investment in a new business do not count toward the mitigating value, but profits from the former employee's labor and services do.⁴³

B. Congressional Antidiscrimination Statutes

Throughout the twentieth century, Congress passed statutes that prevented employer discrimination against employees, whether based on union activity, race, age, disability, or other protected conditions.⁴⁴ The National Labor Relations Act (NLRA),⁴⁵ Title VII of the 1964 Civil Rights Act (Title VII),⁴⁶ and the Age Discrimination in Employment Act (ADEA)⁴⁷ each provide redress procedures for employees terminated due to discriminatory conduct by the employer.⁴⁸

39. See Gonzalez, *supra* note 8, at 778 (explaining problems of reinvestment in business from computational standpoint).

40. See *Kyle v. Pou*, 23 S.E. 114, 115 (Ga. 1895) (drawing distinction between capital investment in business and personal services to business).

41. See *Price v. Davis*, 173 S.W. 64, 68 (Mo. Ct. App. 1915) (explaining difference between corporate profits and individual earnings). “The profits of the new business belonged to the corporation as an independent entity, and not to its stockholders, and plaintiff’s interest in the assets and profits of the corporation was derived . . . from his investment in the capital stock as a shareholder.” *Id.* A major issue under this calculation method is preventing the former employee from hiding profits in the corporation through excessive reinvestment in the business, as opposed to paying out dividends. See generally *infra* Part III.B (discussing possible ways to prevent former employer from insuring self-employed’s success).

42. See Gonzalez, *supra* note 8, at 778 (explaining computational problems stemming from self-employment mitigation cases).

43. See *Kyle*, 23 S.E. at 115 (explaining difference between passive capital investment and labor-intensive personal services); see also *infra* note 106 (discussing application of collateral-source rule in self-employment context).

44. See *infra* note 45.

45. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2006)).

46. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, §§ 701-718, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e-1 to -17 (2006 & Supp. III 2010)).

47. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (2006 & Supp. III 2010)).

48. See 29 U.S.C. § 160(c) (authorizing National Labor Relations Board authority to award backpay to discriminatee); 42 U.S.C. § 2000e-5(g)(1) (indicating damages courts may award); 29 U.S.C. § 626(c)

I. National Labor Relations Act

In addition to providing certain employees the right to collectively bargain, the NLRA outlaws discrimination against employees' union activities.⁴⁹ To prevent unfair labor practices, Congress created a cause of action whereby employees who face discrimination can seek redress from the National Labor Relations Board (NLRB), which has authority to award backpay.⁵⁰

Although the NLRA does not contain an explicit mitigation provision within its text, the NLRB and courts read the mitigation duty into the language of the statute, likely due to early common-law decisions.⁵¹ Accordingly, the NLRB and courts routinely hold that self-employment, if undertaken in bona fide good faith, complies with the obligation to mitigate damages.⁵²

Following a wrongful termination, the discharged employee must make reasonable efforts to obtain comparable employment, which may include self-employment.⁵³ The self-employed's endeavor does not require success, but it does require "an honest good faith effort."⁵⁴ Typically, the NLRB and courts

(providing use of backpay as remedy for age discrimination). Title VII explicitly provides: "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. § 2000e-5(g)(1). The Supreme Court has also acknowledged that Congress expressly modeled the damages provision of Title VII on the damages provisions of the NLRA. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 & n.11 (1975). The ADEA contains no mitigation language like Title VII, but the Supreme Court has concluded that courts should use Title VII jurisprudence as a guide in interpreting the ADEA. See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979). The Court concluded that this must have been Congress's intent because the damages language is nearly identical to Title VII's and because "the ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace." *Id.*

49. See 29 U.S.C. §§ 157-158 (describing employee rights and outlawing unfair labor practices by management).

50. See *id.* § 160(c) (authorizing, though not requiring, NLRB to award backpay to victim of unfair labor practices); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941) (reiterating discretionary power given to NLRB to award backpay).

51. See Eglit, *supra* note 21, at 51-52 (comparing language of NLRA with Title VII, which includes mitigation provision); see also *Phelps Dodge Corp.*, 313 U.S. at 197-98 (deducting actual earnings in addition to losses willfully incurred during backpay period); *NLRB v. Arduini Mfg. Corp.*, 394 F.2d 420, 422-23 (1st Cir. 1968) (holding self-employment reasonable because claimant made seventy percent of his prior income); *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 835 (1st Cir. 1955) (requiring mitigation by aggrieved employee). "The Board . . . required wrongfully discharged employees to mitigate their damages by seeking employment elsewhere . . ." *Cashman Auto Co.*, 223 F.2d at 835.

52. See *Heinrich Motors, Inc. v. NLRB*, 403 F.2d 145, 148 (2d Cir. 1968) (describing mitigation rule in self-employment context); *NLRB v. Mastro Plastics Corp.*, 354 F.2d, 170, 179 (2d Cir. 1965) (holding self-employment does not destroy backpay award); *Cashman Auto Co.*, 223 F.2d at 835 (holding self-employment following wrongful termination does not curtail backpay award); see also NLRB, CASEHANDLING MANUAL pt. 3, § 10552.3 (2011), available at <https://www.nlr.gov/sites/default/files/documents/44/compliancemanual.pdf>.

53. See *Armstrong Tire & Rubber Co.*, 119 N.L.R.B. 353, 356 (1957) (claiming full-time devotion to self-employment entitles former employee to backpay); *Cashman Auto Co.*, 109 N.L.R.B. 720, 721-22 (1954) (citing NLRB history in enforcing backpay with self-employment as mitigation); *Rathbun Molding Corp.*, 76 N.L.R.B. 1019, 1035 n.21 (1948) (holding farming following discharge constitutes reasonable self-employment to mitigate damages).

54. *Cashman Auto Co.*, 223 F.2d at 836.

find a good-faith effort when the discharged employee starts a new business in a field related to his former employment.⁵⁵

Furthermore, as long as the former employee does not engage in a willful loss of earnings, the NLRB and the courts generally deem the self-employment reasonable.⁵⁶ One notable exception occurred in the case of a discharged employee who operated a small ice-house business with his wife.⁵⁷ Though the discharged employee worked a full-time shift, the Fifth Circuit concluded that working at the ice-house business was not bona fide self-employment because the business was registered under his wife's name.⁵⁸ The dissent echoed the theme of cases upholding reasonableness of self-employment, claiming that the discharged employee made an honest, good-faith effort to mitigate his damages by working with his wife, and therefore there was no willful loss of earnings that would be detrimental to a backpay recovery.⁵⁹

Having determined that self-employment can constitute reasonable mitigation of damages, the NLRB and the courts next had to determine the best method for calculating the mitigating value.⁶⁰ Unlike the common-law courts, which struggled with determining the best method to calculate the mitigating amount, the NLRB settled on the method of "deducting his net profits from his gross back pay."⁶¹ As an ancillary issue in *Golden State Bottling Co. v. NLRB*, the Supreme Court tacitly approved the NLRB's method of deducting the net profits of the self-employed's business.⁶²

2. Title VII

In *Albermarle Paper Co. v. Moody*,⁶³ the Supreme Court explained that Congress, in drafting Title VII's backpay provision, borrowed heavily from the

55. Ed Aro & Peter Walsh, *An Overview of the Mitigation of Economic Damages*, COLO. LAW., Oct. 2000, at 23, 24 ("[S]tarting a business in one's own field of expertise without making a serious effort to find employment can be reasonable mitigation . . ."); see also *Heinrich Motors, Inc.*, 403 F.2d at 147 (mechanic operating used-car business); *Cashman Auto Co.*, 223 F.2d at 836 (mechanics engaged in auto-repair business); *Efco Mfg. Inc.*, 111 N.L.R.B. 1032, 1034-35 (1955) (qualified shell fisherman conducting his own shell-fishing operation).

56. See *Heinrich Motors, Inc.*, 403 F.2d at 148 (explaining rule of reducing backpay for willful loss of earnings); *Mastro Plastics Corp.*, 354 F.2d at 179 (stating reducing backpay acceptable only if "discriminatee willfully forewent greater earnings").

57. See *NLRB v. Armstrong Tire & Rubber Co.*, 263 F.2d 680, 684 n.4 (5th Cir. 1959).

58. See *id.* at 683-84 (modifying NLRB order by removing from backpay period time spent working at ice-house).

59. See *id.* at 685 (Rives, J., dissenting) (rejecting majority's application of willful-loss-of-earnings doctrine).

60. See *supra* Part II.A.2 (describing calculation methods under common law).

61. *Armstrong Tire & Rubber Co.*, 119 N.L.R.B. 353, 356 (1957); see also *Heinrich Motors, Inc. v. NLRB*, 403 F.2d 145, 148 (2d Cir. 1968) (explaining general rule of subtracting net earnings from gross backpay); NLRB, CASEHANDLING MANUAL, *supra* note 52, § 10552.3.

62. See 414 U.S. 168, 188 (1973). "The Board treats net profits of the employee who goes into business on his own as interim earnings for the purpose of computing net backpay." *Id.*

63. 422 U.S. 405 (1975).

language of the NLRA.⁶⁴ Unlike the NLRA, however, Title VII contains an express provision that mandates that the court deduct “[i]nterim earnings or amounts earnable with reasonable diligence” from the gross backpay award.⁶⁵ Congress provided neither reasoning nor analysis of the proper application of this mitigation principle; it simply followed the case law from prior decisions under the NLRA.⁶⁶ Congress also refused to offer guidance on what constitutes reasonable interim employment or on what calculation method courts should use.⁶⁷ In the absence of congressional guidance, courts have adopted the following framework: the discharged employee must act with reasonableness while seeking or refusing other employment.⁶⁸

As in cases decided under the NLRA, so long as the former employee undertakes self-employment with a bona fide, good-faith effort, the court will likely hold that such efforts were reasonable.⁶⁹ But this does not always hold true, as demonstrated by a case in which a discharged teacher worked at the family grocery store without pay while refusing to search for other teaching jobs.⁷⁰

When determining mitigation amounts under Title VII, courts generally deduct the net profits of the self-employment, as opposed to the reasonable value of services to the self-employed’s business.⁷¹ In the absence of actual interim-period earnings, courts determine the salary the claimant reasonably

64. See *id.* at 419 & n.11 (looking to legislative history of Title VII to show similarities to NLRA).

65. 42 U.S.C. § 2000e-5(g)(1) (2006); see also John H. Mason & Christopher L. Ekman, *Defending Against Damages Claims in Discrimination Cases*, 13 LAB. LAW. 471, 491 (describing Title VII placing duty on plaintiffs to mitigate damages); Kende, *supra* note 3, at 47 (discussing Title VII’s mitigation requirement as extension of common-law doctrine).

66. See Eglit, *supra* note 21, at 27-30 (explaining persistence of mitigation clause throughout Title VII’s legislative history).

67. See *id.* at 24-25 (explaining discretion given to trial judge regarding backpay).

68. See *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-32 (1982) (describing mitigation principle of Title VII); *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 695-96 (2d Cir. 1998) (describing reasonableness of mitigation of damages); *Hill v. City of Pontotoc*, 993 F.2d 422, 427 (5th Cir. 1993) (analyzing reasonableness of conduct and asserting self-employment may be reasonable mitigation); *Nord v. U.S. Steel Corp.*, 758 F.2d 1462, 1470 (11th Cir. 1985) (reinforcing Title VII claimant must use reasonable diligence to find similar employment).

69. See *Hawkins*, 163 F.3d at 696 (holding self-employment as lawyer reasonable method to mitigate); *Nord*, 758 F.2d at 1471 (explaining assisting husband in opening psychology practice constitutes reasonable self-employment).

70. See *Johnson v. Chapel Hill Indep. Sch. Dist.*, 853 F.2d 375, 383 (5th Cir. 1988) (holding taking unpaid position at family grocery store unreasonable for former teacher); Mason & Ekman, *supra* note 65, at 491-92 (discussing applicability of mitigation rule when taking substantially reduced pay during self-employment). But see *Nord*, 758 F.2d at 1472 (holding performing unpaid work does not necessarily mitigate against backpay award). “A district court is not required to calculate and deduct the value of services the claimant performed without compensation.” *Id.*

71. See *Hill*, 993 F.2d at 427 (deducting amount claimant made from self-employment during interim period); *Nord*, 758 F.2d at 1472 (deducting money earned from backpay, but not value of unpaid services to business).

could have attained, and then deduct that amount from the backpay award.⁷² This formula, however, applies only when the former employee gains typical monetary interests in the new business, such as a salary.⁷³ But, when an entrepreneur foregoes monetary remuneration to build equity in the business, the mitigating value should approximate the reasonable value of services provided to the business.⁷⁴ Seemingly, under the influx of exotic remuneration policies embraced by some entrepreneurs, courts began to use the reasonable-value-of-services method when earnings were not easily discernable.⁷⁵

3. Age Discrimination in Employment Act

Although passed in the wake of Title VII, the ADEA inexplicably contains no mitigation clause.⁷⁶ Although the reasons for this congressional omission are unknown, one scholar theorized that Congress intentionally omitted the provision in the hopes of eliminating the mitigation doctrine altogether under the ADEA.⁷⁷ The prohibitory language of the ADEA, however, closely resembles that of Title VII, which has caused courts to read the mitigation doctrine into the ADEA.⁷⁸ Mitigation under the ADEA does not require success, but it too requires “an honest, good faith effort.”⁷⁹ Likewise, self-employment may constitute reasonable mitigation of damages.⁸⁰ In response to a party’s claim that self-employment should not be included as reasonable mitigation, one court cleverly opined: “The notion that starting one’s own business cannot constitute comparable employment for mitigation purposes not

72. See *Johnson*, 853 F.2d at 383 (remanding for deduction of net amount claimant reasonably could have earned as teacher).

73. See *Gonzalez*, *supra* note 8, at 778 (describing method of calculation for equity interests).

74. See *McCluney v. Jos. Schlitz Brewing Co.*, 540 F. Supp. 1100, 1104 (E.D. Wis. 1982) (valuing in-kind remuneration as amount after deduction of reasonable value of services); *Scott v. Océ Indus., Inc.*, 536 F. Supp. 141, 148-49 (N.D. Ill. 1982) (calculating mitigating damages as reasonable value of services). “Under the facts here that reasonable value must by definition be identical to the reasonable value of her services that Scott is entitled to receive as damages. Accordingly no damages are recoverable for the period after she committed herself to NuTheme rather than the general employment market.” *Scott*, 536 F. Supp. at 149.

75. See *Gonzalez*, *supra* note 8, at 778-79 (describing formula to value claimant’s services); see also *supra* note 74 (describing use of reasonable value of services under exotic business entities).

76. See 29 U.S.C. §§ 621-634 (2006); Eglit, *supra* note 21, at 30 (describing history of ADEA’s passage).

77. See Eglit, *supra* note 21, at 32. According to Professor Eglit, Congress may have believed that imposing a mitigation requirement would be futile because victims of age discrimination are less likely to find comparable work than their younger colleagues. See *id.*

78. See *id.* 30-31 (noting similarity of language and describing infusion of mitigation of ADEA cases); see also *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979) (noting parallels between Title VII and ADEA).

79. *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1065 (8th Cir. 1988) (holding plaintiff opening own trucking business acted reasonably even though business failed); see also *Gonzalez*, *supra* note 8, at 776 (discussing use of self-employment as reasonable method of mitigation).

80. See *Smith v. Great Am. Rests., Inc.*, 969 F.2d 430, 438 (7th Cir. 1992) (describing mechanics of using self-employment as mitigation tool). “Self-employment can constitute employment for purposes of mitigating damages, as long as the self-employment was a reasonable alternative to finding other comparable employment.” *Id.*

only lacks support in the cases, but has a distinctly un-American ring.”⁸¹

Some courts began to add a requirement that the self-employment be “a reasonable alternative to finding other comparable employment.”⁸² For instance, in *Smith*, the Seventh Circuit held that a former restaurant manager opening her own restaurant constituted reasonable mitigation, even though the restaurant remained unprofitable for over two years.⁸³ But in *Hansard*, the Fifth Circuit held that unsuccessfully operating a weekend flea-market booth was not reasonable mitigation because the discharged employee could have continued searching for work during the week.⁸⁴ Thus, it seems that the case law agrees that unsuccessful self-employment may constitute mitigation as long as it is both a reasonable alternative to other employment and is undertaken as part of an honest, good-faith effort.⁸⁵

Like the courts in NLRA and Title VII suits, courts in ADEA actions struggle to compute the interim earnings that represent the mitigating value.⁸⁶ In the dicta of *Carden v. Westinghouse Electric Corp.*,⁸⁷ the court created a series of questions that should be answered to properly assess the mitigating value of self-employment:

[H]as the plaintiff drawn a salary which has reduced, if not eliminated the year-end profit? Have personal expenses, normally paid by a wage earner from a salary, been absorbed by the business, e.g., personal car expenses, insurance, vacations and other personal expenses? Have dividends been paid? Have profits been earned? Have particular expenses been appropriately offset against revenues? Have profits been reinvested in capital assets and have reserves been established? If so, how should they be treated in a mitigation context[?] Has the plaintiff benefited by an increase in value of the business?⁸⁸

Subsequent courts have looked to, and relied on, these questions when calculating the mitigating value of self-employment.⁸⁹

81. *Id.*

82. *Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1005 (3d Cir. 1988) (asserting test for determining reasonableness of self-employment).

83. *Smith*, 969 F.2d at 438-39.

84. *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1468 (5th Cir. 1989); *see also infra* note 106 (discussing collateral-source rule).

85. *See Gonzalez, supra* note 8, at 777-78 (describing general rule of mitigation, using ADEA cases as basis); *Zuchlewski, supra* note 8 (“[S]o long as starting one’s own business is a reasonable effort and undertaken in good faith, it will generally be considered permissible mitigation.”).

86. *See Gonzalez, supra* note 8, at 778-79 (describing computational problems in self-employment cases); *see also Carden*, 850 F.2d at 1005-06 (explaining difficulties arising in self-employment context).

87. 850 F.2d 996 (3d Cir. 1988).

88. *Id.* at 1006.

89. *See, e.g., Thomas v. Deloitte Consulting LP*, No. 3-02-CV-0343-M, 2004 WL 1372954, at *3-4 (N.D. Tex. June 14, 2004); *Stuart v. Normandy Osteopathic Med. Ctr. of St. Louis, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 1552, 1554 (E.D. Mo. 1990); *Raya & Haig Hair Salon v. Pa. Human Relations Comm’n*, 915 A.2d 728,

Ultimately, the *Carden* questions attempt to bring a realistic approach to the complicated problem of calculating the mitigating value in self-employment cases.⁹⁰ Unlike many of the earlier cases in which discharged laborers performed odd jobs with their skills and tools, today's claimants often incorporate sophisticated business ventures, which necessitates a finding of what belongs to the business and what belongs to the individual.⁹¹ Nevertheless, the damages formula has remained relatively unchanged in recent decades: courts generally deduct the net profits of the business, except when complex business ventures obviate the use of reasonable value of services.⁹²

C. State Law

Another recent development in employment-discrimination law has been the reappearance of cases decided under state antidiscrimination statutes.⁹³ Although these cases often begin in tribunals, the disappointed party may appeal to the state's court system, which provides more case law to examine and analyze.⁹⁴ In general, the state courts and tribunals follow federal courts both in determining reasonableness and computing the mitigating value.⁹⁵

With regard to reasonableness of choosing self-employment as a mitigation tool, state courts, following the federal lead, generally conclude that self-employment, if undertaken with an honest, good-faith effort, can constitute

736 (Pa. Commw. Ct. 2007).

90. See *Carden*, 850 F.2d at 1005-06 (reciting complications arising in calculating self-employment damages).

91. Compare *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955) (mechanics engaged in auto-repair business), and *Efco Mfg. Inc.*, 111 N.L.R.B. 1032, 1034-35 (1955) (qualified shell fisherman conducted own shell-fishing operation), with *Smith v. Great Am. Rests., Inc.*, 969 F.2d 430, 439 (7th Cir. 1992) (instructing trial court, on remand, to deduct net profits of Smith's business as mitigation), and *Fini v. Remington Arms Co.*, No. Civ.A. 97-12-SLR, 1999 WL 825604, at *5-6 (D. Del. Sept. 24, 1999) (deducting income earned from own consulting company after termination). But see *Teichgraeber v. Mem'l Union Corp. of Emporia State Univ.*, 932 F. Supp. 1263, 1266-67 (D. Kans. 1996). The court in *Teichgraeber* ordered more discovery because, by employing the plaintiff, the restaurant did not have to pay another employee. See *id.* Thus, the business profited to a greater extent than the stipend it paid to her. See *id.*

92. See *Gonzalez*, *supra* note 8, at 778-79 (discussing complications arising out of calculating backpay).

93. See, e.g., MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2004 & Supp. 2011). For a list of state antidiscrimination laws across the United States, see 5 EMPLOYMENT COORDINATOR, *Employment Practices* §§ 4:18 to :68 (2010).

94. See *Raya & Haig Hair Salon v. Pa. Human Relations Comm'n*, 915 A.2d 728, 737 (Pa. Commw. Ct. 2007) (remanding to determine proper mitigation amount); *Havill v. Woodstock Soapstone Co.*, 865 A.2d 335, 347 (Vt. 2004) (deciding reasonableness of self-employment in state age-discrimination case); *Grievance of Merrill*, 596 A.2d 345, 349 (Vt. 1991) (deciding amount to deduct from self-employment following wrongful termination); *Lewis v. Bos. Pub. Health Comm'n*, 25 Mass. Discrimination L. Rep. (Landlaw) 353, 359 (Comm'n Against Discrimination Oct. 16, 2003) (holding self-employment as reasonable mitigation).

95. See *Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry*, 232 P.3d 277, 284 (Colo. App. 2010) (holding trial court must subtract "aggregate economic gain" of self-employed interim earnings); *Hollingsworth v. Time Warner Cable*, 861 N.E.2d 580, 598 (Ohio Ct. App. 2006) (holding self-employment may constitute reasonable mitigation of damages).

reasonable mitigation of damages.⁹⁶ Also, the burden to prove the unreasonableness of self-employment falls on the employer, who must show both availability of other jobs and failure of the claimant to exercise reasonable diligence in seeking those opportunities.⁹⁷

State courts, however, often struggle to determine the best method to use in calculating interim earnings.⁹⁸ Generally, courts distinguish between profits made from labor and services in the business and profits derived from passive capital investment.⁹⁹ Nevertheless, most state courts choose to subtract the net profits of the business—rather than reasonable value of services to the new business—from the gross backpay.¹⁰⁰

D. Current Developments in the Law of Mitigation by Self-Employment

1. Determining Reasonableness

The first question in any case involving mitigation of damages following wrongful termination is whether the former employee's action constitutes a reasonable attempt to mitigate damages.¹⁰¹ The defendant has the burden of proving that the claimant did not make a reasonable attempt to find comparable employment or, in the alternative, acted unreasonably in pursuing self-employment.¹⁰² Easy cases, where courts uphold reasonableness, often involve

96. See *Bonidy*, 232 P.3d at 284 (holding decision to become self-employed does not indicate lack of reasonableness); *Raya & Haig Hair Salon*, 915 A.2d at 735 (citing *Carden* in holding self-employment may constitute reasonable mitigation).

97. See *Raya & Haig Hair Salon*, 915 A.2d at 735 (placing burden on employer to prove unreasonableness); *Havill*, 865 A.2d at 346 (explaining burden employer must satisfy to show unreasonableness).

98. See *Raya & Haig Hair Salon*, 915 A.2d at 736 (quoting *Carden* questions because of difficulty in determining valuation of self-employment mitigation).

99. See *Ferry v. Rosewood Constr. Corp.*, No. 09–P–114, 2010 WL 86334, at *1 (Mass. App. Ct. Jan. 12, 2010) (determining fixing-up house and selling at profit investment activity, not labor-intensive self-employment).

100. See *Raya & Haig Hair Salon v. Pa. Human Relations Comm'n*, 915 A.2d 728, 736-37 (Pa. Commw. Ct. 2007) (instructing Commission to deduct net profits of self-employed business as mitigating value); *Havill v. Woodstock Soapstone Co.*, 865 A.2d 335, 347 (Vt. 2004) (instructing trial court to deduct net earnings from self-employment). Colorado chooses to deduct “the amount the employee could have expected to earn absent the wrongful termination, reduced by either (a) the employee’s actual earnings in an effort to mitigate damages or (b) the amount the employee failed to earn by not properly mitigating his or her damages.” *Bonidy*, 232 P.3d at 283.

101. See *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-32 (1982) (requiring Title VII claimant to “use reasonable diligence in finding other suitable employment”); *Smith v. Great Am. Rests., Inc.*, 969 F.2d 430, 438 (7th Cir. 1992) (holding self-employment may constitute reasonable mitigation); *Kende*, *supra* note 3, at 47-48 (discussing mitigation duty of wrongfully discharged employee).

102. See *LINDEMANN & GROSSMAN*, *supra* note 2, at 2779-80 (stating burden on defendant for failure-to-mitigate defense); *Gonzalez*, *supra* note 8, at 776 (discussing when courts generally hold self-employment as reasonable form of mitigation); *Mason & Ekman*, *supra* note 65, at 491 (describing defendant’s burden of proving lack of mitigation by plaintiff); *Zuchlewski*, *supra* note 8 (discussing mitigation duty thrust upon defendant).

facts where former employees start businesses using the same skills required at their former jobs.¹⁰³ More difficult cases, where reasonableness is less obvious, arise when the discharged employees pursue businesses that deviate from the skills required and learned from their former place of employment, or when they approach self-employment with a lackadaisical attitude.¹⁰⁴

In determining the reasonableness of undertaking self-employment, courts typically undergo a factually intensive search for whether the discharged employee pursued self-employment with the vigor of a full-time job.¹⁰⁵ Reasonableness is, perhaps, most suspect if the discharged employee operates only a part-time endeavor, which is more akin to collateral-source jobs than replacement employment.¹⁰⁶ Furthermore, former employers often claim that the former employee's decision to start his own business is analogous to the claimant attending school full-time in the interim period, which cuts off the

103. See, e.g., *Smith*, 969 F.2d at 438 (restaurant manager opening restaurant); *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1065 (8th Cir. 1988) (trucker starting trucking business); *Raya & Haig Hair Salon*, 915 A.2d at 735 (hairstylist opening own salon); see also *Aro & Walsh*, *supra* note 55, at 24 (describing likelihood of court upholding self-employment as reasonable mitigation when using similar skills).

104. See *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1468 (5th Cir. 1989) (holding former vending machine servicer unreasonably attempted flea-market business); *NLRB v. Armstrong Tire & Rubber Co.*, 263 F.2d 680, 684 (5th Cir. 1959) (holding working for wife's ice-house business not reasonable); *Williams v. Imperial Eastman Acquisition Corp.*, 994 F. Supp. 926, 932 (N.D. Ill. 1998) (holding experienced quality-assurance inspector running family cattle ranch unreasonable); *Aro & Walsh*, *supra* note 55, at 24 (describing when courts hold self-employment as unreasonable attempt to mitigate). Because the skills necessary for cattle ranching deviate substantially from quality assurance, the court in *Williams* refused to consider ranching a reasonable alternative to finding other employment, and thus refused to allow backpay. See 994 F. Supp. at 932. The dissent in *Armstrong Tire* argued that the majority unjustifiably claimed that working at the ice-house business was unreasonable because it placed too much emphasis on the fact that the business was in his wife's name. See 263 F.2d at 685 (Rives, J., dissenting). The dissent further argued that the claimant met the honest, good-faith requirements because, in addition to providing capital to purchase the lot and construct the building, "he worked feverishly . . . to make it a successful operation." *Id.*

105. See *Smith*, 969 F.2d at 438 (discussing amount of time claimant devoted to restaurant at least equal to other full-time jobs); *Armstrong Tire*, 263 F.2d at 685 (Rives, J., dissenting). "[C]ourts often focus not so much on the profitability or success of that business, but on whether the pursuit of that business was objectively reasonable and whether the entrepreneur put sufficient time and capital into the business." *Aro & Walsh*, *supra* note 55, at 24.

106. See *Hansard*, 865 F.2d at 1468 (characterizing flea-market business as part-time enterprise). "In this case *Hansard's* efforts were simply insufficient. The flea-market business was never more than a part-time enterprise. *Hansard* was fully capable of continuing his job search during the week." *Id.* The collateral-source rule, also known as the moonlighting rule, applies to money earned from a source outside of a person's regular employment. See 5 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 92.08 (2d ed. 2010). Earnings from a collateral source generally are not deductible as a mitigating value because they theoretically could have been earned while still employed with the former employer. See LINDEMANN & GROSSMAN, *supra* note 2, at 2826; Gonzalez, *supra* note 8, at 786. This rule has a profound effect on self-employment cases, especially ones in which the claimant operated the mitigating business before the wrongful termination. See, e.g., *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104, 1111-12 (8th Cir. 1994) (holding money earned moonlighting in interim period not deductible as mitigating value); *Hansard*, 865 F.2d at 1468 (holding flea market collateral to job search, and thus not proper mitigation); *Stuart v. Normandy Osteopathic Med. Ctr. of St. Louis, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 1552, 1554 (E.D. Mo. 1990) (valuing business as difference between earnings with claimant managing and earnings when claimant worked as employee).

backpay period because the claimant removes himself from the labor market.¹⁰⁷ *Carden* rejected this argument because, while a person attending school foregoes present earnings for increased future earnings, the self-employed individual, while hoping for future potential earnings, also strives for present earnings.¹⁰⁸

Entrepreneurial experience and a business plan are not necessities, but often tend to increase the likelihood that the court will deem self-employment a reasonable pursuit of mitigation.¹⁰⁹ Once a self-employed individual realizes that the new business is failing, a duty may arise to cease operations and resume a search for gainful employment.¹¹⁰ The self-employed has time, however, to determine whether the business, which is losing money at the time, might be profitable in the long run.¹¹¹ Absent a complete lack of effort by the discharged employee, courts typically hold that self-employment, if undertaken in good faith, is a reasonable means of mitigating damages.¹¹² A reasonable,

107. See LINDEMANN & GROSSMAN, *supra* note 2, at 2784 (discussing general rule of full-time enrollment in school terminating backpay period); Gonzalez, *supra* note 8, at 773-74 (claiming attending school generally removes claimant from labor market and thus terminates backpay period); Kende, *supra* note 3, at 48 n.43 (discussing division among courts in deciding education as mitigation); Mason & Ekman, *supra* note 65, at 493-95 (describing general rule of unavailability when plaintiff attends school during interim period).

108. See *Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1005 (3d Cir. 1988).

109. See *Air Line Pilots Ass'n v. Trans States Airlines, LLC*, 692 F. Supp. 2d 1105, 1110, 1113 (E.D. Mo. 2010) (upholding self-employment as reasonable mitigation despite lack of entrepreneurial experience); *Raya & Haig Hair Salon v. Pa. Human Relations Comm'n*, 915 A.2d 728, 735 (Pa. Commw. Ct. 2007) (upholding mitigation as reasonable even though self-employed had no business plan). *But see* *Coleman v. Lane*, 949 F. Supp. 604, 612 (N.D. Ill. 1996) (holding that choosing self-employment unreasonable with no entrepreneurial experience). *Coleman* may be an aberration, however, because the claimant in that case made no "serious attempts to form or market his own business." *Id.* Because business plans often prime the pump for marketing, sales leads, and external financing, writing a business plan increases the odds that the new business will survive. SHANE, *supra* note 11, at 74.

110. See *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1468 (5th Cir. 1989) (stating once business fails, duty to mitigate requires resumption of job search); *Boyd v. SCM Allied Paper Co.*, 42 Fair Empl. Prac. Cas. (BNA) 1643, 1655 (N.D. Ind. 1986) (opining duty to mitigate resumes when self-employment fails).

111. See *EEOC v. Joe's Stone Crab, Inc.*, 15 F. Supp. 2d 1364, 1379 (S.D. Fla. 1998). "[U]nprofitability during the initial stages of operation will not, by itself, establish that the enterprise was an unreasonable method of mitigating damages." *Id.*

112. See Gonzalez, *supra* note 8, at 776 (describing general rule that self-employment can constitute reasonable alternative to other employment); Zuchlewski, *supra* note 8 (describing general rule of courts holding mitigation by self-employment as reasonable); see also *Taylor v. Cent. Pa. Drug & Alcohol Servs. Corp.*, 890 F. Supp. 360, 373 (M.D. Pa. 1995) (holding unsuccessful efforts to sustain self-employment reasonable). The *Taylor* court opined:

[S]tarting her own businesses when no offers of employment were forthcoming was a laudable effort and should not be used against her to cut off her right to receive back pay. A ruling to the contrary would serve as a disincentive to Title VII plaintiffs unable to secure employment. Individuals in that position would have no incentive to use whatever talents or income-earning abilities they may have to earn money through self-employment as a stop-gap measure until full-time employment becomes available.

Taylor, 890 F. Supp. at 373.

good-faith effort is not a particularly high standard to meet, but this leniency helps ensure that the discharged employee receives a recovery against the discriminating employer.¹¹³

2. Calculating the Mitigating Value

Once the court establishes reasonableness, it next determines damages—usually in the form of backpay—derived from the unlawful employment discrimination.¹¹⁴ Valuing self-employment hinges on preventing the former employee from obtaining a windfall, or double recovery.¹¹⁵ The make-whole nature of backpay remedies precludes the use of backpay as a punitive tool against the employer, because the purpose of antidiscrimination remedies is to compensate the terminated employee's loss, not to punish the employer.¹¹⁶

Throughout the last century, courts have used two methods of determining interim damages of self-employed individuals: the reasonable value of services to the self-employed's business and the net profits of the self-employed's business.¹¹⁷ Each approach has its strengths and weaknesses, and thus each party to the suit prefers a different calculation method.¹¹⁸

a. Reasonable Value of Services to the Business

The reasonable-value-of-services calculation method attempts to determine the monetary value of the self-employed's efforts by valuing labor and services in the new business.¹¹⁹ Though rarely used today, this was once the preeminent method of calculating the mitigating value.¹²⁰ This method attempts to determine the market value of the services the self-employed

113. See *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1065 (8th Cir. 1988); Eglit, *supra* note 21, at 89 (“Reasonableness tests typically are not rigorous; they encourage the upholding of the policy or practice being challenged.”).

114. See Kende, *supra* note 3, at 46 (describing nearly universal use of backpay to compensate discrimination victims).

115. See *EEOC v. Ilona of Hungary, Inc.*, 97 F.3d 204, 214 (7th Cir. 1996), (denying backpay that would place claimant in “better position” than if discrimination never occurred), *modified*, 108 F.3d 1569 (7th Cir. 1997); *Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1005 (3d Cir. 1988) (answering question of how to value self-employment); *Joe's Stone Crab*, 15 F. Supp. 2d at 1377-78 (explaining make-whole purpose of Title VII remedies); *Blakey v. Cont'l Airlines, Inc.*, No. 93-2194, 1997 WL 1524797, at *14 (D.N.J. Sept. 9, 1997) (stating prevention of double recovery main reason for mitigation-of-damages doctrine); *McCluney v. Jos. Schlitz Brewing Co.*, 540 F. Supp. 1100, 1102 (E.D. Wis. 1982) (claiming Title VII not vehicle for windfall recovery); Kende, *supra* note 3, at 45 (“Congress crafted the remedial provisions of . . . antidiscrimination statutes to make whole the victims of discrimination.”).

116. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (describing goal of backpay awards); *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1469 (5th Cir. 1989) (claiming ADEA remedies make-whole, not punitive); *Mason & Ekman*, *supra* note 65, at 472 (explaining purpose of antidiscrimination remedies to make victim whole).

117. See *supra* Part II.A.2 (describing different methods used to value self-employment as mitigating tool).

118. See *supra* Part II.A.2 (describing method preferences for each party in discrimination suit).

119. See *Gonzalez*, *supra* note 8, at 778-79 (describing valuation of reasonable value of services).

120. See *supra* Part II.A.2 (describing historical significance of reasonable-value-of-services method).

provided his own business, and then deducts that amount as the interim earnings.¹²¹

Today, the reasonable-value-of-services method is primarily used only when the facts of a particular case make it nearly impossible to determine the net profits of the business.¹²² This method, however, has the advantage of ensuring a deduction of interim earnings from the backpay total, and thus, the discriminating employer generally prefers this method because it lowers the final backpay recovery.¹²³

b. Net Profits of the Self-Employed's Business as the Mitigating Value

Alternatively, the net-profits-of-the-business method treats the net profits of the self-employed's business as the mitigating amount.¹²⁴ Unsurprisingly, this method tends to increase the gross backpay because most new businesses fail or lose money in initial months or years.¹²⁵ This method makes the most sense if the claimant mitigates by performing odd jobs as a sole proprietor, because the claimant's gross profit likely approximates his net profit due to low overhead costs.¹²⁶ But the simplicity of this calculation method disintegrates if the former employee chooses to incorporate the new business, because the claimant might reinvest an excessive amount of the profits in the business in order to maximize the backpay award.¹²⁷

121. See Gonzalez, *supra* note 8, at 778 (describing interim amount of reasonable value of services); see also *Armstrong v. Index Journal Co.*, 647 F.2d 441, 449 (4th Cir. 1981) (deducting reasonable value of services from back-pay award); *Blomstrom v. Bethlehem Steel Corp.*, 47 Fair Empl. Prac. Cas. (BNA) 1261, 1264 (E.D. Pa. 1987) (deducting actual earnings and reasonable value of services for which no specific salary obtained); *McCluney v. Jos. Schlitz Brewing Co.*, 540 F. Supp. 1100, 1103 (E.D. Wis. 1982) (valuing and deducting as interim earnings in-kind remuneration); *Scott v. Océ Indus., Inc.*, 536 F. Supp. 141, 148-49 (N.D. Ill. 1982) (deducting reasonable value of nonsalary compensation).

122. See *Armstrong*, 647 F.2d at 449 (deducting reasonable value of services of work for which plaintiff received no salary); *Blomstrom*, 47 Fair Empl. Prac. Cas. (BNA) at 1264 (deducting reasonable value of services); *McCluney*, 540 F. Supp. at 1103-04 (choosing to value in-kind services when claimant paid in land-ownership interests); *Scott*, 536 F. Supp. at 148-49 (choosing reasonable-value-of-services test where plaintiff paid in equity interest in business); Gonzalez, *supra* note 8, at 778 (discussing application of reasonable-services-to-business method of calculation).

123. See Eglit, *supra* note 21, at 21 (describing positive outcomes for employers due to mitigation rule); *supra* Part II.A.2 (discussing defendants' preference for use of this method).

124. See *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 188 (1973) (describing use of net earnings by NLRB); *Smith v. Great Am. Rests., Inc.*, 969 F.2d 430, 439 (7th Cir. 1992) (remanding to deduct actual earnings of restaurant from damage award); *Grievance of Merrill*, 596 A.2d 345, 349 (Vt. 1991) (claiming deduction of net profits from self-employment as backpay). "The [NLRB] treats net profits of the employee who goes into business on his own as interim earnings for the purpose of computing net backpay." *Golden State Bottling Co.*, 414 U.S. at 188.

125. Cf. SHANE, *supra* note 11, at 112; see also *supra* notes 9-11 and accompanying text (citing survival rates for new businesses).

126. See *Arduini Mfg. Corp.*, 162 N.L.R.B. 972, 980 (1967) (deducting, as mitigating value, work obtained helping neighbor build house); *Brown & Root, Inc.*, 132 N.L.R.B. 486, 526-27 (1961) (deducting income earned from odd jobs).

127. See *Stuart v. Normandy Osteopathic Med. Ctr. of St. Louis, Inc.*, 52 Fair Empl. Prac. Cas. (BNA)

To combat some of these problems, *Carden* introduced a thorough, though nonexhaustive, series of questions in an attempt to determine the “aggregate economic gain” to the self-employed’s business.¹²⁸ The aggregate economic gain often includes more than just salary and benefits paid to the self-employed.¹²⁹ It is an attempt to find the increased value infused into the business through the claimant’s skills and labor, not just capital.¹³⁰ If the owner pours skills and labor into the business, it will likely create value in the business beyond the mere salary paid back to the owner.¹³¹ Theoretically, this method considers such gains when determining the mitigating value.¹³²

III. ANALYSIS

This section of the Note will explore challenging areas of the law with which courts have struggled and will suggest solutions that might alleviate some of the inherent unfairness of mitigation by self-employment.

A. The Costs of Starting a Business Have Declined Because of the Internet

Without question, the internet has reshaped our global culture in the last two decades, and perhaps nothing better demonstrates this than the dramatic rise—and fall—of internet businesses.¹³³ In addition to large internet corporations, the internet allows entrepreneurs to create flourishing small businesses with minimal start-up capital.¹³⁴ Because of the minimal costs, the economic risks commonly associated with starting a business dissipate to a certain extent.¹³⁵

1552, 1554 (E.D. Mo. 1990) (ruling on defendant’s concern of plaintiff hiding profits in corporate form); Gonzalez, *supra* note 8, at 778 (claiming difficulty stems from reinvestment of profits into business). *But see* Price v. Davis, 173 S.W. 64, 68 (Mo. Ct. App. 1915) (deciding net profits of business belong to corporation, not to shareholder or officer).

128. *Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1005-06 (3d Cir. 1988) (issuing questions trial court should reconsider on remand); *see supra* text accompanying note 88 (providing questions formulated by *Carden*).

129. *See Stuart*, 52 Fair Empl. Prac. Cas. (BNA) at 1555 (remanding to determine what gain business received from self-employed’s employment).

130. *See id.* (citing economic gain for business with owner working there); *Teichgraeber v. Mem’l Union Corp. of Emporia State Univ.*, 932 F. Supp. 1263, 1266-67 (D. Kan. 1996) (allowing discovery into benefit of self-employment to claimant’s restaurant); Aro & Walsh, *supra* note 55, at 24 (“[C]ourts often focus . . . on whether . . . the entrepreneur put sufficient time and capital into the business.”).

131. *See Carden*, 850 F.2d at 1006 (discussing questions asked to determine aggregate economic gain); *supra* text accompanying note 88 (listing *Carden* questions).

132. *See Teichgraeber*, 932 F. Supp. at 1266-67 (reopening discovery to determine aggregate gain to restaurant with claimant working there full-time); *Stuart*, 52 Fair Empl. Prac. Cas. (BNA) at 1554 (claiming mitigating value should reflect gain of increased hours worked by claimant).

133. *See* PEGGY A. LAMBING & CHARLES R. KUEHL, *ENTREPRENEURSHIP* 85 (4th ed. 2007) (attributing rise in home-based businesses partially to increasing internet use).

134. *See id.* (“The success of e-commerce is the success of millions of invisible pioneers in garages and spare bedrooms.”).

135. Henry H. Peritt, Jr., *Economic and Other Barriers to Electronic Commerce*, 21 U. PA. J. INT’L ECON. L. 563, 566-67 (2000) (“Lower economic barriers to entry draw more small entities into electronic markets

And with minimized risk, there is less incentive for the self-employed to maximize the effort put into the new venture.¹³⁶

Regardless of the risk, almost half of new businesses fail within the first five years of operation.¹³⁷ Many new businesses fail because the owners do not take critical steps that, according to research, help the business last longer—steps such as writing a business plan, marketing the business, and closely monitoring the business's finances.¹³⁸ Moreover, creating a new business typically takes a person about one full year.¹³⁹ And while most new businesses fail organically—that is, without affecting other external businesses—those businesses started by claimants tend to have an extraordinary impact on the entrepreneur's former employer, who may be on the hook for a backpay award.¹⁴⁰

B. Preventing Employers from Insuring Their Former Employees' Self-Employment

Determining aggregate economic gain involves a complicated computation, but an unresolved issue remains: When the claimant starts a new business, will there even be an economic gain to create the offsetting mitigating value?¹⁴¹ Because of the low survival rate of new businesses, the new venture likely will not have profits at all.¹⁴² And if profits do exist, they are likely razor thin.¹⁴³ Thus, courts must consider whether the claimant is using the discrimination lawsuit as a way to insure against self-employment losses.¹⁴⁴

Starting a business takes great entrepreneurial courage because of the risk involved.¹⁴⁵ With pending backpay awards, however, claimants in jurisdictions that deduct net profits of the business as the mitigating value have the opportunity to start a business with none of the risks commonly associated with such an endeavor.¹⁴⁶ If the new business fails or loses money, the claimant still

because the minimum economic scale of doing business is less.”); Quittner, *supra* note 18 (discussing low cost of starting internet business).

136. See Don Silver, *Why Are So Many Internet Start-Ups Failing Today?*, VIRTUAL BUS. LIFESTYLE, <http://www.virtualbusinesslifestyle.com/2010/10/internet-business-failures> (last visited Mar. 1, 2012) (arguing many internet businesses fail because of lackadaisical approach by owners).

137. See SHANE, *supra* note 11, at 98 (discussing failure rates for new businesses).

138. See *id.* at 118-19. In fact, most entrepreneurs never write business plans, even though studies have shown that companies with business plans are more likely to survive. *Id.* at 117-18.

139. *Id.* at 72-73.

140. See *infra* Part III.B (discussing solutions to inherent problem in self-employment-mitigation analysis).

141. See SHANE, *supra* note 11, at 98; *supra* notes 9-11, 137-140 and accompanying text; see also Gonzalez, *supra* note 8, at 778 (describing problems associated with self-employment as mitigation).

142. Cf. SHANE, *supra* note 11, at 112.

143. *Id.*

144. See *Smith v. Great Am. Rests., Inc.*, 969 F.2d 430, 439 (7th Cir. 1992) (“The ADEA must not be used as a tool for insuring a plaintiff’s fledgling business while it continues to sustain losses.”).

145. See SHANE, *supra* note 11, at 98; *supra* notes 9-11, 137-140 and accompanying text.

146. See *McCluney v. Jos. Schlitz Brewing Co.*, 540 F. Supp. 1100, 1103-04 (E.D. Wis. 1982)

receives the discrimination award based on his past salary, but with no offsetting mitigating value because of the lack of profits in the new business.¹⁴⁷ Thus, a claimant awaiting backpay remedies has the opportunity to grow a business while knowing that, if it fails, he can still receive money as if he had worked his old job during that tenure.¹⁴⁸ The nature of this insurance relationship constitutes a windfall, because if an ordinary entrepreneur fails, he loses both money and time invested in the new business and the lost opportunity of working for another.¹⁴⁹

The contrarian position might suggest that the employer should bear such costs because it caused the discharge of the employee through its discriminatory practices.¹⁵⁰ Although the former employer did discriminate, the make-whole nature of backpay remedies should preclude undertaking of

(disapproving of claimant's theory of placing all risk on former employer); Zuchlewski, *supra* note 8 (discussing concern among claimants who start own business). "Terminated individuals in today's economy who challenge their dismissal and are faced with the duty to mitigate need not be concerned about jeopardizing a possible back-pay award if they go into business for themselves as long as the effort is a realistic and well-intentioned one." Zuchlewski, *supra* note 8.

147. See *McCluney*, 540 F. Supp. at 1103-04.

Mr. McCluney argues that his approach places the risk with Schlitz, since if the ventures go bad, the award of back pay is not reduced; if the ventures are successful, the award is smaller. . . . Recently, the ventures have apparently turned sour, but to place all that depreciation value in Schlitz' lap is inconsistent with the principle of making Mr. McCluney whole, for it ignores the good years that went before.

. . . .
 . . . The net result of the McCluney approach is to use the back pay award as an insurance policy for the speculative nature of his line of work. I do not believe that is the purpose of [Title VII].

Id.

148. See *Cornell v. T.V. Dev. Corp.*, 260 N.Y.S.2d 865, 870 (App. Div. 1965) (holding employer should not bear all loss while self-employed receives all benefits), *rev'd*, 215 N.E.2d 349 (N.Y. 1966).

149. See *id.*; Eglit, *supra* note 21, at 26 (explaining purpose of antidiscrimination statutes to make claimant whole); Kende, *supra* note 3, at 68-69 (describing employer's right to protection from employees seeking a windfall).

The corporation, which must fend off his competition, should not also be required to stand as his surety against any loss thus voluntarily incurred by him. It is quite inequitable, to say the least, to permit him to take all the possible profits of his competitive venture but to have the corporation bear all this possible losses to the extent of the damages to which he otherwise might have been entitled.

Cornell, 260 N.Y.S.2d at 870.

150. See *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1212 (D.D.C. 1990) (claiming defendant's discrimination not blank check to increase damages award); *Raya & Haig Hair Salon v. Pa. Human Relations Comm'n*, 915 A.2d 728, 733 (Pa. Commw. Ct. 2007) (describing concept of constructive discharge); Eglit, *supra* note 21, at 60 ("[M]itigation . . . serves as a device to protect wrongdoers from paying full economic fare for their wrongdoing."). See generally Kende, *supra* note 3 (discussing application of mitigation doctrine to constructively discharged claimants). "[T]he nature of the wrong committed by a defendant does not grant the harmed plaintiff carte blanche to hold defendant necessarily accountable for all the consequences where discharge is forced. Equity is the creature of experience tempered by common sense." *Hopkins*, 737 F. Supp. at 1212.

risk-free self-employment.¹⁵¹ Upholding the full backpay award while the self-employed's business loses money essentially provides a double recovery to the claimant and thus serves to penalize the employer.¹⁵² Such a system incentivizes the claimant to open a business because he knows that if the business fails, the mitigating value will be zero, thereby preserving the full backpay award.¹⁵³ Thus, the claimant is assured of income equal to his former salary, while potentially benefiting exponentially from the pursuit of risk-free entrepreneurship.¹⁵⁴

Meanwhile, when an employer is held liable in wrongful-termination cases, it usually will depend on a mitigating value through regular employment.¹⁵⁵ But if the claimant's self-employment venture loses money, the employer must then pay claimant's former salary for the whole backpay period—an arrangement that smacks of punitive damages.¹⁵⁶ For better or worse,

151. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419-21 (1975) (describing make-whole nature of discrimination remedy); *McCluney*, 540 F. Supp. at 1103 (noting inconsistency of make-whole remedy by placing self-employment risk on employer); *Cashman Auto Co.*, 109 N.L.R.B. 720, 724-25 (1954) (Rodgers, Member, dissenting) (arguing majority compels employer to essentially underwrite the self-employed's business); Sperino, *supra* note 5, at 706 (describing make-whole nature of antidiscrimination equitable remedies).

Self-employment carries with it a recognized element of risk which in great part is dependent upon the business abilities of the entrepreneur. There is no logical reason why the employer should be required to bear that risk and to underwrite, as it were, the employee's efforts to establish himself in business. . . . A rule that subjects an employer's back-pay liability to factors as capricious and arbitrary as the business abilities of a discharged employee is not my idea of fair administration of the [NLRA].

Cashman Auto Co., 109 N.L.R.B. at 724-25 (Rodgers, Member, dissenting).

152. See *McCluney v. Jos. Schlitz Brewing Co.*, 540 F. Supp. 1100, 1103 (E.D. Wis. 1982) (stating that placing risk on former employer inconsistent with make-whole remedies); *Cashman Auto Co.*, 109 N.L.R.B. at 725 (Rodgers, Member, dissenting) (claiming backpay, when used as insurance against losses, moves from make-whole to punitive). "Damages should ordinarily extend only to the date upon which 'the sting of any discriminatory conduct [has] ended.'" *Smith v. Great Am. Rests., Inc.*, 969 F.2d 430, 439 (7th Cir. 1992) (quoting *Syvoock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 160 n.14 (7th Cir. 1981)).

153. See *Cashman Auto Co.*, 109 N.L.R.B. at 724-25 (Rodgers, Member, dissenting) (describing policy concerns of deducting net earnings in self-employment cases).

154. See *McCluney*, 540 F. Supp. at 1103 (describing benefit to claimant when employer bears risk of loss); see also *Stuart v. Normandy Osteopathic Med. Ctr. of St. Louis, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 1552, 1554 (E.D. Mo. 1990) (fashioning questions to determine what self-employed gained by working in own restaurant). In *Stuart*, the claimant operated a Subway restaurant as a side venture, but increased his hours at the restaurant following termination from his regular job. 52 Fair Empl. Prac. Cas. (BNA) at 1554. The court determined that the aggregate economic gain should be the amount the Subway would have made had Stuart remained in his regular employment, subtracted from the amount it made with his increased time at the Subway. *Id.*

155. See Eglit, *supra* note 21, at 60 (describing mitigation as device to protect wrongdoers from bearing full economic impact); Gonzalez, *supra* note 8, at 778 (describing confusion arising when claimant mitigates by self-employment); see also *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-98 (1941) (describing fairness in deducting mitigating value from backpay).

156. See *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1469 (5th Cir. 1989) (claiming purpose of ADEA to make plaintiff whole, not to impose punitive damages); *Carden v. Westinghouse Elec.*

employment law—evolving from contract law—uses a system in which damages serve to make the victim whole, not to punish the offender.¹⁵⁷

There are few available options to combat this phenomenon of damages. One solution would be to simply calculate all self-employment backpay awards by the reasonable-value-of-services method.¹⁵⁸ Theoretically, such a decision would value the claimant's business by determining what the business gains by having the claimant work there, even if the business shows no actual profits.¹⁵⁹ Because this may be difficult to value, the reasonable-value-of-services method is best reserved for cases in which the net-profits-of-the-business method does not make sense, such as when the claimant gains future equity or other in-kind remuneration in the business.¹⁶⁰

The second option is to heighten the standard of reasonableness when a claimant undertakes self-employment.¹⁶¹ When a claimant fails to mitigate damages, the courts usually do not eliminate a backpay award entirely; rather, they simply deduct what the discharged employee could have reasonably earned in the interim.¹⁶² With a low reasonableness standard, courts typically ensure that claimants receive some semblance of backpay recovery to ease the

Corp., 850 F.2d 996, 1005 (3d Cir. 1988) (requiring deduction if interim earnings in order to prevent windfall); see also 3A LARSON, *supra* note 106, §§ 103.51, 103.53 (describing purpose of ADEA remedies as make-whole); Sperino, *supra* note 5, at 706 (discussing make-whole nature of employment remedies).

157. See *supra* notes 115-116 and accompanying text (describing employment remedies as make-whole in nature, not punitive); see also Albemarle Paper Co. v. Moody, 422 U.S. 405, 419-21 (1975) (describing make-whole nature of discrimination remedy); Carden, 850 F.2d at 1005 (claiming purpose of damages to make whole, not to provide windfall). See generally Eglit, *supra* note 21 (arguing for reevaluation of mitigation principle to better serve justice for aggrieved employees).

158. See *supra* Part II.D.2.a (describing use of reasonable-value-of-services method); see also 39 C.J. *Master and Servant* § 152 (1925) (describing reasonable-value-of-services test); Gonzalez, *supra* note 8, at 778 (describing use of reasonable-value-of-services method).

159. See *supra* Part II.A.; see also Kramer v. Wolf Cigar Stores, 91 S.W. 775, 778 (Tex. 1906) (describing reasonable value of services added to business); 39 C.J. *Master and Servant* § 152 (1925) (discussing use of self-employment as mitigation method).

160. See *supra* Part II.D.2.a (describing uses for reasonable value of services); see also McCluney v. Jos. Schlitz Brewing, Co., 540 F. Supp. 1100, 1102-03 (E.D. Wis. 1982) (choosing reasonable-value-of-services test because self-employed paid in ownership interests); Scott v. Océ Indus., Inc., 536 F. Supp. 141, 148-49 (N.D. Ill. 1982) (applying reasonable-value-of-services test because claimant received both compensation and equity interest); Gonzalez, *supra* note 8, at 778-79 (describing valuation method used in *McCluney*).

161. See *supra* Part II.D.1 (discussing reasonableness standard for mitigating by self-employment); see also Eglit, *supra* note 21, at 89 (“Reasonableness tests typically are not rigorous . . .”).

162. See LINDEMANN & GROSSMAN, *supra* note 2, at 2782 & nn.132-33 (claiming unreasonable mitigation effort cuts off right to backpay during that period); Mason & Ekman, *supra* note 65, at 491-92 (discussing judicial options in absence of mitigation). There is a circuit split regarding the elements that the defendant must prove to establish failure to mitigate. LINDEMANN & GROSSMAN, *supra* note 2, at 2780. Some courts require that the defendant prove both that the claimant did not seek other employment with reasonable diligence and that there was a reasonable chance of finding comparable employment if the claimant exercised reasonable diligence. See *id.* at 2780 n.129. “The Fourth, Fifth, Eighth, and Eleventh Circuits, on the other hand, require the employer to show only that the plaintiff did not make reasonable efforts to obtain other work.” *Id.* at 2780-81; see also *id.* at 2781 n.130.

sting of discrimination.¹⁶³ Heightening the standard would ensure that claimants truly make a good-faith, reasonable decision to enter into self-employment.¹⁶⁴

When evaluating these businesses, it is clear that some undertakings are more reasonable than others. Accordingly, courts and factfinders should view home-based businesses with some suspicion, especially internet-based businesses.¹⁶⁵ With the rise of the internet, the costs of starting a new business have plummeted.¹⁶⁶ But not all internet businesses qualify as businesses for the purpose of mitigation, because many home-based, internet businesses function more like hobbies than actual businesses.¹⁶⁷

That is not to say that home-based, internet businesses are inherently unreasonable.¹⁶⁸ Rather, the line in determining whether the former employee is engaged in a legitimate business venture or more of a hobby is much finer. Take, for example, the range of participants on eBay, the popular internet auction site.¹⁶⁹ Some users operate stores through eBay that generate hundreds of sales a day; such stores are seemingly legitimate businesses.¹⁷⁰ On the other hand, some users occasionally sell personal belongings to generate some extra income.¹⁷¹ These types of “businesses” square more soundly with *Hansard*—in which the court held a flea-market booth to be more hobby than business—

163. See *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 695 (2d Cir. 1998) (holding burden of reasonableness of self-employment “not onerous” and not requiring success). The jury makes the ultimate determination of whether the self-employment constituted a reasonable effort to mitigate damages. See *id.* at 696.

164. Compare *Coleman v. Lane*, 949 F. Supp. 604, 612 (N.D. Ill. 1996) (finding maintenance worker unreasonable in pursuing self-employment without entrepreneurial experience), with *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955) (upholding reasonableness, despite poor judgment in opening repair shop), *Air Line Pilots Ass’n v. Trans States Airlines, LLC*, 692 F. Supp. 2d 1105, 1109-10 (E.D. Mo. 2010) (affirming arbitrator’s decision that self-employment reasonable, despite lack of entrepreneurial experience), and *Raya & Haig Hair Salon v. Pa. Human Relations Comm’n*, 915 A.2d 728, 735 (Pa. Commw. Ct. 2007) (affirming reasonableness of opening own salon, despite lack of business plan or marketing leads); see also *Zuchlewski*, *supra* note 8 (describing standard of reasonableness applied by most courts facing this issue). Although the discriminatees worked part-time and showed poor bookkeeping and managerial skills, the First Circuit upheld their decision as reasonable because mitigation “only requires an honest good faith effort.” *Cashman Auto Co.*, 223 F.2d at 836.

165. Cf. *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1468 (5th Cir. 1989) (holding weekend flea market left plenty of time for job search during week).

166. See *Quittner*, *supra* note 18.

167. See *Hansard*, 865 F.2d at 1468 (holding flea market not business); *Grosvenor Orlando Assocs., Ltd.*, 350 N.L.R.B. 1197, 1202-03 (2007) (finding flower arranging for daughter hobby, not self-employment).

168. See *Havill v. Woodstock Soapstone Co.*, 865 A.2d 335, 347 (Vt. 2004) (holding working for home typing business sufficient mitigation).

169. See *Spors*, *supra* note 18 (discussing challenges of running online retail business through eBay).

170. See *id.*; cf. *Havill*, 865 A.2d at 347 (holding home-based business proper mitigation). The then-CEO of eBay, Meg Whitman, estimated that 430,000 users make substantial income by selling on eBay. *Small Business Is the Real Internet Success Story*, BUS. WIRE (May 6, 2004), <http://www.businesswire.com/news/home/20040506005633/en/Small-Business-Real-Internet-Success-Story-eBays>.

171. See *Spors*, *supra* note 18.

than any of the cases where the court upheld mitigation by self-employment.¹⁷² A bright-line test is impossible; rather, courts should use a balancing test to determine whether a home-based, internet business is reasonable.¹⁷³

The same is not true for traditional, brick-and-mortar businesses.¹⁷⁴ With higher start-up capital required, entrepreneurs generally do not tread lightly.¹⁷⁵ Additionally, these entrepreneurs are more likely to need outside capital to fund their new businesses—capital from investors or a bank loan.¹⁷⁶ The formalistic nature of these transactions ensures that the entrepreneurs are not undertaking self-employment lightly.¹⁷⁷ Furthermore, financiers are unlikely to invest with or loan to entrepreneurs without the entrepreneur having a sufficient business plan, experience, or other recognized small-business practices.¹⁷⁸

Therefore, courts must dig deeper into the facts to determine the reasonableness of mitigating by self-employment.¹⁷⁹ Starting a business does not necessarily signify that the former employee acted reasonably in mitigating damages, so courts should apply a balancing test to determine reasonableness.¹⁸⁰ Although not exhaustive, courts could assess reasonableness by determining whether the claimant had—among other attributes—a business plan, entrepreneurial experience, sales leads, marketing ideas, devotion in the form of long hours, or other accepted small-business skills.¹⁸¹ Similarly, once the business is up and running, the court should ensure that the claimant is adhering to proper business practices, such as accounting, shareholder meetings, paying taxes, and so forth.¹⁸² Such a multifactor test would ensure that claimants do not undertake self-employment lightly and, likewise, that they understand the risks faced by ordinary entrepreneurs.¹⁸³ And though this plan

172. *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1468 (5th Cir. 1989); *see also* *Grosvenor Orlando Assocs., Ltd.*, 305 N.L.R.B. 1197, 1202-03 (2007) (finding flower arranging for daughter not self-employment, but hobby).

173. *Cf. Hansard*, 865 F.2d at 1468 (holding no reasonable jury could find Hansard actually engaged in business).

174. *See* SHANE, *supra* note 11, at 84-85 (explaining manufacturing sector requires extensive financing).

175. *See* Quittner, *supra* note 18 (claiming writing business plan typically precedes financing).

176. *See* SHANE, *supra* note 11, at 84-85; *see also* LAMBING & KUEHL, *supra* note 133, at 213.

177. *See* Quittner, *supra* note 18 (claiming start-ups traditionally funded before launch).

178. *See* SHANE, *supra* note 11, at 84-85; *see also* LAMBING & KUEHL, *supra* note 133, at 213.

179. *Compare* *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1468 (5th Cir. 1989) (holding flea market on weekends insufficient for mitigation), *with* *Smith v. Great Am. Rests., Inc.*, 969 F.2d 430, 438 (7th Cir. 1992) (holding former waitress opening restaurant sufficient mitigation), *and* *Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1005-06 (3d Cir. 1988) (holding self-employment reasonable form of mitigation).

180. *See* *Smith*, 969 F.2d at 438 (“[S]elf-employment can satisfy the burden of diligence in mitigation.” (citing *Hansard*, 969 F.2d at 1468)).

181. *See* *supra* note 164 (discussing self-employment skills and their relationship to determining reasonableness).

182. *See* *Grosvenor Orlando Assocs., Ltd.*, 350 N.L.R.B. 1197, 1202-03 (2007) (emphasizing claimant did not pay taxes on earnings, and thus hobby).

183. *See* *supra* note 164; *see also* OFFICE OF ADVOCACY, *supra* note 9 (describing risks commonly associated with starting business).

might lead to unnecessary judicial intervention into business decisions, it would ensure that former employees start and operate legitimate businesses.¹⁸⁴

IV. CONCLUSION

Under current law, a victim of unlawful employment discrimination may fulfill the duty to mitigate damages through self-employment. Courts hold self-employment sufficient if it constitutes a reasonable alternative to seeking comparable employment and is undertaken in good faith. Furthermore, courts prefer valuing self-employment by calculating the net profits earned by the business during the interim period and using that amount as the mitigating value. These net profits are then offset against the gross backpay amount, thus creating the suit's final recovery.

In a country where the entrepreneurial spirit is woven throughout the culture, victims of employment discrimination will inevitably take the plunge into entrepreneurship. But the question is not whether they will take the plunge; it is whether they will be immune to any risk because of their forthcoming backpay award. Although the employer may have caused the unemployment of the employee, the current state of law simply cannot tolerate the use of a looming backpay award as an insurance policy on the employee's new business.

Thomas J. McIntyre

184. See 8 LARSON, *supra* note 106, § 135.04 (claiming not jury's place to second-guess "employer's business judgment"); see also *Manning v. McGraw-Hill, Inc.*, 64 F. Supp. 2d 996, 998-99 (D. Colo. 1998) (instructing jury to defer to employer's business judgment), *rev'd*, 216 F.3d 1087 (10th Cir. 2000).