range of activities listed in the Guidelines.[1]

[6–8] We remand for a reevaluation of Thompson's subjective complaints of pain, giving due regard to the opinion of Thompson's treating physician. If on remand Thompson's subjective complaints are found to be credible, even if not to the extent that she alleges, then the ALJ should determine whether Thompson's nonexertional impairments affect her residual functional capacity in any significant way which would preclude her from engaging in the exertional tasks contemplated in the Guidelines. *Tucker v. Heckler*, 776 F.2d at 795. Thus Thompson's nonexertional impairments are to be considered in combination with her exertional limitations in determining her residual functional capacity. If Thompson's nonexertional impairments significantly affect her residual functional capacity then the Guidelines are not controlling and may not be used to direct a conclusion of disabled or not disabled. We recognize that this presents a difficult question of degree and therefore we believe that additional guidance is warranted. In this context "significant" refers to whether the claimant's nonexertional impairment or impairments preclude the claimant from engaging in the full range of activities listed in the Guidelines under the demands of day-to-day life. Under this standard isolated occurrences will not preclude the use of the Guidelines, however persistent nonexertional impairments which prevent the claimant from engaging in the full range of activities listed in the Guidelines will preclude the use of the Guidelines to direct a conclusion of disabled or not disabled. For example, an isolated headache or temporary disability will not preclude the use of the Guidelines whereas persistent migraine headaches may be sufficient to require more than the Guidelines to sustain the Secretary's burden. However, in such circumstances the Guidelines may be used as a guide if supplemented with vocational expert testimony or other evidence in the record which meets the Secretary's burden of showing that there exists work in the national economy that Thompson is capable of performing. Finally, it appears that the ALJ failed to consider Thompson's obesity. While obesity is not a per se impairment, on remand, the ALJ should consider Thompson's obesity as an impairment that may affect her disability status. *Stone v. Harris*, 657 F.2d 210 (8th Cir.1981).

III. CONCLUSION

Accordingly the decision of the district court is reversed and remanded with instructions to remand to the Secretary for a rehearing consistent with this opinion.

Coletta SAYRE, Personal Representative of the Estate of Grover C. Sayre, Jr., Appellee,

v.

The MUSICLAND GROUP, INC., A SUBSIDIARY OF AMERICAN CAN CO., a New Jersey Corp., Appellant,

American Can Company, a New Jersey Corp.

No. 87–5174.

United States Court of Appeals, Eighth Circuit.

Submitted Feb. 8, 1988.

Decided June 21, 1988.

Rehearing and Rehearing En Banc Denied Aug. 10, 1988.

Widow of employee was substituted as party in employment discrimination and state breach of contract suit and was awarded damages by jury before the United States District Court for the District of Minnesota, Paul A. Magnuson, J., and defendant appealed. The Court of Appeals, Bowman, Circuit Judge, held that: (1) defendant's failure to plead affirmative defense of mitigation of damages precluded jury instruction on that issue; (2) employer

1. This statement of the law is approved and adopted by the court *en banc*.

deed, Fed.R.Civ.P. 8(c) is entitled "Affirmative Defenses." It states:

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, *and any other matter constituting an avoidance or affirmative defense.*

Fed.R.Civ.P. 8(c) (emphasis added).

Failure to mitigate damages is not among the nineteen affirmative defenses enumerated in the non-exhaustive list in Rule 8(c). However, mitigation issues are usually regarded as affirmative defenses under the catchall clause "and any other matter constituting an avoidance or affirmative defense." For example, "[t]he general authority, and in fact the almost universal weight of authority, is that the burden of pleading and proving mitigation of damages in an employee's action for breach of an employment contract is upon defendant employer." 5 C. Wright & A. Miller, Federal Practice & Procedure § 1273, at 322 n. 84 (1969) [hereinafter Wright & Miller] (citing dicta from *Stinson v. Edgemoor Iron Works*, 53 F.Supp. 864, 868 (D.C.Del.1944)). *See also* 2A Moore's Federal Practice ¶ 8.27[4], at 8–197 n. 3 (1987); 28 U.S.C.A. Rule 8, at 309 n. 38b (West Supp.1988). *But see* 11 Am.Jur. Proof of Facts 2d 679, 695 § 18 (1976) ("Probably a majority of courts have held that [mitigation after wrongful discharge] is an affirmative defense ... although a significant number of cases have held that the plaintiff's having obtained other employment or his failure to mitigate damages by doing so may be shown under the employer's general denial...."); 25 C.J.S. *Damages* § 142, at 1225 (1966) (same).

A case decided by this Court, *American Surety Co. of New York v. Franciscus*, 127 F.2d 810 (8th Cir.1942), illustrates the long-established majority view that failure to mitigate is an affirmative defense. A defendant surety company contended on appeal that the plaintiff's recovery should be reduced because plaintiff had not mitigated his damages arising from the breach of a mechanic's lien bond. We rejected this argument, holding that "before the [defendant] could invoke the [mitigation] rule, the burden rested upon it to plead and prove the facts necessary to support the inference that the [plaintiff] was 'unreasonable' in neglecting to minimize the damages...." *Id.* at 816. *See Ingraham v. United States*, 808 F.2d 1075, 1078 (5th Cir.1987) ("In the years since the adoption of [Rule 8(c)], the residuary clause has provided the authority for a substantial number of additional defenses which must be timely and affirmatively pleaded. These include ... failure to mitigate damages...."). *See also 999 v. C.I.T. Corp.*, 776 F.2d 866, 870 n. 2 (9th Cir.1985); *TCP Indus. v. Uniroyal, Inc.*, 661 F.2d 542, 550 (6th Cir.1981); *Camalier & Buckley–Madison, Inc. v. Madison Hotel*, 513 F.2d 407, 419–20 n. 92 (D.C.Cir.1975); *White v. Bloomberg*, 501 F.2d 1379, 1382 (4th Cir. 1974); *Consolidated Mortgage & Fin. Corp. v. Landrieu*, 493 F.Supp. 1284, 1293 (D.D.C.1980).

[2] Federal courts typically consider state court decisions on burdens of pleading or proof before concluding that mitigation is an affirmative defense. *See 999, TCP, American Sur., supra. See also Seal v. Industrial Elec.*, 362 F.2d 788, 789 (5th Cir.1966) ("Whether a particular matter is to be regarded as an affirmative defense is to be determined by state law."). Reference to state law can be helpful, but it is certainly not required when a federal court decides a purely procedural question. 5 Wright & Miller, *supra*, § 1271, at 304–05 ("State statutes and decisions often are utilized in deciding when certain defensive matters should be pleaded affirmatively. These are not binding on the federal courts but occasionally provide useful analogies.")

which incidentally affect litigants' substantive rights do not violate [the Rules Enabling Act] if reasonably necessary to maintain the integrity of that system of rules." *Burlington N.R.R. v. Woods*, 480 U.S. 1, 107 S.Ct. 967, 970, 94 L.Ed.2d 1 (1987).

(footnote omitted). *See also id.* § 1272, at 320–21.[3]

In light of the purpose of the Federal Rules of Civil Procedure to provide uniform guidelines for all federal procedural matters, such as the pleading of affirmative defenses, we discern no principled reason for basing the federal procedural decision before us on state law. Since the overwhelming majority of federal courts have decided, for whatever reasons, that failure to mitigate damages is an affirmative defense under the catchall clause of Rule 8(c), we would thwart the purpose of the federal rules if we were to hold otherwise. Pickwick does not cite a single case in which a federal court has held that failure to mitigate damages is not an affirmative defense. This defense is routinely pleaded affirmatively in federal court, *see, e.g., Anastasio v. Schering Corp.*, 838 F.2d 701, 707 (3d Cir.1988); *Nationwide Engineering & Control Systems v. Thomas*, 837 F.2d 345, 346 (8th Cir.1988), and in the instant case, we hold, as did the District Court, that failure to mitigate damages is an affirmative defense under Rule 8(c). As with other affirmative defenses, failure to plead mitigation of damages as an affirmative defense results in a waiver of that defense and its exclusion from the case. *See, e.g., Camalier & Buckley-Madison, Inc.*, 513 F.2d at 420 n. 92.

Pickwick argues that federal courts are required to follow state procedural law to decide whether a particular defense falls within the catchall clause of Rule 8(c), and, further, that failure to mitigate damages is not an affirmative defense under Minnesota law. These assertions fail for two reasons. First, state law may be informative, but it is not binding. Second, even if federal courts were bound by state determinations, which we believe they are not, Minnesota's rulings on pleading mitigation do not contradict the majority rule.

If a federal court chooses to consider state law when interpreting a federal rule of procedure, it typically looks to the substantive rules governing burdens of proof. *See Sundstrand Corp. v. Standard Kollsman Indus.*, 488 F.2d 807, 813 (7th Cir. 1973). *See also* 2A Moore's Federal Practice ¶ 8.27[2], at 8–176 (1987). In Minnesota, as in nearly every other jurisdiction, the defendant has the burden of proving that the plaintiff failed to mitigate his damages, *see, e.g., Soules v. Independent School Dist. No. 518*, 258 N.W.2d 103, 107 (Minn. 1977), so it is logical to assume that under Minnesota law the defendant likewise has the burden of pleading this defense affirmatively.

Pickwick cites one case, *Hartwig v. Loyal Order of Moose*, 253 Minn. 347, 91 N.W. 2d 794 (1958), for the proposition that failure to mitigate damages is not an affirmative defense in Minnesota. *Hartwig*, however, is not on point. It involved a tort claim under the state Civil Damages Act arising out of a drunk driving accident, where the defendant neglected to plead that the plaintiff already had recovered a specific sum of money under the state Wrongful Death Act. Because the plaintiff failed to object to the introduction of evidence of the prior collateral recovery, it appears that the mitigation issue was tried by consent. *See id.* 91 N.W.2d at 804. Most importantly, the mitigation issue in *Hartwig* is completely different from the one before us. *See* 1 Pirsig, Minn. Pleading (4th ed.) § 1387 (cited in *Hartwig*, 91 N.W.2d at 803).[4] In the context of its

3. In a case involving issues of proof, not issues of pleading, a panel of this Court noted: "If a matter is an affirmative defense under state law, it will be treated as such in a diversity action in a federal court of that state. 5 C. Wright & A. Miller, Federal Practice & Procedure § 1272 at 317 (1969)." *Bartak v. Bell-Galyardt & Wells, Inc.*, 629 F.2d 523, 527 (8th Cir.1980). This statement is dictum, an observation rather than a prescription, and our opinion today is not at odds with the holding of *Bartak* or with the full text of the Wright and Miller section cited in that case.

4. Section 1387 of Pirsig on Minnesota Pleading states that "matter in mitigation" need not be pleaded affirmatively. The author then provides two examples of such matter, *i.e.*, good faith in an action for conversion, and bad reputation in an action for libel or slander. However, the section concludes with the following caveat: "Failure of the plaintiff to mitigate the damages sustained has been held to be matter to be affirmatively pleaded by the defendant...." 1 Pirsig, Minn. Pleading § 1387. Although Pickwick cites section 1387, it ignores the last sen-