

Superior Protection, Inc. and United Government Security Officers of America for and on behalf of Local 229. Cases 16–CA–21399

August 31, 2006

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

On January 25, 2006, Administrative Law Judge George Carson II issued the attached supplemental decision. The Respondent filed exceptions, a supporting brief, and a reply brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Superior Protection, Inc., Houston, Texas, its officers, agents, successors, and as-

signs shall make whole the individual named below, by paying him the amount following his name, plus interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholding required by Federal and State laws:

Kelvin Trotter \$123,907.87

Tamara J. Gant, Esq., for the General Counsel.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. I heard this case in Houston, Texas, on December 19, 2005. The Board, on July 31, 2003, found that the Respondent disciplined and discharged Kelvin Trotter in violation of Section 8(a)(1), (3), and (4) of the Act and ordered, inter alia, that he be made whole for any loss of earnings and other benefits. *Superior Protection, Inc.*, 339 NLRB 954 (2003). On July 26, 2004, the Court of Appeals for the Fifth Circuit enforced the Board's Order. A controversy having arisen regarding the backpay due, the Regional Director for Region 16, on October 6, 2005, issued a compliance specification that set out the backpay and benefits due to discriminatee Kelvin Trotter. The Respondent filed a timely answer that was thereafter amended twice. The operative pleading is the Respondent's second amended answer dated November 28, 2005. The Respondent did not appear at the hearing.¹

On the entire record, including my observation of the demeanor of the witnesses, I make the following

¹ We find no merit in the Respondent's arguments that the judge denied it due process by granting the General Counsel's petitions to revoke the subpoenas duces tecum issued by the Respondent and by refusing to consider and rejecting the documentary materials contained in Respondent's posthearing letter and limiting the record to evidence adduced at the hearing. The Respondent voluntarily chose not to appear and participate in the hearing, and therefore waived its opportunity to present evidence.

We also adhere to the Board's long-established policy of not deducting unemployment compensation benefits in computing backpay, rejecting the Respondent's argument to the contrary. See *Gullett Gin Co. v. NLRB*, 340 U.S. 361 (1951).

For institutional reasons, Member Kirsanow applies established law holding that unemployment compensation does not offset backpay. He reserves judgment on the merits of that precedent, however, and expresses his concern that the policy against offset for unemployment may not be consistent with the limits of the Board's remedial authority. Under the no-setoff policy, an employer must pay backpay without receiving credit for payroll taxes paid into the State unemployment compensation fund or for the impact of employees' collection of unemployment benefits on the employer's experience rating. This arguably crosses the line from the remedial to the punitive. The Supreme Court's decision in *Gullett Gin Co.*, supra, is not to the contrary. There, the Court held that it was within the discretion of the Board to find the no-setoff policy not impermissibly punitive, not that the Board was compelled to so find. 340 U.S. at 365. As stated above, however, Member Kirsanow reserves judgment regarding the continuing validity of the no-setoff policy until the issue is presented in a case in which it is fully briefed by the parties.

In view of our disposition of this case, we find it unnecessary to pass on the General Counsel's motion to strike Respondent's exceptions and the Respondent's motion requesting oral argument.

¹ Counsel for the Respondent, by letter dated December 16, 2005, advised that his client had determined "not to make an appearance at the hearing." No representative of the Respondent appeared. At the close of the hearing, pursuant to the request of the General Counsel to file a brief, I set January 17, 2006, as the date for receipt of briefs. Thereafter, by letter dated December 19, 2005, served on all parties, the General Counsel waived the filing of a brief and requested an expedited decision. Counsel for the Respondent, in a response by letter dated December 20, 2005, argued, inter alia, that it had issued subpoenas duces tecum to agents of the Board and that it had been denied due process. Lest there be any claim that I took an action prejudicial to the Respondent and inconsistent with my actions at the hearing, I took no action altering the due date for the filing of briefs as set out in the official record. Counsel's December 20 letter attached copies of the subpoenas and other documents identified as exhibits A through N. The subpoena duces tecum sought production of the requested documents at the hearing, and the Respondent did not appear at the hearing. Immediately prior to the close of the hearing, I granted petitions to revoke the subpoenas insofar as permission for the disclosure of documents in the possession of the Board had not been sought or granted pursuant to Sec. 102.118(a)(1) of the Board's Rules and Regulations. The record consists of the probative evidence adduced at the hearing. The Respondent, having not appeared at the hearing, made no offer of either testimonial or documentary evidence. I have not considered the documents attached to the Respondent's letter. Insofar as they are tendered as posthearing exhibits, they are rejected. The Respondent did not file a brief. The Respondent has not been denied due process.

FINDINGS OF FACT

I. PRELIMINARY MATTERS

The Respondent's second amended answer admits that the "formulas for determining gross backpay and the amount of health and welfare due" as pled in the compliance specification "are generally as is stated." No alternative formulas are pled, and no alternative figures are stated. The second amended answer pleads that vacation hours included in the backpay figure "would constitute double payment." It denies the backpay period set out in the compliance specification. The second amended answer also denies the total backpay due as set out in the compliance specification, pleading that Trotter "failed to mitigate his damages, voluntarily removed himself for the job market . . . refused to accept reinstatement when it was unconditionally offered to him . . . and received unemployment compensation."

The Board, in *Southland Mfg. Corp.*, 193 NLRB 1036 (1971), held that the employer has the burden of proving, "as to vacation pay, that the employees would not have been paid vacation pay in addition to the wages they would have earned." In determining the amount of vacation pay due to Trotter, as hereinafter discussed, I find that, although entitled to 2 weeks of vacation, it was Trotter's practice to take only 1 week of vacation and to receive pay for the second week.

The Respondent, although denying the backpay period set out in the compliance specification, from September 21, 2001, the date of Trotter's termination as found in *Superior Protection, Inc.*, supra at 957, until May 9, 2005, "the date on which the Respondent reinstated him," does not affirmatively plead what it contends constitutes the appropriate backpay period. Although pleading that Trotter "refused to accept reinstatement when it was unconditionally offered to him," the Respondent did not plead the date of the alleged offer or the date of alleged refusal. The Respondent has not established either an unconditional offer or a refusal by Trotter to accept that offer. It is well settled that "[i]t is the employer's burden to establish that it made a valid offer of reinstatement" to a discriminatee. *Adscov Mfg. Corp.*, 322 NLRB 217, 218 (1996).

Willful loss of earnings is an affirmative defense that must be established by a respondent. The Respondent pleads that the "amounts allegedly due Trotter do not take into account that Trotter failed to mitigate his damages." The burden of establishing that a discriminatee failed to mitigate damages through interim employment is upon the respondent. A respondent does not meet this burden "by presenting evidence of lack of employee success in obtaining interim employment." *Black Magic Resources*, 317 NLRB 721 (1995). "[T]he applicable standard is one of reasonable diligence . . ." *Arlington Hotel*, 287 NLRB 851 (1987). A good-faith effort is sufficient. The discriminatee need not be successful. The discriminatee must exercise "reasonable diligence" in seeking interim employment. A discriminatee is not held to a standard of exercising the highest diligence in conducting a job search. *Lundy Packing Co.*, 286 NLRB 141, 142 (1987). The Respondent, apparently seeking an offset for unemployment compensation received by Trotter, pleads that he received unemployment compensation. Unemployment compensation does not offset backpay liability.

Demi's Leather Corp., 333 NLRB 89, 91 (2001). The receipt of unemployment compensation constitutes "prima facie evidence of a reasonable search for interim employment." *Birch Run Welding*, 286 NLRB 1316, 1319 (1987). The Respondent has not established any failure on the part of Trotter to mitigate his damages.

At the hearing, the General Counsel amended appendices C and D to reflect additional interim earnings by Trotter in the second and third quarters of 2003. Compliance Officer Charlene Donovan testified that Trotter had reported this income, as shown on his self-employment income as reported to the Internal Revenue Service (IRS), but that it had not been reflected in the appendices because there were no Form 1099s relating to it. Trotter credibly testified that the income was received for performing yard work at various times during that year. There was no concealment of these earnings by Trotter. See *Paper Moon Milano*, 318 NLRB 962, 965 (1995). The amended calculations, reflected in the amended appendices received as General Counsel's Exhibit 2, correctly reflect Trotter's self employment income for 2003 and reduce the Respondent's backpay liability.

II. FACTS

The only issue in dispute upon which the General Counsel bears the burden of proof relates to vacation pay. Once the General Counsel establishes that an employee or employees would have worked through their vacation periods, it is a respondent's burden to establish that the employees "would not have been paid vacation pay in addition to the wages they would have earned." *Southland Mfg. Corp.*, supra. Although the Respondent argues that paying vacation pay in addition to wages would amount to a double recovery, precedent notes that "an assumption that the Respondent's employees would have worked through their vacation periods without specifically being paid therefore . . . would be based on a premise of unjust enrichment to the Respondent." *Sioux Falls Stock Yards*, 236 NLRB 543, 545-546 (1978). Trotter testified that he had taken no vacation prior to his September 21 discharge in 2001, but that he took "regular vacation" in 2000. Trotter was entitled to 2 weeks vacation and he credibly testified that, in 1997 and 1998, with the company that was the predecessor to Superior, "instead of me taking the full two weeks off, I took one week off, and I got the vacation pay for one week as opposed to the regular vacation check for two weeks." Although Trotter's practice was not totally consistent, having taken regular vacation in 2000 but no vacation in 2001, I find that the foregoing testimony establishes that it was Trotter's practice to take 1 week of actual vacation each year and to work through and receive the pay for the second week of vacation. The Respondent did not establish that he would not have received vacation pay for this second week of vacation in which Trotter would, consistent with his past practice, have worked. The backpay calculations distribute the vacation pay equally in each quarter which appears to be the manner in which vacation accrued.

III. BACKPAY

A. Wages

The Respondent's second amended answer admits the gross backpay formula and does not dispute the basis of the calcula-

tion of overtime or offer an alternative calculation for backpay or overtime. I have found that it was Trotter's practice to take 1 week, 40 hours, of actual vacation each year and to receive additional compensation for the second week of vacation, a total of 40 hours. The compliance specification calculates Trotter's vacation pay on the basis of a total of 80 hours (2 weeks) a year, 20 hours per quarter, which has been included in the backpay wage figure for each applicable quarter. In view of my finding, the backpay wage total should instead be calculated on the basis of 10 hours of vacation pay per quarter for a total of 40 hours (1 week) per year. The foregoing adjustment decreases the vacation pay due to Trotter by 50 percent in each quarter, a total of \$2590.60, resulting in a reduction of total back wages from \$109,871.19 to \$107,280.59.²

B. Health and Welfare (Medical Insurance)

The compliance specification sets out the Respondent's liability for health and welfare, and the Respondent's second amended answer admits that the formula for determining gross backpay and the amount of health and welfare due "are generally as stated." The applicable health and welfare rates with the effective date thereof that were paid pursuant to the contract under which the Respondent operated are set out in appendix B.

² I have not revised the multiple appendices to conform to the foregoing finding. Before computing interest due, the Region should assure that the figures reflected in the appendices are appropriately revised. Thus, the vacation pay of \$334.40 for the fourth quarter of 2001 through the third quarter of 2003 should be \$167.20 for each of those quarters, and the vacation pay of \$358 for the fourth quarter of 2003 through the second quarter of 2005 should be \$179 for each of those quarters.

The applicable rate multiplied by the regular hours worked, as set out in appendix C, reflects the Respondent's liability for health and welfare for each quarter of the backpay period. The Respondent asserts no alternative basis for computation of health and welfare benefits. The total liability of the Respondent for health and welfare payments, as reflected in appendix D, is \$16,627.28.

In view of the foregoing and on the entire record, I issue the following recommended³

ORDER

The Respondent, Superior Protection, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall, consistent with the compliance specification as modified by the foregoing findings, satisfy the obligation to make whole Kelvin Trotter by paying the following amounts, together with interest thereon accrued to the date of payment computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws.

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|--------------------|---------------------|
| Wages | \$ 107,280.59 |
| Health and Welfare | <u>\$ 16,627.28</u> |
| Total: | \$ 123,907.87 |

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.