

**Aero Ambulance Service, Inc. and Teamsters Union Local 617 a/w International Brotherhood of Teamsters.**<sup>1</sup> Case 22–CA–20950

May 31, 2007

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND SCHAUMBER

On September 21, 2001, Administrative Law Judge Raymond P. Green issued the attached second supplemental decision.<sup>2</sup> With respect to discriminatee Guy Greene, the General Counsel filed exceptions and a supporting brief, the Respondent filed a brief in opposition, and the General Counsel filed a reply brief. The Respondent also filed cross-exceptions and a supporting brief, and the General Counsel filed an answering brief. With respect to discriminatee Michael Goldblatt, the Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply 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 as modified.

- We agree with the judge, for the reasons he states, that the Respondent owes Guy Greene the sum of \$19,793.12 in backpay, plus interest. For the reasons set forth below, we disagree with the judge's determination that the Respondent owes Michael Goldblatt the sum of \$44,358.65 in backpay, plus interest. The General Counsel argued, and the judge agreed, that Goldblatt's backpay period began with his October 6, 1995 discharge and continued until January 31, 2000, when it terminated based on the Respondent's valid offer of reinstatement to Goldblatt. The judge found that Goldblatt mitigated his damages from the fourth quarter of 1995 through the end of the second quarter of 1998. During that period of time, he increased his hours at Pathmark (where he worked while also working for the Respondent), leaving Pathmark in July 1997. He also obtained full-time employment in January 1997 as an EMT (the position from which he was unlawfully discharged) at Life Support Ambu-

lance, where he worked until February 14, 1998. Thereafter, he looked for jobs as a bartender and film extra. Other than the second quarter of 1998, Goldblatt reported interim earnings in every quarter during that period. These earnings ranged from a low amount of less than \$300 to a high amount of almost \$7000. Indeed, Goldblatt's interim earnings were high enough to yield no net backpay for the second and third quarters of 1997, and only a token payment for the fourth quarter of that year.<sup>3</sup> In 1999 and 2000, Goldblatt worked as a bartender and a film extra and the judge deducted those earnings but indicated that the Respondent owed the difference between those earnings and what Goldblatt would have earned with the Respondent.

- In July 1998, Goldblatt applied for social security disability insurance (SDDI) benefits and began receiving them in November 1998, with retroactive payments for August and September. Goldblatt was not employed at all during the third and fourth quarters of 1998, and the judge tolled backpay for those periods. On this record, the judge found that Goldblatt's SSDI benefits constituted interim earnings and that, during the period up through January 31, 2000, when Goldblatt received an offer of reinstatement from the Respondent, he never earned enough to meet the Social Security Administration's (SSA) threshold for termination of benefits.<sup>4</sup> Based on these facts, the judge determined Goldblatt's backpay award to be \$44,358.65.

We disagree. Although we adopt the judge's findings that Goldblatt's backpay period commenced with his discharge and continued during his interim employment as an EMT—during which interim employment period Goldblatt properly mitigated his damages—we find, for the reasons that follow, that his backpay period tolled on February 9, 1998, rather than January 31, 2000.

As the Board noted in *Performance Friction Corp.*, 335 NLRB 1117 (2001), “[t]he Board has traditionally applied the rule that an employer generally is not liable for backpay for periods when an employee is unavailable for work

<sup>3</sup> The judge adjusted Goldblatt's Pathmark interim earnings downwards to reflect more accurately the regular hours and overtime hours he worked. The judge also declined to add to Goldblatt's Pathmark interim earnings amounts for sick pay, holiday pay, and vacation pay. No party excepted to the judge's calculations in these respects.

<sup>4</sup> The judge noted: “The basis of the [SSA] entitlement is supposed to be a person's inability to obtain employment, although the [SSA] encourages disabled persons to become employed inasmuch as one can earn up to \$700 per month for nine months without losing the benefit.”

<sup>1</sup> We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

<sup>2</sup> The underlying unfair labor practice decision is reported at 327 NLRB 639, enf. mem. 302 F.3d 816 (1999).

due to a disability.” *Id.* at 1119 (footnote omitted). We find that, as of February 9, 1998, Goldblatt’s physical and emotional condition rendered him unable to perform “his previous employment or substantially equivalent employment.” *Performance Friction*, *supra* at 1120. Accordingly, we toll Goldblatt’s backpay as of February 9, 1998, and find that the Respondent owes Goldblatt the reduced sum of \$23,821.11 in backpay, plus interest.

On July 20, 1998, Goldblatt provided a sworn statement to the SSA, in connection with his “Application for Disability Insurance Benefits,” which stated: “I became unable to work because of my disabling condition on February 9, 1998.” In his “Disability Report,” provided to the SSA on the same day, Goldblatt elaborated. He stated that he was unable to hold a full-time job because of problems related to his use of a prosthetic leg. He attested that he could not stand on the prosthesis and sometimes could not even attach it because of swelling and pain. Goldblatt further stated that he became depressed and was laid off, which condition made the depression worse. Finally, in his “Activities of Daily Living Questionnaire” provided to the SSA on August 6, 1998, Goldblatt stated that his stump and knee joint were deteriorating as the pain grew more intense with time.

In addition, the record shows that at least two physicians examined Goldblatt in connection with his SSDI benefits application. The first found that Goldblatt appeared to have advanced arthritis in his right knee and needed a new prosthesis. The second found that Goldblatt needed to have his physical condition stabilized with pain management and a new prosthesis, and that psychotherapy was indicated. Further, at the supplemental hearing, Goldblatt testified that when his full-time employment as an EMT ended on February 14, 1998, he did not “want to do” EMT work because he decided “this kind of work is not for me anymore . . . I just figured I would not do EMT for a while.” Indeed, Goldblatt decided that he “wanted to look for work for something else” such as “bartending jobs.” Goldblatt also looked for work as a film extra. In his December 15, 1999 affidavit to the Board, Goldblatt described the period after his employment with Life Support Ambulance thus: “I continued to look for work but decided not to look for work with an ambulance company as I was burned out from the excessive hours. I . . . wanted to take a break from this type of work for a while.” His testimony clearly shows he had no interest in doing EMT work anymore.<sup>5</sup>

<sup>5</sup> Thus, our colleague is clearly in error when she states that Goldblatt’s comments dealt only with “where” he would seek work after he had been discharged, which she claims, in turn, has no bearing on whether he remained able to do EMT work.

Based on this evidence, we find that after February 9, 1998, Goldblatt was unable or unwilling to perform work substantially equivalent to his EMT duties for the Respondent. In addition to Goldblatt’s representations to the SSA concerning his physical and emotional health, we note that two physicians provided objective assessments of Goldblatt’s circumstances that led to the SSA’s granting, without the necessity of a hearing, his application for disability benefits. Finally, Goldblatt testified that he decided to leave the EMT field. Goldblatt admitted that he did not want to do EMT work anymore and he was determined to do some other type of work. There is nothing in Goldblatt’s statement to suggest that he distinguished between EMT work for one employer and EMT work for another employer. Thus, it is reasonable to infer that, if he had not been discharged from his EMT job with the Respondent, he would nonetheless have resigned from that EMT job in February 1998. In addition, the statement shows that Goldblatt was no longer searching for EMT work.<sup>6</sup>

In so finding, we recognize that Goldblatt testified at the supplemental hearing that he was able to work and that he might have exaggerated his infirmities in connection with his application for disability benefits. We find this evidence insufficient to outweigh the substantial record evidence that Goldblatt was unable or unwilling to continue work as an EMT. In *Performance Friction*, *supra* at 1119–1120, the Board tolled the respondent’s backpay with respect to discriminatee Mantecon based on factual findings made pursuant to his claim for disability to the SSA that Mantecon was unable to work, despite his assertion that he felt able to work and had sought interim employment.

*Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999), does not require a different result. The Supreme Court held in *Cleveland* that receiving SSDI benefits did not estop an employee from pursuing an Americans with Disabilities Act (ADA) claim, reasoning that an ADA suit claiming that an employee could perform job duties with reasonable accommodation is not inconsistent with an SSDI claim that the employee could not perform the job without an accommodation. As the Board noted in *Performance Friction*, *supra*, however, “*Cleveland* dealt with the interaction between the ADA and SSA statutes, and cautioned that it did *not* involve . . . the interaction of either of the statutes before us with other statutes.” 335 NLRB at 1119 fn. 15, quoting *Cleveland*, *supra*, at 802 (emphasis in original). By contrast, the inquiry under the NLRA is simply whether the employee can perform substantially equivalent work, *not* whether he

<sup>6</sup> We need not speculate as to the reason for Goldblatt’s unwillingness to do EMT work. The fact is that he was unwilling.

could do so if the employer were to make job accommodations for him.<sup>7</sup> We further recognize that a *claim* for disability benefits, taken alone, “is not prima facie proof that an employee is no longer in the labor market.” *Performance Friction*, supra, 335 NLRB at 1120; see also *Cox Communications*, 343 NLRB 164 fn. 5 (2004), citing *Iron Workers Local 433 (Steel Fabricators)*, 341 NLRB 523 fn. 7 (2004). Here, however, we find that Goldblatt’s assertions to the SSA that he could not work, his testimony that he was unwilling to continue working as an EMT because of his mental state, and the evidence of the doctors who examined him constitute substantial evidence that Goldblatt was not able to perform EMT duties or substantially equivalent work after February 9, 1998.<sup>8</sup>

Our dissenting colleague states that we have afforded the Respondent the benefit of the doubt, relied largely on Goldblatt’s statements in support of his SSDI claim, and placed undue emphasis on Goldblatt’s testimony that after February 1998, he did not want to do EMT work anymore.

We disagree with our colleague’s assessment of our position. We have simply taken Goldblatt at his word. Goldblatt himself attested in his sworn statement to the SSA that he was unable to work as of February 9, 1998. Goldblatt himself testified at the supplemental hearing that he no longer wished to work as an EMT but wanted to do other types of work as of February 14, 1998. Goldblatt testified at the supplemental hearing that those other types of work were jobs as a bartender and film extra.

Our dissenting colleague relies on the fact that Goldblatt continued to work after February 1998. However, that work was not EMT work or substantially equivalent work. Thus, his work at those jobs does not establish his ability or willingness to do EMT work. There can be no doubt

<sup>7</sup> Chairman Battista further notes that *Cleveland* deals with the issue of estoppel. The decision herein is based on the fact of unavailability for the work involved. Chairman Battista assumes arguendo that Goldblatt is not estopped from making the claim that he was not unavailable. Chairman Battista rejects the claim on its merits.

<sup>8</sup> Our conclusion is similar to that reached by the Board in *Performance Friction*, supra. As discussed above, the Board concluded in that case, as a matter of fact, that an employee (Mantecon) could not perform his past or similar work. The Board relied on the factual findings of an SSA judge. Here, we rely on the facts as set forth by Goldblatt in his sworn statement to SSA. We do not find the cases distinguishable because an SSA judge reviewed the evidence in *Performance Friction*. That evidence was taken because the employee there, Mantecon, was denied SSDI benefits initially, and thus a hearing was held. In this case, Goldblatt’s application was granted by the SSA and no such fact-finding was necessary.

Chairman Battista believes that there is a distinction between facts found after an evidentiary hearing and alleged facts asserted by a party to that hearing. In that sense, *Performance Friction* is distinguishable. However, he agrees that Goldblatt’s assertion (which is contrary to his interests here) is relevant to the factual issue of whether he was unavailable for the work involved herein.

that after February 1998, Goldblatt rejected the entire field of EMT work and any related type of work. There is no equivalency between EMT work, on the one hand, and bartending/ film extra work on the other hand. The training and skills necessary for successful accomplishment of the one type of work are entirely different from the other. Moreover, Goldblatt testified that his recompense for his non-EMT work was relatively low—he did not receive more than \$700 per month over a nine month period, the cap for losing his disability payments. This amount approximates \$4.30 per hour. By contrast, the record shows that EMT work paid more than twice this amount. Goldblatt’s backpay calculation credits him with a raise to \$10 per hour as of January 1997, and another raise to \$10.50 per hour as of October 1997. Goldblatt’s interim employment after February 1998 was in no way “substantially equivalent.” See *EDP Medical Computer Systems*, 302 NLRB 54, 55 (1991) (David Burgos); *Daniel Construction Co.*, 276 NLRB 1093, 1094 (1985) (Sammy Wood); *NHE/Freeway, Inc.*, 218 NLRB 259, 260–261 (1975) (Beulah Hunt), *enfd.* 545 F.2d 592 (7th Cir. 1976).

Thus, we find Goldblatt’s failure, after February 1998, to pursue EMT work or work in related fields “was in essence a willful loss of earnings standing between [him] and [his] right to backpay.” *NHE/Freeway*, supra at 260. It is well established that a respondent is not obliged to subsidize the venture where a discriminatee “voluntarily absented himself from the comparable labor market.” See *Big Three Industrial Gas*, 263 NLRB 1189, 1219 (1982) (Steve Wylie). As we have already stated, Goldblatt’s own words attest to his voluntary absence from the comparable labor market. As a result, we have had no occasion to resolve doubts in the Respondent’s favor, or to rely too heavily on—or to place undue emphasis on—any particular one of Goldblatt’s statements. Our conclusion herein is dictated by the plain meaning of Goldblatt’s statements: Goldblatt was unable or unwilling to perform EMT duties or substantially equivalent work after February 9, 1998. We toll Goldblatt’s backpay accordingly.<sup>9</sup>

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge only to the extent consistent with this Second Supplemental Decision and Order and orders that the Respondent, Aero Ambulance Service, Inc., Hackensack, New Jersey, its

<sup>9</sup> Goldblatt’s backpay consists of the following quarterly net backpay amounts. As Goldblatt’s backpay terminated on February 9, 1998, the amount for that quarter consists of 5/9 of that quarter’s total amount.

officers, agents, successors, and assigns, shall pay to Guy Greene the sum of \$19,793.12 and to Michael Goldblatt the sum of \$23,821.99 plus interest<sup>10</sup> and minus tax withholdings required by Federal and State laws.

Year/Qtr.	Net Backpay
95/Q4	\$4,712.97
96/Q1	\$3,292.40
96/Q2	\$2,373.67
96/Q3	\$4,361.64
96/Q4	\$5,108.69
97/Q1	\$2,033.16
97/Q2	\$0.00
97/Q3	\$0.00
97/Q4	\$61.32
98/Q1	\$1,877.26
Feb. 9, 98	
Total	\$23,821.11

MEMBER LIEBMAN, dissenting in part.

The majority errs in cutting off backpay to claimant Michael Goldblatt as of February 9, 1998, based on a weak inference that he was unable or unwilling to work after that date.<sup>1</sup> It was the burden of the Respondent, as the wrongdoer, to prove such a basis for reducing gross backpay here. The majority's decision, in turn, mistakenly discounts evidence (1) that Goldblatt could, and did, work after February 1998; and (2) that Goldblatt's physical condition was largely based on his having used a worn-out medical prosthesis, whose replacement he could not afford, after being unlawfully discharged.<sup>2</sup>

#### I.

Goldblatt lost his lower right leg as a child. As an adult, fitted with a prosthesis, he was able to work, including serving as an emergency medical technician (EMT) for the Respondent before his unlawful discharge in 1995. The backpay period covered by the compliance specification in this case spans the last quarter of 1995 to the first quarter of 2000, when Goldblatt declined an offer of reinstatement by the Respondent.

As detailed in the judge's decision, Goldblatt worked during 15 of the 16 calendar quarters of the relevant backpay period for which the judge found backpay was owed.<sup>3</sup> During this period, Goldblatt's interim earnings

showed no trend indicating a diminishing capacity to work. In fact, his interim earnings in 1997 almost matched his full-time earnings with the Respondent, and in 1999 his earnings continued at a relatively high level, surpassing \$7700 during that year (in addition to disability payments concurrently received).

On July 20, 1998, with the help of his mother, Goldblatt applied for social security disability insurance (SSDI) benefits, a program administered under the Social Security Act (SSA). On that date he filed two forms required for initiating this claim. The first, an "Application for Disability Insurance Benefits" form, included the statements "I became unable to work because of my disabling condition on February 9, 1998," and "I am still disabled." Both of these statements were required for further processing of the SSDI claim. The second form was a "Disability Report," which required Goldblatt to state his "disabling condition" and to explain how that condition kept him from working. On that form, he referred to his amputated leg, the condition of the stump resulting in pain, and the inability to fit on a prosthetic leg. As a result, he alleged that he could not stand on this leg. In addition, he stated, "I seem unable to hold a full-time job for a year at a time because of the pain and ulcers developing."<sup>4</sup> The form also included the remark that he could "not afford another leg" (prosthesis).

On August 6, 1998, Goldblatt filled out a third form entitled "Activities of Daily Living Questionnaire," in which he declared that he had no money to buy a new artificial leg, and that his "stump and knee joint [were] deteriorating and the pain [was growing] more intense as time [went] on." That report also indicated that he was not being prescribed any pain medication. It appears that he was not under the regular care of a physician at the time of his filing for SSDI benefits.

After Goldblatt filed his application for SSDI benefits, he was examined by two physicians who were assigned to review his condition. On August 27, 1998, Dr. Padmavathy Kurra, reported that Goldblatt needed help "to get back, if possible, to going back to work," by means of pain management and "also needs the prosthesis probably." His report also indicated that Goldblatt has stated his prosthesis had worn out and that he could not afford another one because he was told it would cost

<sup>10</sup> Interest shall be computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

<sup>1</sup> I agree with the majority's backpay award for the period prior to February 9, 1998.

<sup>2</sup> The apparent replacement cost of the prosthesis (\$25,000) closely approximates Goldblatt's backpay losses prior to February 1998.

<sup>3</sup> No exceptions have been filed to the judge's finding that Goldblatt failed to make sufficient searches for interim employment during two other quarters within the backpay period, during the latter half of 1998,

which the judge relied on as the basis for denying backpay for these quarters.

<sup>4</sup> In light of Goldblatt's actual employment history, this statement should *not* be interpreted to mean that there were 1-year periods where Goldblatt was unable to work. There is no evidence to suggest that Goldblatt's periods of unemployment, prior to making this statement, ever came close to lasting a year. Rather, what the statement does seem to mean is that because of his medical condition, Goldblatt could not complete a full year of continuous work, without an interruption.

\$25,000. On September 21, 1998, Dr. L. Vassallo reported on Goldblatt's physical condition and concluded:

This patient who is post below knee amputation has clinical evidence of advanced arthritis on his right knee. He has also clinical evidence of loose prosthesis. This patient needs a new prosthesis.

In March 2000, Goldblatt voluntarily provided the Board with an affidavit revealing his receipt of SSDI benefits since August 1998. Those benefits were included in the compliance specification as interim earnings and were deducted from Goldblatt's gross backpay. The record does not contain any other formal disposition of Goldblatt's condition explaining why he qualified for SSDI benefits. At some date following his receipt of SSDI benefits, Goldblatt was fitted with a new prosthesis.

## II.

In backpay proceedings, the Board follows a "general rule that the [r]espondent, as the wrongdoer, must establish any facts that would negate or mitigate its backpay liability." *Velocity Express, Inc.*, 342 NLRB 888, 889–890 (2004), *enfd.* 434 F.3d 1198 (10th Cir. 2006). Here, then, the General Counsel did not have the burden of proving that Goldblatt was able to work during the backpay period. Rather, that burden fell on the Respondent. See *American Mfg. Co. of Texas*, 167 NLRB 520, 522 (1967) (addressing unavailability for work because of illness or accident). See also *Superior Export Packing Co.*, 299 NLRB 61, 65 (1990). In turn, "mere suspicion and uncertainty are not enough to meet the [r]espondent's burden of proof" in connection with an affirmative defense to backpay liability. *Cibao Meat Products*, 348 NLRB 47, 48 (2006). Rather, "[d]oubts, uncertainties, or ambiguities are resolved against the wrongdoing respondent." *Midwestern Personnel Services*, 346 NLRB 624–625 (2006).

Although it was not his burden to do so, the General Counsel provided clear, direct evidence to support his contention that Goldblatt was able to work during all relevant quarters of the backpay period, even after his receipt of SSDI benefits. First, there is uncontradicted evidence that he continued to work during the latter part of the backpay period.<sup>5</sup> Second, the reports provided by

<sup>5</sup> Although Goldblatt has conceded that he exaggerated his condition in filing for SSDI benefits, there is no finding that he engaged in any inappropriate conduct relevant to the compliance proceeding that would justify restricting his backpay award. Compare *American Navigation Co.*, 268 NLRB 426 (1983) (claimants will be denied backpay for all quarters in which they concealed interim earnings). On the contrary, the record shows that Goldblatt voluntarily disclosed his receipt of SSDI benefits well in advance of the compliance hearing.

the doctors who examined Goldblatt indicate that their assessment of his disability was largely influenced by judgments that his existing prosthetic leg was worn out, causing him pain, and that he was financially unable to afford a new prosthesis. It is apparent that the physicians saw this as a significant—but not irreversible—basis for the assessments included in their SSDI reports.<sup>6</sup> Because Goldblatt obtained a new prosthesis sometime during the first half of 1999, enabling him to work as a bartender, it would seem that any inability to work was resolved well before the end of the backpay period.

The majority ignores who bears the burden of proof here, giving the Respondent—not Goldblatt—the benefit of the doubt. In cutting off backpay to Goldblatt, the majority largely relies on statements made in support of Goldblatt's SSDI claim, which Goldblatt asserted were exaggerations for the purpose of being able to qualify for SSDI benefits. The judge clearly considered this evidence in weighing Goldblatt's veracity, and was also guided by independent medical opinions and Goldblatt's actual employment record after February 1998.

The majority errs in placing undue emphasis on Goldblatt's testimony that he was "burned out" in February 1998 and that this prompted him to seek work in other areas, not as an EMT. On the basis of this testimony, the majority has concluded that, "it is reasonable to infer that, if he had not been discharged from his EMT job with the Respondent, he would have nonetheless resigned from that EMT job in February, 1998." This conclusion is speculative on several grounds. First, Goldblatt's assertion of burnout referred to his decision about where to seek employment after having been discharged as an EMT. That decision has no bearing on whether Goldblatt remained able to perform EMT work. Second, had Goldblatt remained employed by the Respondent, there is no firm basis for assessing whether, and for how long, he would have remained employed. The Board traditionally does not reduce backpay awards, and so penalize the victims of unfair labor practices, on the basis of such speculation.<sup>7</sup> The Board has refused to toll backpay (or to relieve an employer from the obligation to offer a discriminatorily discharged employee reinstatement) even where the discharged employee clearly has stated a desire never to work for the employer again. *Seligman & Associates*, 273 NLRB 1216 (1984), *enf.*

<sup>6</sup> A similar argument can be made with respect to whether Goldblatt's complaints of pain could have also been treated by medication, although the record does not provide detail on this matter.

<sup>7</sup> See, e.g., *Robert Haws Co.*, 161 NLRB 299, 302 (1966) ("It would be contrary to the purposes of the Act to penalize [the employee] by reducing the amount of backpay . . . because of the speculative possibility that had he not first been discriminatorily discharged he would have voluntarily quit"), *enfd.* 403 F.2d 979 (6th Cir. 1968).

denied on other grounds 808 F.2d 1155 (6th Cir. 1986), cert. denied 484 U.S. 1026 (1988). Finally, Goldblatt's reliance on a worn-out prosthesis—a problem that was remedied—may well have explained his “burn out.”

The majority also asserts that the types of jobs sought by Goldblatt after February 14, 1998, were not substantially equivalent to EMT work. However, as a general proposition, a discharged employee is not obliged to seek the same type of interim employment as that from which he was discharged, in order to receive backpay.<sup>8</sup> The Board's limited exception to this rule—obligating a discharged discriminatee who is trained in a highly specialized skill in which he has extended work experience to seek work within this field<sup>9</sup>—does not clearly apply here. In applying this exception, the Board considers the employee's former earnings as an indicator of the relative skill, and does not impose this standard for relatively low wage positions.<sup>10</sup> Goldblatt's former hourly wage at the time of his discharge as an EMT was \$900 per hour. This rate does not signify that this position was so specialized that Goldblatt should be obligated during the entire period of interim employment to seek work within this field or be barred from a further backpay award. Given his circumstances, his interim employment during the 16 months prior to the end of the compliance period on January 31, 2000, should not defeat his entitlement to backpay relief.<sup>11</sup>

### III.

In sum, the actual evidence here is that Goldblatt could and did work after applying for disability benefits and obtaining a new prosthesis for his leg. The record does not establish that he was unable to work, nor would I engage in speculation on that point. The sole question, then, is whether Goldblatt's efforts to find interim employment were sufficient. In awarding backpay, the administrative law judge found that they were. I agree with the judge, and, accordingly, I dissent from the majority's holding.

*Bert Dyce Goldberg, Esq.*, for the General Counsel.

<sup>8</sup> See, e.g., *Avon Convalescent Center*, 219 NLRB 1210, 1215 (1975), enf'd. in relevant part 549 F.2d 1080 (6th Cir. 1977). See also *E & L Plastics Corp.*, 314 NLRB 1056, 1058 ((1994); *De Jana Industries*, 305 NLRB 845, 846 fn. 6 (1991).

<sup>9</sup> See *Associated Grocers*, 295 NLRB 806, 810 (1989), and cases cited therein.

<sup>10</sup> *Avon Convalescent Center*, supra at 1215; *Marlene Industries Corp.*, 234 NLRB 285, 289 (1978).

<sup>11</sup> There is no basis for the majority's calculation that Goldblatt's hourly rate for his interim employment during this period was \$4.30 per hour. This calculation is premised on Goldblatt working full-time, but the record only states Goldblatt's earnings on a quarterly basis and does not specify how many hours Goldblatt worked each week during this period or his hourly wages when employed.

*Jedd Markus and Keith J. Rosenblatt, Esqs.*, for the Respondent.

## SECOND SUPPLEMENTAL DECISION

### STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This backpay case was tried in Newark, New Jersey, on December 20, 2000, and June 21, 2001.<sup>1</sup>

The underlying unfair labor practice case was issued by the Board on February 17, 1999, in 327 NLRB 639. It was enforced by the Third Circuit Court of Appeals on November 10, 1999.

The backpay specification was issued by the Regional Director on July 28, 2000, and as amended, the General Counsel contends that Michael Goldblatt is owed \$51,223.56 plus interest and Guy Greene is owed \$45,354.55 plus interest. The backpay period commenced on October 6, 1995, the date that each was fired. The backpay period for Greene ended on February 2, 2000, in accordance with a valid offer of reinstatement. The backpay period for Goldblatt ended on January 31, 2000, by virtue of a valid offer of reinstatement.

The Respondent contends that both discriminatees should have their backpay claims substantially reduced because they both “failed to exercise even minimal efforts to obtain substantially equivalent employment during a majority of the backpay period.” Further, the Respondent contends that because of a medical condition, Goldblatt was unable to work in a full-time position for a period of 2 years and therefore should be considered to be out of the relevant labor market for this period.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following<sup>2</sup>

### FINDINGS AND CONCLUSIONS

#### Legal Principles

The finding of an unfair labor practice is presumptive proof that some backpay is owed. *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). Once the General Counsel has shown the gross backpay due in the specification, the Respondent has the burden of establishing affirmative defenses which would mitigate its liability, including willful loss of earnings and interim earnings to be deducted from the backpay award. *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963); see also *Sioux Falls Stock Yards Co.*, 236 NLRB 543 (1978).

A Respondent does not meet its burden of proof by presenting evidence of lack of employee success in obtaining interim employment or of so-called “incredibly low earnings,” but must affirmatively demonstrate that the employee did not make rea-

<sup>1</sup> There was a substantial break in the hearing because one of the discriminatees, Michael Goldblatt became seriously ill.

<sup>2</sup> I hereby grant the Respondent's motion to supplement the record. At the close of the hearing, I notified Respondent's counsel that he could supplement the record by putting into evidence, upon notice to the General Counsel, those records upon which the Region's compliance officer made her backpay summary. As the General Counsel has raised no objections, I shall receive into evidence R. Exhs. 22–34, which are annexed to the motion.

sonable efforts to find interim work. *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575–576 (5th Cir. 1966). The evidence must establish that during the backpay period there were sources of actual or potential employment that the claimant failed to explore, and must show if, where, and when the discriminatee would have been hired had they applied. *Id.* at 1308; *McLoughlin Mfg. Corp.*, 219 NLRB 920, 922 (1975); *Isaac & Vinson Security Services*, 208 NLRB 47, 52 (1973). *Champa Linen Service Co.*, 222 NLRB 940, 942 (1976).

Although a discriminatee is required to make reasonable efforts to mitigate a loss of income, he or she is held only to reasonable exertions, not to the highest standard of diligence. *NLRB v. Arduini Mfg. Co.*, 384 F.2d 420, 422–423 (1st Cir. 1968); *Otis Hospital*, 240 NLRB 173, 175 (1979). Success is not the measure of the sufficiency of the discriminatee’s search for employment. The law requires only an “honest, good faith effort.” *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955). A discriminatee is not required to apply for each and every possible job that might have existed in the industry, or even to apply for work during each and every quarter. *Champa Linen Service*, above at 942; *Madison Courier, Inc.*, 202 NLRB 808, 814 (1973); *Sioux Falls Stock Yards*, above at 551; *Cornwell Co.*, 171 NLRB 342, 343 (1968). What constitutes reasonable efforts depends on the circumstances of each case, an examination of the entire backpay period, and not upon a purely mechanical examination of the number or kind of applications for work made by the discriminatees. *Cornwell Co.*, supra; *Mastro Plastics Corp.*, above at 1359.

In determining the reasonableness of this effort, the employee’s skill, qualifications, age, and labor conditions in the area are factors to be considered. However, even where the evidence raises doubt as to the diligence of the claimant’s efforts to gain employment, it is the discriminatee who must receive the benefit of the doubt rather than the Respondent wrongdoer whose conduct has created the situation giving rise to the uncertainty. *NLRB v. Miami Coca-Cola Bottling Co.*, above at 572–573; *Neely’s Car Clinic*, 255 NLRB 1420, 1421 (1981); *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), enfd 683 F.2d 1296 (10th Cir. 1982); *Otis Hospital*, above at 174.

On the other hand, a discriminatee, depending on his or her circumstances, is required to seek substantially equivalent work, at least initially. For example, in *Mastro Plastics Corp.*, 136 NLRB 347 (1962), the Board held that in the case of employee Pasculli, that her backpay was cut off because she only sought part-time employment and therefore did not put herself in a labor market comparable to that of *Mastro*. In *EDP Medical Computer Systems*, 304 NLRB 627, 636 (1991), the Board denied a backpay claim on the grounds that the discriminatee did not make an adequate search for similar, or at least similarly paid work. See also *Knickerbocker Plastic Co.*, 132 NLRB 1209 (1961) (in relation to a discriminatee named Anthony Pavani). In *NHE/Freeway, Inc.*, 218 NLRB 259 (1975), the Board stated:

We agree . . . that Hunt’s complete failure, aside from her one early approach to a health facility, to pursue employment as a nurse’s aide was in essence a willful loss of earnings standing between her and her right to back pay. We see no merit in the Administrative Law Judge’s excusing her

from seeking such work on the ground that she was not a nurses aide by vocation, for it is clear she had the training and experience for such work and also that it was her most immediate area of training and experience.

A discriminatee is permitted to take a lower paying job without having his search characterized as inadequate and constituting a willful loss of earnings. But various cases have struggled with a question as to what is a reasonable period of time or circumstances wherein a discriminatee may accept a lower paying job than the one from which he was fired. *Tubari Ltd. Inc. v NLRB*, 959 F.2d 451 (3d Cir. 1992).

I also note that a discriminatee’s decision to become self-employed may be construed as a reasonable effort to mitigate damages. The fact that an employee decides to pursue entrepreneurial activity would not warrant a conclusion that he or she has not made a good-faith effort. In *Kansas Refined Helium Co.*, 252 NLRB 1156 (1980), the Board stated:

As set forth hereafter, a portion of Rodgers’ earnings during the back pay period came from self-employment, which the Second Circuit Court of Appeals held in *Heinrich Motors, Inc. v. N.L.R.B.*, 403 F.2d 145, 148 (1968), ‘is an adequate and proper way for an employee to attempt to mitigate his loss of wages. Self-employment should be treated like any other interim employment in measuring back pay liability.’ Further, ‘the principle of mitigation of damages does not require success; it only requires and honest good-faith effort.’

The Board has also found that poor recordkeeping, uncertain memory, and even exaggeration do not necessarily disqualify an employee from receiving backpay. *Kansas Refined Helium Co.*, supra at 1159; *Sioux Falls Stock Yards*, supra at 559–560. Further, it is neither unusual nor suspicious if a discriminatee cannot accurately recall details of a work search undertaken several years before. *United Aircraft Corp.*, 204 NLRB 1068 fn. 4 (1973).

#### Formula for Gross Backpay

Both discriminatees worked as emergency medical technicians, also referred to as EMTs. This was a relatively unskilled job requiring them to deal with sick or injured people, so as to transport them, usually, to a hospital. At the time of their discharges, Greene and Goldblatt were earning \$9 per hour.

Based on records furnished by the Respondent, specifically payroll records of David Pardi and Francis Reilly Jr., whom the Respondent asserted in a letter dated December 21, 1999, were two employees who would be the “most accurate basis for comparison in calculating the back pay liability,” the compliance officer concluded that Greene should be credited with a \$1-an-hour raise 20 months after his hire (on or about August 6, 1999), and with an additional \$.50-per-hour raise on September 17, 1997. Similarly, and for the same reason, the compliance officer concluded that Goldblatt should be credited with a \$1-an-hour raise 20 months after his hire and an additional 50-cent raise on September 17, 1997. Inasmuch as the Respondent has not shown that the raises given to Pardi and Reilly were related to their special skills, accomplishments or “merit,” it is my opinion that the General Counsel has demonstrated that similar raises would have been given to Greene and Goldblatt.

The compliance officer calculated the average number of hours worked by each discriminatee before his discharge and their average number of overtime hours. She then applied the applicable wage rates as described above. This method of determining the gross backpay, was reasonable. In my opinion, the only serious question in this case is whether the discriminatees made sufficient efforts to mitigate their damages.

Guy Greene

At the opening of the hearing, the General Counsel amended the backpay specification to reduce the claimed net backpay for Greene from \$62,901.22 to \$30,753.60. However, when the hearing resumed, the General Counsel amended the specification to raise the amount claimed on behalf of Green to \$45,354.55. The reason for this was that the claim initially asserted that Greene's workweek at the Respondent was 28.68 hours per week. However, this average included time that he was absent for a 6-week period because of an injury, during which time he collected Worker's Compensation benefits. Thus, the original average included periods of time when he worked zero hours per week on account of an injury, a circumstance which was atypical. Accordingly, the General Counsel argues and I agree, that Greene's average workweek prior to his discharge, should be recalculated to take into account the extended period of absence. As a consequence, Greene's typical hours per week would have been 35.54. On this basis, the General Counsel contends that Greene's net backpay should be \$45,354.55 plus interest.<sup>3</sup>

The Respondent contends that Greene should be disqualified because he willfully concealed his interim earnings.

The Respondent points out that after the initial case was tried, the Region's compliance officer sent written instructions to Greene and Goldblatt regarding recording their attempts to find interim employment and their interim earnings. In filling these forms out, Greene did not include cash payments received for physical training. Thereafter, in an affidavit given by Greene in connection with the backpay investigation, Greene stated that he had earnings from work as a personnel trainer and as a photographer. He also stated that he was paid in cash but didn't remember how much money he earned. Subsequently, Greene, with the assistance of the Region's compliance officer, did his best to reconstruct, in the absence of records, the amount of cash earnings he made before the commencement of this hearing.

In my opinion, Greene did not willfully refuse to disclose his interim earnings. During the backpay investigation, when questioned by the compliance officer, Greene gave truthful answers regarding his search for work and his interim earnings to the extent they could be known. His responses in the backpay investigation do not, in my opinion, meet the standards for disqualification under the rationale of *Ad Art*, 280 NLRB 985, (1986), and *American Navigation Co.*, 268 NLRB 426 (1984).

<sup>3</sup> In the specification, the General Counsel concluded that no backpay should be accorded to Greene during October 1997, because he was unavailable for work due to a knee injury. Taken into account, the General Counsel calculated Greene's net backpay for the 4th quarter of 1997 to be \$232.62. Similarly, the General Counsel conceded that Greene was not available for work for a 1-month period of time during the 4th quarter of 1966, because of an injury, thereby reducing his net backpay to \$2575.64 for that period.

The Respondent also contends that Greene should be disqualified from receiving backpay because he never made an adequate search for equivalent employment.

Fortunately for Greene, his wife is a physician who earned about \$190,000 per year during the backpay period. One could argue that as a consequence, his efforts might not been the same as other discriminatees in attempting to gain interim employment. And to an extent this was true, in the sense that for much of the backpay period, Greene devoted his efforts, with varying degrees of success, in trying to become a self-employed photographer or physical trainer.

The evidence shows that Greene, in 1995, contacted a number of ambulance companies in New Jersey and a hospital in New York. Greene testified that at the hospital, he was told that he did not have the necessary qualifications. He also testified that he met with equal unsuccess when he contacted various ambulance companies in New Jersey. In this regard, Greene testified that he ultimately decided to seek opportunities elsewhere because after a contact with a company called Ambulette, his friend, who worked there, told him that everybody knew about his union activity. From this, Greene surmised that it would be difficult obtaining employment as an EMT in the area because of his union activities that had caused his discharge from the Respondent in the first place.

Greene's testimony that he gave up on his search for an EMT job because he believed that he was being blackballed, was uncontroverted. That being the case, he would be excused to seek alternative employment even if at a lower wage rate. *United Aircraft Corp.*, 204 NLRB 1068 (1973). It also renders essentially irrelevant, the testimony of Robert Sans, presented by the Respondent as an expert witness and who testified that there were plenty of EMT jobs available within a 14-mile radius of Hackensack. In *Lundy Packing Co.*, 286 NLRB 141 (1987), the Board stated:

It is well settled that the reasonableness of a discriminatee's efforts to find a job . . . need not comport with the highest standard of diligence . . . . Rather it is sufficient that the discriminatee make a good faith effort. In determining the reasonableness of this effort, the discriminatee's skills, experience, qualifications, age and labor conditions in the area are factors to be considered. The existence of job opportunities by no means compels an inference that the discriminatees would have been hired if they had applied.

Applying these principles here, we point out first that no showing has been made that a specific discriminatee refused a job offer. Nor does the Respondent's evidence establish that the discriminatees would have been hired if they had applied at a particular company. Absent any such showing, testimony describing available job opportunities is of limited significance.

The judge's tolling of back pay for these four discriminatees has the effect of condemning them for accepting part-time jobs, despite the fact that such jobs had the

effect of mitigating the Respondent's damages at a time when they had gone through recurrent but fruitless efforts to find employment.

Inasmuch as I conclude that the Respondent has not met its burden to show that Greene failed to make an adequate search for work during the 4th quarter of 1985, I shall accept the compliance officer's calculation that during that quarter, his net backpay was \$3433.92 plus interest.

After being fired by the Respondent, Greene's first and last job as an employee, was at the Harlem YMCA where he was hired in January 1996 as a physical trainer. As it appears that his rate of pay was similar to that earned while at Aero, this would be equivalent employment. Greene worked at the YMCA during the first quarter of 1996, but was discharged after about 4 weeks. The General Counsel calculated that during the 1st quarter of 1996, Greene's interim earnings were \$2556 and that his net backpay during that quarter was \$1742.58 plus interest.<sup>4</sup>

Subsequent to his employment at the YMCA, Greene focused all of his attention on getting freelance work as a physical trainer or as a photographer. As a physical trainer, Greene tried to obtain clients who he could train at various gyms such as Jack LaLaine, Pumping Iron, the New York Sports and Racquet Club, and the World Gym. He also managed, during the period from 1997 through 1998, to obtain a steady client (the Steve Blank family), which provided a more steady if small source of income. According to Greene, his attempt to become a physical trainer was not particularly successful for a variety of reasons. For one, he described the competition as being quite fierce. For another, gyms rarely were willing to allow him to use their facilities to train people on an independent basis. Additionally, clients tended to be in it for the short term.

In addition, Greene also embarked on a quest to be a freelance photographer. Greene testified that he started this venture in late 1998, and during a 13- or 14-month period, managed to sell some photographs and work on about nine projects. From this, Greene earned about \$1800.

Greene finally testified about an intention to start a dog breeding business. But this failed, essentially because when the puppies were born, he decided to give them away to his friends, instead of selling them.

Greene's entrepreneurial endeavors, no doubt cushioned by his wife's income, were not successful, at least not from an economic point of view. One can't say, however, that he stayed home and made no efforts to earn money. Indeed, he reported interim earnings for every quarter during the backpay period, generally in the range of \$2000 to \$3000. (As noted above, in two quarters he was injured and therefore was unavailable for work.) The question here is whether this effort was a sufficient attempt to mitigate his damages as that term is defined by law.

As it is clear that the Board recognizes that a discriminatee can attempt to mitigate damages by becoming self-employed, Greene's initial period of activity in that regard should, in my

opinion, be treated as a valid effort to mitigate his damages. In this regard, the Board, in *Mastro Plastics*, supra, stated that the principle of willful loss of earnings, "rests not so much on the common law theory of mitigation of damages as on the public policy of promoting production and employment." And in this country, at least, there is a strong public policy of encouraging entrepreneurship.

But there has to be a limit beyond which it becomes objectively obvious and obvious to even the most optimistic entrepreneur that his or her venture will not succeed and cannot substitute for the money earned at the prediscrimination job. In this case, and in the circumstances described by Greene, it is my opinion that a reasonable time to engage in an unsuccessful venture would be 12 months. After that, it seems to me that Greene should have resumed his search for substantially equivalent employment. Accordingly, although I adopt the compliance officer's net backpay claims for Greene up to and including the end of the first quarter of 1997, I also conclude that his backpay should be tolled thereafter. Therefore, I find that for 2d quarter, 1996, the net backpay is \$3928.58 plus interest; that for 3d quarter, 1996, the net backpay is \$3833.68 plus interest; that for 4th quarter, 1996, the net backpay is \$2575.64 plus interest; and that for 1st quarter, 1997, the net backpay is \$4278.72 plus interest.

Michael Goldblatt

Prior to his discharge, Goldblatt, had worked, on average, 40.468 hours per week plus an average of 4.06 hours per week at overtime rates. He also worked part time at Pathmark both before and after he was discharged by Aero.

It also is noted that Goldblatt, as a result of a childhood accident, had one leg amputated and uses a prosthesis that has to be changed from time-to-time. Although this may result in discomfort, especially when a new prosthesis is fitted, Goldblatt has sought, with varying degrees of success, to work all of his adult life. Indeed, the number of hours he worked while at the Respondent, indicates a willingness to work hard.

According to Goldblatt, one of the problems he has had to deal with during his working life, is that if he discloses his disability to prospective employers, he is likely to face resistance in being offered employment.<sup>5</sup> As a consequence, Goldblatt has padded his job applications by adding, as a job reference, his uncle for whom he claimed to have worked.<sup>6</sup> This is not true, but it is understandable, and does not, in my opinion, deter his backpay claim.

After his discharge from Aero, Goldblatt increased the number of hours that he worked at Pathmark. This was, in my opinion, a reasonable thing for him to do because he already had a job at Pathmark and could substantially increase his earnings simply by adding to his hours. Although, his rate of pay at Pathmark was lower than that at Aero, I don't think it was unreasonable for Goldblatt to increase his hours at Pathmark instead of going on what might have been, for him in light of his disability, a difficult search for a job that might pay only a little bit more.

<sup>4</sup> The fact that Greene was fired from his job at the YMCA does not amount to a willful loss of interim earnings. In *Newport News Shipbuilding*, 278 NLRB 1030 fn. 1 (1986), the Board held that a discharge from interim employment will only toll backpay when the Respondent has established that the discharge was for willful or gross misconduct.

<sup>5</sup> Goldblatt also indicated that he has had difficulty in retaining jobs for one reason or another.

<sup>6</sup> When shown two separate applications with different wages listed for his fictitious jobs with his uncle, Goldblatt testified that he thought he deserved a raise.

Goldblatt continued to work at Pathmark until the week ending July 19, 1997. Both parties agree that the proper measure for interim earnings from Pathmark, is the difference between the average weekly wages earned after his discharge from Aero and the average weekly wages earned before his discharge. *Golay & Co.*, 184 NLRB 241, 245 (1970).

At some point, at the urging of a friend and without much expectation, Goldblatt went to a film shoot and was hired as an extra. During the backpay period, he was able to obtain a small number of such jobs, most of which involved at most a couple of days work but at relatively high fees. As should be obvious from this record, this type of work, although paying very well, is extremely sporadic, at least in the case of Goldblatt. One reason is that if you are an extra on a television show, the producers, according to Goldblatt, are not likely to use a person, as an extra, on a steady basis. (It might seem peculiar to see the same man or woman in the jury box, during each episode of *Law and Order*.)

In January 1997, Goldblatt while still working at Pathmark also obtained a full-time job as an EMT with Life Support Ambulance in Paramus, New Jersey. It seems that Goldblatt initially worked at Life Support Ambulance until December 1997, when he was fired and thereafter was rehired and worked there from January to February 14, 1998.

Goldblatt testified that after working for Life Support Ambulance, he was burnt out and no longer wanted to work as an EMT. In this regard, he testified that over the next several months, he looked for a job as a bartender by looking in newspapers and called up places.

During the period from late June 1998 through September 1998, Goldblatt moved into a friend's house on the Jersey Shore. He did not pay rent and except for a couple of jobs as a movie extra, did not work. Goldblatt asserted that during this time, he attempted to get employment at hotels or bars in the area but found out that those jobs had already been filled before he arrived at the beach. He made no other efforts during this time to obtain employment.

Upon returning from the beach sometime in late September 1998, and until 1999, Goldblatt sought work only as a film extra.

At about the same time that he returned from the beach, Goldblatt, with the assistance of his mother, applied for disability benefits to the Social Security Administration. His application was based on his amputation and Goldblatt concedes that to an extent, he exaggerated his problems in an effort to obtain permanent disability status. He began receiving benefits in the amount of \$618 per month in November 1998, and received retroactive payments for August and September. The payments were increased in January 1999, to \$621 per month, and in January 2000 to \$623 per month. The basis of the entitlement is supposed to be a person's inability to obtain employment, although the Social Security Administration encourages disabled persons to become employed inasmuch as one can earn up to \$700 per month for 9 months without losing the benefit. I should note that the General Counsel has treated the social security benefits as interim earnings and therefore has reduced the net backpay claim accordingly. Until the end of 1998, Goldblatt only sought employment as a film extra.

In February 1999, Goldblatt got a job at the Montammy Golf Club as a bartender. He ultimately was discharged on or about

May 30, 1999, because he was out sick too often and was unable to work as a waiter or bus boy. Goldblatt attributes this to the fact that he had gotten a new leg and had not yet gotten used to it.

With respect to Goldblatt's postdischarge employment with Pathmark, the Respondent asserts that I should include in his interim earnings, sick pay, holiday pay, and vacation pay that Goldblatt received. The amounts being respectively \$123.50, \$78, and \$78. However, there is nothing in this record to suggest that these benefits were not already part of the wage package that Goldblatt received from Pathmark during the time that he previously had worked for that company. (Indeed, as the payroll records indicate that dues were deducted from his wages, it would appear likely that Pathmark was a union shop where these benefits were part of a collective-bargaining agreement.) As such, these benefits would have been given to Goldblatt during the period that he moonlighted at Pathmark while working at Aero, and not additional new benefits that he received for the first time after his discharge by the Respondent. Accordingly, I will not add these amounts to interim earnings.

In relation to the interim earnings from Pathmark, the Respondent contends that the average number of hours worked by Goldblatt before his discharge was higher than what has been computed by the General Counsel. It therefore argues that the amount of his postdischarge interim earnings would also be higher. In this regard, the General Counsel calculated that prior to his discharge, Goldblatt worked an average of 10.58 regular hours and an average of 3.24 overtime hours at Pathmark whereas the Respondent calculated that Goldblatt worked an average of 8.92 regular hours and 2.96 overtime hours at Pathmark. (During this time, Goldblatt's pay rate at Pathmark was \$6.32 per hour and his overtime rate was \$9.48.)

The General Counsel, in General Counsel's Exhibit 6, indicates that Goldblatt was hired by the Respondent on March 13, 1995, at \$9 per hour. By reviewing the Pathmark payroll records, and using a spreadsheet program, I came up with the following. During the period that Goldblatt worked both at Pathmark and Aero, his average weekly regular hours were 9.183 and his average weekly overtime hours were 3.275. Thus, my calculation for overtime hours is substantially the same as the General Counsel's, whereas my calculation for Goldblatt's regular hours at Pathmark is somewhere between the numbers calculated by the General Counsel and the Respondent.<sup>7</sup> My number being 9.183, this is 1.397 less than the General Counsel's calculation and ultimately results in adding a total of \$18.16 per quarter to Goldblatt's interim earnings during the time that he worked for Pathmark after his discharge from Aero. (Thereby reducing his net backpay by the same amount of \$18.16 per quarter.) Therefore, I will modify the claimed net backpay as follows:

4th Quarter 1995	\$4712.97
1st Quarter 1996	3292.40
2d Quarter 1996	2373.67
3d Quarter 1996	4361.64
4th Quarter 1996	5108.69

<sup>7</sup> In my judgment, the Respondent in making its calculations did not credit Goldblatt with the correct number of regular and overtime hours during the weeks ending June 3, July 8, and September 9, 1995.

1st Quarter 1997                      \$2033.16<sup>8</sup>

As noted above, during 1997, and until sometime in February 1998, Goldblatt worked at Pathmark and at Life Support Ambulance. Because Goldblatt's interim earnings in the second quarter and third quarter of 1997 exceeded his gross backpay, his net backpay is calculated at \$0. Also because his interim earnings for the 4th quarter of 1997 almost equaled his gross backpay, he net backpay is calculated at \$61.32.

In the 1st quarter of 1998, Goldblatt resumed his job at Life Support Ambulance but was subsequently fired from that job. And to the extent that Goldblatt's testimony was that he sought work after this discharge as a bartender, I do not think that the Respondent has rebutted that assertion. In the first quarter of 1998, Goldblatt's interim earnings were \$2093.57 and his net backpay would be \$4223.83 plus interest. In the second quarter of 1998 he had no interim earnings and his net backpay would be \$6355.17 plus interest.

I am more dubious about Goldblatt's claim that he sought work during the third quarter of 1998, when he spent his time at the beach. Although he claimed that he sought work as a bartender at various hotels, it was clear that no jobs were available at this seaside resort. Instead of returning to his home, an area where he had previously worked, Goldblatt decided to stay at the beach and remain, rent free, at his friend's house. Based on this record, I will exclude Goldblatt's backpay claim for the 3d quarter of 1998. See *Knickerbocker Plastic Co.*, 132 NLRB 1209, 1216 (1961).

In the autumn of 1998, Goldblatt filed for Social Security Disability and in November 1988, he began receiving payments of \$613 per month or \$1839 per quarter. From that point onward and until the first quarter of 1999, Goldblatt only sought work as a film extra. Inasmuch as the record shows that for Goldblatt, work as a film extra was sporadic and indeterminate, it is my conclusion that by focusing his job search only in this area, Goldblatt, during this time, absented himself from a comparable labor market and therefore did not make a sufficient search for equivalent work. See *Big Three Industrial Gas*, 263 NLRB 1189, 1219 (1982). See also *Twistex Inc.*, 291 NLRB 46, 49 (1988), where the Board stated: However, in September 1986, she [Tina Potter] began to work on a casual basis, for about \$5 per hour, for a doctor. . . . Between September 1986 and May 1987, she worked only about 100 hours at the doctor's office, working in some months and not at all in others and did not seek any other employment. Clearly, the limited nature of her employment with the doctor left her sufficient time to seek other employment and I find that it was not reasonable for her to cease all efforts to secure more nearly comparable interim employment for this period of about 8 months.

In light of the above, I will toll Goldblatt's backpay claim for the 4th quarter of 1998, not because he was out of the labor market due to a medical disability, but because he was not looking for work that could be considered anything other than sporadic.

In early February 1999, Goldblatt obtained a job at a golf club where he worked primarily as a bartender. In that job, Goldblatt

had interim earnings of \$2679.35 during the first quarter and \$5110.70 during the second quarter. In this job, Goldblatt, but for the fact that he had received a new artificial leg, could have had similar earnings as he had received when he was employed by the Respondent. But according to Goldblatt, because of his physical condition at the time, he missed many days and ultimately was fired because he was out too often. Based on the fact that during these two quarters, Goldblatt accepted what I think constituted equivalent employment, I find that his net backpay for each quarter was \$3582.05 plus interest and \$1244.47 plus interest.

According to Goldblatt, after his discharge from Montammy Golf Club in May 1999, he sought other employment as a bartender as well as seeking jobs as a film extra. In the 3d quarter of 1999, the compliance officer lists Goldblatt's interim earnings as being \$3911.32, apparently all of which was derived from eight jobs as a film extra plus his Social Security benefits. In the 4th quarter of 1999, the compliance officer put Goldblatt's interim earnings at \$3478 derived from 10 jobs as a film extra plus his social security benefits. And finally, in the first 4 weeks of the 1st quarter of 1990, the compliance officer put Goldblatt's interim earnings at \$623 derived from two jobs as a film extra plus his social security benefits. As it is my opinion, that the Respondent has not sustained its burden of proof regarding Goldblatt's claim that he was seeking bartending as well as film extra work during this period of time, I conclude that the compliance officer's net backpay calculations for each of these quarters is correct. Thus, for the 3d quarter of 1999, the net backpay is \$2565.622 plus interest; for 4th quarter of 1999, the net backpay is \$3002.45 plus interest; and for 1st quarter of 2000, the net backpay is \$1438.21.

On these findings of fact and conclusions of law and on the entire record, I issue the following conclusions and recommended<sup>9</sup>

#### ORDER

The Respondent, shall

1. Make payment to Guy Greene the sum of \$19,793.12 plus interest, less tax withholdings required by Federal and State laws.
2. Make payment to Michael Goldblatt the sum of \$44,358.65 plus interest, less tax withholdings required by Federal and State laws.

<sup>9</sup> 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.

<sup>8</sup> Although Goldblatt continued to work at Pathmark until July 1997, he also obtained another EMT job and there is no net backpay claim for him in the second and third quarters of 1997.