

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ATLANTIC VEAL & LAMB, INC.

and

KNITGOODS WORKERS' UNION
LOCAL 155, UNION OF NEEDLETRADES,
INDUSTRIAL & TEXTILE EMPLOYEES, AFL-CIO
INTERNATIONAL UNION, AFL-CIO-CLC

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: 29-CA-24619
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**RESPONDENT ATLANTIC VEAL & LAMB, INC.'S EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE RAYMOND P. GREEN'S
SECOND SUPPLEMENTAL DECISION**

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INTRODUCTION

This matter has been transferred to the Board following the issuance of Administrative Law Judge Raymond P. Green's Second Supplemental Decision. The Board issued its decision and remanded this case to Judge Green on May 28, 2010, 355 NLRB No. 38. In this decision, the Board directed Judge Green:

to make an explicit finding as to Ogando's income in 2002 and 2003 and whether or not the Respondent met its burden to establish that Ogando willfully concealed income from the Board for the period from August 28, 2001, to June 7, 2004. The judge should then make findings as to the backpay owed to Ogando for the period in question based on those findings.

In accordance with this directive, Judge Green issued his aforementioned Second Supplemental decision finding that Ogando willfully concealed his income from the Board for the periods of 2002 through June 7, 2004. However, Judge Green found that Ogando mitigated his damages during the fourth quarter of 2001, and was entitled to an additional \$3,400 in backpay for this time period.

ISSUES PRESENTED

FIRST EXCEPTION

Respondent takes exception to the Judge's finding that Ogando is entitled to back pay for eight-weeks in the fourth quarter of 2001.

SECOND EXCEPTION

Respondent takes exception to the Judge's finding that Ogando attempted to mitigate his damages in the fourth quarter of 2001.

THIRD EXCEPTION

Respondent takes exception to the ALJ awarding Ogando more than six-weeks of back pay in the fourth quarter of 2001.

STATEMENT OF THE CASE

On June 30, 2004, the Board issued its underlying decision in this case finding *inter alia* that Respondent, Atlantic Veal & Lamb, Inc. (hereinafter “Atlantic Veal”) had unlawfully discharged Jorge Ogando. Accordingly, the Board ordered Atlantic Veal to reinstate Ogando and to make him whole. This original decision (342 NLRB 418 (2004)) was enforced by the United States Court of Appeals for the District of Columbia Circuit, 156 Fed Appx. 330 (D.C. Cir., 2005). A compliance specification was issued and a hearing was held before Judge Green. In January of 2007, Judge Green issued his Supplemental Decision in this matter and found that Ogando was entitled to \$18,514 in net back pay, plus interest.

Following the filing of exceptions and cross-exceptions, the Board, at 355 NLRB No. 38 (2010), remanded the case to Judge Green with instructions to make:

An explicit finding as to Ogando’s income in 2002 and 2003 and whether or not the Respondent met its burden to establish that Ogando willfully concealed income from the Board for the period from August 28, 2001 to June 7, 2004. The judge should then make findings as to the backpay owed to Ogando for the period in question based on those findings.

In accordance with this directive, Judge Green issued his Second Supplemental Decision finding that Respondent had, in fact, met its burden of proving that Ogando had willfully concealed his 2002, 2003 and first and second quarter of 2004 earnings. Therefore the Judge denied Ogando back pay for these periods. Nevertheless, the Judge awarded Ogando back pay for the last eight-weeks of the fourth quarter of 2001 and concluded that Ogando’s net back pay is \$21,914, plus interest.

ARGUMENT

FIRST EXCEPTION

Respondent takes exception to the Judge's finding that Ogando is entitled to back pay for eight-weeks in the fourth quarter of 2001.

SECOND EXCEPTION

Respondent takes exception to the Judge's finding that Ogando attempted to mitigate his damages in the fourth quarter of 2001.

THIRD EXCEPTION

Respondent takes exception to the ALJ awarding Ogando more than six-weeks of back pay in the fourth quarter of 2001.

Although not specifically stated by the ALJ, in awarding Ogando back pay for the last eight-weeks of the fourth quarter of 2001, the Judge necessarily found that Ogando had attempted to mitigate his damages. However, in light of Board precedent and case law, the record as a whole does not support this ruling. Due to the fact that Respondent's exceptions are closely related they will be discussed together.

The Board's case law with regard to back pay and the duty to mitigate is well established. In *Grosvenor Resort*, 350 NLRB 1197, 1198-99 (2007), the Board reviewed this precedent and summarized it as follows:

A discriminatee must make reasonable efforts to secure interim work to be entitled to backpay. *Glenn's Trucking Co.*, 344 NLRB 377 (2005). The "sufficiency of a discriminatee's efforts to mitigate backpay are determined with respect to the backpay period as a whole and not based on isolated portions of the backpay period." *Electrical Workers Local 3*, supra at 1266. It is the respondent's burden to prove that the discriminatee failed to exercise reasonable diligence in searching for work. *Millennium Maintenance & Electrical Contracting*, supra. . .

* * *

It is well settled that “an employee discriminatorily laid off or discharged need not *instantly* seek new work; rather the test is whether, on the record as a whole, the employee has diligently sought other employment during the entire backpay period.” (Emphasis added.) *Saginaw Aggregates*, 198 NLRB 598 (1972), *enfd.* 482 F.2d 946 (6th Cir. 1973) (backpay awarded even though employee did not seek interim work for initial 2 weeks). Notwithstanding the Board’s focus on the totality of a discriminatee’s mitigation efforts, a discriminatee’s unreasonable delay in commencing an initial search for interim work will not be excused simply because he or she thereafter diligently seeks work. If the discriminatee unreasonably delays an initial search, the Board will toll backpay for that period, and will commence it if and when a reasonably diligent search begins. See *Marlene Industries Corp.*, 183 NLRB 50, at 54–55 and 59 (1970) (discriminate Edge’s backpay tolled for initial 6-week period, despite subsequent successfully diligent job search efforts).

In the case at bar, Ogando freely admitted that he did not immediately begin a search for work. At page 74 of the Transcript leading up to Judge Green’s Supplemental Decision, Ogando testified as follows:

Q: But, sir, why is it that you didn’t look for a job from the day you left Atlantic until November of 2001?

A: Well, what happened is that I left the company in August the 28th and November - - September 11, you know what happened. So after September 11, everything stopped. Everything was closed. The economy collapsed. So I decided not to look for a job.

According to Ogando, he did not look for work until mid-November of 2001 (Transcript at page 72).

In his initial Supplemental Decision, Judge Green described Ogando’s explanation as follows: “To me this is a nonsequeter. The New York economy did not cease as of September 11, 2001 and I can see no reason why Ogando should be excused from looking for work during this period.” Apparently after the Board remanded this case to Judge Green, he decided to revisit this quarter of the back pay period and found that Ogando began to mitigate his damages in

November of 2001. The Judge's Second Supplemental decision, however, awards Ogando back pay from the beginning of November 2001. Clearly, Ogando is not even arguably entitled to back pay until mid-November, which would equal six-weeks, not eight-weeks as the Judge awarded.

In accordance with Board precedent, the whole record must be consulted in determining whether a discriminate made a good faith effort to mitigate his damages. It is Respondent's position that when the record, as a whole, is reviewed, Ogando is not entitled to back pay for any part of the fourth quarter of 2001. Ogando testified that after his termination, he applied for and received unemployment benefits from the State of New York (T. at 61-62). However, he did not utilize the New York Department of Labor's job search assistance while receive unemployment after discharge (T. at 65). In addition, Ogando could not identify a single potential employer he applied to other than a Moroccan nightclub (T. 68) and Home Depot (T. at 67) and both of these applications were completed in 2002.

Significantly, Ogando, as the Judge's Supplemental and Second Supplemental decisions make clear, is not credible. He deliberately lies when it suits his situation. He lied to the Board, he lied to the bank when applying for a mortgage and he lied on job applications. Why should he suddenly become believable when he says he began a job search in mid-November of 2001? If Ogando was being truthful, certainly he could have identified at least one position he applied for in 2001¹. In reality, the only positions he recalls applying for were in the year 2002.

While Respondent bears the burden of proving that Ogando failed to reasonably mitigate his damages, it should not be required to prove the impossible. If Ogando, as he did with regard to his interim earnings, simply lies about where he applied for work and/or how he conducted his job search, how is an employer supposed to contest his statements? How can a prospective

¹ It should be noted that when Ogando was asked questions about other matters that favored his position, he recalled minute details. For example, he recalled details about bank deposits and banking codes (T. 207-210) but could not recall the name of the person he had a joint bank account with (T. 163).

employer be asked whether Ogando actually applied for employment with it, when the employee refuses to be truthful? How can the respondent check newspapers that were allegedly consulted if the employee refuses to identify which newspapers' classified advertisements he reviewed? It is submitted that when the record discloses multiple untruthful statements and a discriminate cannot identify any employers he applied to or what he did to seek out alternative employment, an inference should be drawn that the discriminate did not, in fact, conduct any type of reasonable job search.

CONCLUSION

For these reasons, the ALJ should not have awarded Ogando any back pay for the fourth quarter of 2001. If, to the contrary, Ogando is awarded back pay for the fourth quarter of 2001, it should not exceed six-weeks of back pay as he did not claim to search for work until mid-November of that year.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief in Support of
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