

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 11-07

March 11, 2011

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Guideline Memorandum Regarding Backpay Mitigation

OVERVIEW

Recent changes to the Board's backpay mitigation doctrine have heightened the burden on discriminatees and the General Counsel to show adequate mitigation of lost earnings. In *Grosvenor Resort*, the Board imposed new job search requirements on discriminatees by establishing a two-week deadline to initiate a search for new work without reduction of backpay.¹ In *St. George Warehouse*, the Board also shifted the burden of production of evidence of adequate search for work, requiring the General Counsel to produce evidence of a reasonably diligent search once the respondent has shown the availability of suitable jobs for the discriminatee.²

These changes in Board law have raised concerns that compliance proceedings, rather than facilitating the remedy that is lawfully due to discriminatees, are now unduly burdening discriminatees and subjecting them to a higher level of scrutiny in establishing a reasonable search for work. Thus, we have considered ways to alter the Board's current mitigation doctrine that would lighten the burden on discriminatees during compliance proceedings.

Based on our assessment of Board mitigation law and of mitigation principles as they have developed in common law and under other statutes, we have concluded that it is appropriate to take two steps to enhance the effectiveness of the backpay remedy and protect discriminatees' rights to an effective remedy in a manner consistent with well-established mitigation law: (1) asking the Board to overturn *Grosvenor Resort* and *St. George Warehouse*, and (2) instructing the Regions to more consistently apply existing Board mitigation principles that rely on state unemployment requirements.

Under well-established general mitigation principles, the reasonableness of the discriminatee's search for work is evaluated in a flexible manner; looking at the totality of the circumstances is an integral aspect of the mitigation doctrine. Thus, any reform of Board mitigation law must maintain this principle. However, the recent changes in

¹ 350 NLRB 1197, 1198-99 (2007).

² 351 NLRB 961, 964-65 (2007).

Board law introduced by *Grosvenor Resort* and *St. George Warehouse* seem to depart from settled mitigation principles. One way to lower the burden on discriminatees and the General Counsel and maintain Board law's consistency with general mitigation principles is to seek revocation of those two recent decisions. Another means of easing the burden of obtaining backpay is to have more consistent application and greater use of existing Board law that recognizes the receipt of unemployment benefits pursuant to state work-search requirements as prima facie evidence of a reasonable search for work.

LEGAL ANALYSIS

I. The “totality of the circumstances” approach to reasonable search must be maintained

A. Development of the Board’s reasonable search standard

The mitigation duty was introduced into Board law by the Supreme Court in *Phelps Dodge Corp. v. NLRB*.³ The Board’s earliest cases did not impose a duty on discriminatees to mitigate their loss of earnings. In these early cases, the Board adjusted the backpay owed to discriminatees by deducting any interim earnings of the discriminatees during the relevant period, but did not consider whether discriminatees made any efforts at reemployment.⁴ In *Phelps Dodge*, however, the Court held that Board backpay orders should remedy “only actual losses” and that to do so backpay deductions should be made “not only for actual earnings,” but also for “willfully incurred” losses.⁵ The Court required the Board to consider whether there was an “unjustifiable refusal to take desirable new employment” and to allow the employer “to go to proof on this issue.”⁶ This mitigation requirement was grounded on “the healthy policy of promoting production and employment.”⁷ Thus, *Phelps Dodge* established the failure to mitigate damages as an available defense to be proved by an employer seeking a reduction of its backpay obligation.

The Board’s initial application of the *Phelps Dodge* mitigation doctrine allowed respondents to reduce backpay only by showing that the discriminatee rejected a job offer or left desirable employment without justification.⁸ The Board initially introduced the duty to make a reasonable search for work in response to economic conditions

³ 313 U.S. 177, 197-200 (1941).

⁴ See, e.g., *Clinton Cotton Mills*, 1 NLRB 97, 111 (1935); *Cohen, S. & Sons*, 4 NLRB 720, 727 (1937); *EI Paso Elec. Co.*, 13 NLRB 213, 245 (1939), *enforced in rel. part*, 119 F.2d 581 (5th Cir. 1941).

⁵ 313 U.S. at 198.

⁶ *Id.* at 199-200.

⁷ *Id.* at 200.

⁸ See, e.g., *Rapid Roller Co.*, 46 NLRB 216, 216-17 (1942), *on remand from* 126 F.2d 452 (7th Cir. 1942).

during World War II in *Ohio Public Service Co.*⁹ Given the wartime abundance of jobs and the national need for labor, the Board began to allow employers to reduce backpay not just by showing a refusal to take a job, but also by showing that the discriminatee had not made “reasonable efforts” to get new employment.¹⁰

The duty to make “reasonable efforts” to find new employment remains an integral part of the Board’s mitigation doctrine since *Ohio Public Service*. Under this doctrine, employers may reduce their backpay obligation by showing that a discriminatee failed to make “a reasonably diligent effort to obtain substantially equivalent employment.”¹¹ The “reasonably diligent effort” requires only a good-faith and sincere attempt by the discriminatee to find work.¹² A good-faith effort is “conduct that is consistent with an inclination to work and to be self-supporting.”¹³ The Board evaluates the reasonableness of the discriminatee’s efforts under the totality of the circumstances, including factors such as the economic climate, the relevant labor market, the discriminatee’s skills, qualifications, and personal circumstances.¹⁴

B. The Board’s Totality of the Circumstances Approach Is Consistent with Mitigation Jurisprudence

The Board’s requirement of a “reasonable search” defined by the totality of the circumstances mirrors well-established mitigation principles as applied in other areas of the law. The duty to mitigate that requires a claimant to use “reasonable diligence” in finding new employment is “rooted in an ancient principle” of the law of damages: the general rule that the victim of a legal wrong must use “such means as are reasonable under the circumstances” to minimize damages.¹⁵ The principle of reasonable diligence applies whether the action arises in tort, contract, or a statutory claim.¹⁶ In all these varied legal contexts, reasonable diligence is determined based on a multitude of factors, including characteristics of the individual seeking work and the job market, and may vary significantly on a case-by-case basis.¹⁷

⁹ 52 NLRB 725 (1943), *enforced*, 144 F.2d 252 (6th Cir. 1944).

¹⁰ *Id.* at 729.

¹¹ *Lorge School*, 355 NLRB No. 94 (2010), slip op. at 3.

¹² *Id.* (and cases cited).

¹³ *Allegheny Graphics, Inc.*, 320 NLRB 1141, 1144 (1996), *enforced* 113 F.3d 845 (8th Cir. 1997) (quoting *Mastro Plastics Corp.*, 136 NLRB 1342, 1359 (1962)).

¹⁴ *Allegheny Graphics*, 320 NLRB at 1144; *Lundy Packing Co.*, 286 NLRB 141, 142 (1987), *enforced*, 856 F.2d 627 (4th Cir. 1988). See also *Pope Concrete Prods.*, 312 NLRB 1171, (1993), *enforced mem.*, 67 F.3d 300 (6th Cir. 1995).

¹⁵ *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 & n.15 (1982).

¹⁶ *Id.* See also Richard J. Gonzalez, *Satisfying the Duty to Mitigate in Employment Cases: A Survey and Guide*, 69 Miss. L.J. 749, 752-53 (1999).

¹⁷ Gonzalez, *supra*, at 755-57 (reasonableness is gauged by “the unique factual circumstances,” including individual characteristics of the claimant and the job market); Lisa J. Bernt, *Finding the Right Jobs for the*

Thus, the Board's use of a case-by-case "totality of the circumstances" approach follows settled principles of the law of damage mitigation. Any modifications to Board law on backpay mitigation must retain the totality of the circumstances principle or place Board law outside the mainstream of mitigation law.

II. Recent Changes in Board Law Seem to Depart from Settled Mitigation Law and Should be Overturned

The recent changes in the Board's mitigation doctrine, resulting from *Grosvenor Resort* and *St. George Warehouse*, do not appear to be consistent with the totality-of-the-circumstances approach or with well-accepted burden of proof principles.

A. *Grosvenor Resort's* two-week deadline

The Board's imposition in *Grosvenor Resort* of a two-week deadline for discriminatees to begin their job search or suffer a concomitant reduction in backpay is a departure from established mitigation law. Before *Grosvenor Resort*, consistent with the totality-of-the-circumstances test, the Board had no defined rule as to how quickly discriminatees must begin their search for work. Rather, the Board looked at the discriminatees' search efforts over the backpay period as a whole and considered the particular circumstances of each individual.¹⁸ Thus, the *initiation* of a discriminatees' job search was evaluated as simply part of considering those job search efforts as a whole. In *Grosvenor Resort*, however, the Board majority set a deadline of two weeks for discriminatees to begin their job search; any delay beyond two weeks, "absent unusual circumstances," results in a reduction in backpay.¹⁹ *Grosvenor Resort* thus sets two weeks as the presumptively reasonable amount of time for discriminatees to begin searching for work. Any period of time longer than that must be justified by undefined "unusual circumstances."

Reasonable Person in Employment Law, 77 UMKC L. Rev. 1, 20-22 (2008) (reasonable diligence determination based on "the totality of a wide range of circumstances" allowing for "a broad range of acceptable efforts;" this "flexible approach is consistent with traditional principles of damage calculations"). See, e.g., *EEOC v. Pape Lift, Inc.*, 115 F.3d 676, 685 (9th Cir. 1997) (reasonableness of mitigation efforts based on "individual's particular circumstances and characteristics"); *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983) (reasonableness depends on "individual characteristics of the claimant and the job market").

¹⁸ *Grosvenor Resort*, 350 NLRB at 1209 (Walsh, dissenting).

¹⁹ 350 NLRB at 1199-1200.

The *Grosvenor* majority seemed to glean the two-week upper limit from a survey of Board cases.²⁰ But, as the dissent points out, Board law has long focused on the reasonableness of discriminatees' efforts as a whole, taking into account their particular circumstances and eschewing precise numerical requirements or "mathematical formulas."²¹ None of the cases relied on by the *Grosvenor* majority implicitly or explicitly suggest that a two-week limit is appropriate in every case.²² Indeed, the majority conceded the existence of Board precedent that found longer delays to be reasonable and proceeded to distinguish them on their facts.²³ The majority opinion thus implicitly acknowledges factual scenarios in which longer delays may be reasonable, but its imposition of an inflexible two-week limit forecloses precisely such fact-intensive analysis, absent "unusual circumstances."

The two-week limit also makes Board law inconsistent with mainstream mitigation doctrine and conflicts with the traditional "totality of the circumstances" approach to mitigation. The imposition of a strict and specific deadline ignores common, hardly "unusual," circumstances that may reasonably affect the timing of a discriminatee's search for work, such as whether the discriminatee is making active efforts to obtain reinstatement, how long the discriminatee had been employed and therefore disconnected from the job-seeking process, hiring cycles in the relevant job market, any complicating factors surrounding the circumstances of the termination, and factors that may affect the discriminatee's frame of mind. Courts have considered such factors in their mitigation analysis under other statutes.²⁴

²⁰ 350 NLRB at 1199.

²¹ *Id.* at 1207.

²² *Id.* at 1208-1209.

²³ *Id.* at 1199 n. 13.

²⁴ See, e.g., *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 394 (5th Cir. 2003) (reasonable for plaintiff not to seek employment for first two months after termination when he was attempting to get rehired by defendant employer); *Air Line Pilots Ass'n, Int'l v. Trans States Airlines, LLC*, 692 F. Supp. 2d 1105, 1113-14 (E.D. Mo. 2010) (several months' delay in pursuing airline employment not unreasonable given that circumstances of plaintiff's termination and airline practices that made it unlikely for him to obtain new employment prior to arbitral award); *Reilly v. Cisneros*, 835 F. Supp. 96, 101 (W.D.N.Y. 1993), *aff'd*, 44 F.3d 140 (2d Cir. 1995) (several months' delay in starting active job search was not unreasonable given plaintiff's circumstances that included 18-year tenure at the defendant employer and struggles with alcoholism); *Lavelly v. Trustees of Boston Univ.*, Civ. A. No. 83-955-G, 1987 WL 17539 (D. Mass. 1987), at *5 (seven months' delay in job search not unreasonable where plaintiff was pursuing reinstatement via administrative and contractual remedies, especially considering the timing of plaintiff's academic-year employment cycle); *Jacobson v. Pitman-Moore, Inc.*, 582 F. Supp. 169, 178 (D. Minn. 1984) (claimant's use of three weeks of accrued vacation time before starting job search was reasonable).

B. St. George Warehouse's shifting of the burden of production

The other departure from established mitigation law is *St. George Warehouse's* shift in the burden of production of evidence.²⁵ Since *Phelps Dodge* introduced the concept of mitigation of damages into Board law, it has been well-established that mitigation is a defense that the employer must raise and on which the employer has the burden of proof.²⁶ The General Counsel's initial burden is to establish the gross backpay due to the discriminatees. It is up to the employer to prove facts that would reduce the amount of backpay, such as interim earnings or a willful loss of earnings.²⁷

Until *St. George Warehouse*, the employer carried both the burden of persuasion and the burden of production on the issue of reasonable search for work. Once the General Counsel established gross backpay, in order to prove lack of a diligent search the employer had to prove two elements: (1) that "there were substantially equivalent jobs in the relevant geographic area," and (2) that "the discriminatee unreasonably failed to apply for these jobs."²⁸ Under this allocation of the burdens, the employer had to "affirmatively demonstrate that the employee 'neglected to make reasonable efforts to find interim work.'"²⁹

Since *St. George Warehouse*, the employer need only show the first element, that substantially equivalent jobs were available. Once the employer comes forward with evidence to satisfy this element, the burden of production shifts to the General Counsel to produce evidence affirmatively establishing a reasonable search for work.³⁰

As the dissent noted in *St. George Warehouse*, the shifted burden of production is against the weight of judicial authority.³¹ Courts have specifically refused to shift the burden of production because to do so would be an obstacle to backpay recovery, contrary to the traditional allocation of burdens, and unwarranted.³² Indeed, courts have

²⁵ 351 NLRB at 964.

²⁶ *Avery Heights*, 349 NLRB 829, 834 (2007); *Allegheny Graphics*, 320 NLRB at 1144 (and cases cited); *NLRB v. Midwestern Pers. Serv.*, 508 F.3d at 422-23.

²⁷ *Avery Heights*, 349 NLRB at 834.

²⁸ *St. George Warehouse*, 351 NLRB at 961.

²⁹ *Allegheny Graphics*, 320 NLRB at 1144 (quoting *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575-76 (5th Cir. 1966)).

³⁰ 351 NLRB at 961.

³¹ 351 NLRB at 969.

³² See *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575 (5th Cir. 1966) (shifting the burden of production to the General Counsel would be impractical and "significantly hamper the backpay remedy"); *Florence Printing Co. v. NLRB*, 376 F.2d 216, 223 (4th Cir. 1967) ("To say that the opponent of one who has the burden of proof, nevertheless, has the burden of producing evidence for his adversary is in reality to shift the burden of proof."); *NLRB v. Mooney Aircraft, Inc.*, 366 F.2d 809, 813-14 (5th Cir. 1966) (rejecting notion that General Counsel should have burden of production because of easier access to information about discriminatees' work searches); *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963) (fact that Board may obtain mitigation information as part of its investigation into backpay

overwhelmingly endorsed the pre-*St. George Warehouse* burdens of proof.³³ Although the Board majority in *St. George Warehouse* relies on the Second Circuit's decision in *NLRB v. Mastro Plastics Corp.*,³⁴ as support for its shift in the burden of production,³⁵ the majority acknowledges that even the Second Circuit has interpreted the *Mastro Plastics* requirement in a limited manner, i.e., as requiring merely that the General Counsel make the discriminatees available to testify, not that the General Counsel necessarily call them to the stand.³⁶ Thus, even *Mastro Plastics* does not support the new burden of production established in *St. George Warehouse*, nor does the Second Circuit espouse it.³⁷

The *St. George Warehouse* shift in burdens is also contrary to common law and general principles of damages mitigation.³⁸ Under Title VII discrimination cases and other employment statutes, courts have uniformly and unequivocally placed the burden of production of mitigation evidence on the respondent employer.³⁹ Under this well-

amounts does not require General Counsel to assume the burden of coming forward with evidence on the employer's defense).

³³ See, e.g., *NLRB v. Jackson Hosp. Corp.*, 557 F.3d 301, 308 (6th Cir. 2009); *NLRB v. Velocity Exp., Inc.*, 434 F.3d 1198, 1203 (10th Cir. 2006); *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 721 (3d Cir. 2001); *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1118 (7th Cir. 1992) (citing *NLRB v. P*I*E* Nationwide, Inc.*, 923 F.2d 506, 513 (7th Cir. 1991)); *Lundy Packing Co. v. NLRB*, 856 F.2d 627, 629 (4th Cir. 1989); *NLRB v. Mercy Peninsula Ambulance Service, Inc.*, 589 F.2d 1014, 1017 (9th Cir. 1979); *The Madison Courier, Inc.*, 472 F.2d 1307, 1318 nn. 31 & 32 (D.C. Cir. 1972) (quoting *Brown & Root*, 311 F.2d at 454).

³⁴ 354 F.2d 170, 175 (2d Cir. 1965).

³⁵ 351 NLRB at 964 n.11.

³⁶ See *NLRB v. Ferguson Elec. Co.*, 242 F.3d 426, 434-35 (2d Cir. 2001).

³⁷ See *McDaniel Ford, Inc. v. NLRB*, 12 Fed.Appx. 75, 77 (2d Cir. 2001), 2001 WL 699121, at **1 (endorsing the traditional allocation of burdens that once the General Counsel has established the backpay the burden shifts to the employer to establish facts to mitigate its liability). As the dissent in *St. George Warehouse* notes, the D.C. Circuit has also retreated from its earlier adoption of the *Mastro Plastics* rule. 351 NLRB at 970 n.4 (citing *Madison Courier*, 472 F.2d at 1318 nn. 31 & 32 (it is employer's burden to establish facts to mitigate its liability)). See also *Nordstrom v. NLRB*, 984 F.2d 479, 481 (D.C. Cir. 1993).

³⁸ See Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 Me. L. Rev. 199, 223 & n.162 (2010) (criticizing *St. George Warehouse* as "contrary to the common law and holdings under various federal employment statutes," citing cases). See also 3 Jacob A. Stein, *Stein on Personal Injury Damages* §18.17 (3d ed.) ("defendant has the burden of proof to show a failure to mitigate. ... The defendant must carefully develop the facts to show that the plaintiff should have accepted another job."); *Eureka Inv. Corp., N.V. v. Chicago Title Ins. Co.*, 743 F.2d 932, 940 (D.C. Cir. 1984) (once prima facie case of damages is made, "the burden of production shifts to the opponent to go forward with evidence tending to mitigate or abate damages"); *Boehm v. ABC, Inc.*, 929 F.2d 482 (9th Cir. 1991) (on issue of damage mitigation, defendant bears burden of both production and persuasion).

³⁹ See, e.g., *Wooldridge v. Marlene Ind. Corp.*, 875 F.2d 540, 548 (6th Cir. 1989) (defendant has burden of producing evidence to establish plaintiff's lack of diligence in mitigating damages, quoting *Rasimas*, 714 F.2d at 623); *Brady v. Thurston Motor Lines*, 753 F.2d 1269, 1274 (4th Cir. 1985); *Nord v. United States Steel Corp.*, 758 F.2d 1462, 147-71 (11th Cir. 1985) and cases cited (burden of producing evidence of lack of diligence properly falls on defendant); *Marks v. Pratt Co.*, 633 F.2d 1122, 1125 (5th Cir. 1981); *Reithmiller v. Blue Cross/Blue Shield*, 390 N.W.2d 227, 230 (Mich. Ct. App. 1986).

established burden allocation, a plaintiff is not required to produce rebuttal evidence of diligence in seeking employment until a defendant has met its burden of showing that there were substantially equivalent positions available *and* a plaintiff did not use reasonable diligence in seeking such substantially equivalent positions.⁴⁰

Thus, in reducing the employer's burden to that of producing only evidence that there were substantially equivalent positions available and requiring the General Counsel to then produce evidence of a reasonable search for employment, *St. George Warehouse* deviates from well-settled law on the mitigation of damages.

III. The Board's Existing Policy of Treating Eligibility for Unemployment Compensation as Prima Facie Evidence of Reasonable Search Should be Broadly Utilized

The Board has recognized that state unemployment programs require claimants, in order to receive unemployment insurance, to prove that they are actively and independently searching for work.⁴¹ The Board has concluded that in cases where the discriminatee has qualified for unemployment compensation by satisfying the state office's work-search requirements, receipt of unemployment benefits is prima facie evidence of a reasonable search for work, i.e., it creates a rebuttable presumption that the discriminatee conducted a reasonable search.⁴² The Board, however, has not been precise about the exact contours of this principle. In some instances, the Board has properly focused on the fact that qualifying for unemployment benefits entails proving to the unemployment office that the claimant is actively seeking employment.⁴³ But in other instances, the Board has simply relied on registration with an unemployment agency, without considering whether the discriminatee complied with any job search requirements.⁴⁴

⁴⁰ *Wooldridge v. Marlene Ind.*, 875 F.2d at 548 (citing *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387, 392 (7th Cir. 1975)).

⁴¹ See, e.g., *Taylor Mach. Prods.*, 338 NLRB 831, 832 (2003), *enforced*, 98 Fed. Appx. 424, 175 LRRM 2320 (6th Cir. 2004); *Birch Run Welding*, 286 NLRB 1316, 1319 (1987), *enforced*, 860 F.2d 1080 (6th Cir. 1988) (table); *Midwest Motel Mgmt. Corp.*, 278 NLRB 421, 422 (1986).

⁴² *Taylor Mach.*, 338 NLRB at 832 (receipt of unemployment compensation pursuant to state rules that required proof of a work search every two weeks was prima facie evidence of a reasonable search for employment); *Birch Run Welding*, 286 NLRB at 1319 (compliance with the job search requirements of state office was prima facie evidence of search for employment). See also *Grosvenor Resort*, 350 NLRB 1197, 1199 n.13 (2007); *Avery Heights*, 349 NLRB 829, 834 (2007); *Superior Protection, Inc.*, 347 NLRB 1197, 1198 (2006); *Midwestern Personnel Servs.*, 346 NLRB 624, 67 (2006), *enforced*, 508 F.3d 418 (7th Cir. 2007).

⁴³ See, e.g., *Taylor Mach.*, 338 NLRB at 832.

⁴⁴ See, e.g., *Avery Heights*, 349 NLRB at 834.

The Board's recognition that meeting state unemployment work-search requirements is rebuttable, prima facie evidence of a reasonable search for work has been accepted in the instances it has been viewed by the courts of appeals.⁴⁵ Because it creates only a rebuttable presumption and still allows the employer to rebut the reasonable search based on the specific circumstances of the case, the rule is also consistent with the case-by-case approach to determining reasonable search that is at the core of established mitigation law.

Aside from having support in Board and court precedent, the prima facie evidence rule is also supported by the reality that states currently require unemployment claimants to conduct an active search for work in order to qualify for benefits. State unemployment compensation programs have, for some time, been subject to federal oversight and certain uniform federal regulations, including regulations for eligibility for unemployment compensation.⁴⁶ These eligibility regulations were put in place to ensure that payment of unemployment insurance is limited to individuals who are "able to work and available for work."⁴⁷ The "able and available" requirement seeks to ensure that the claimant has not withdrawn from the labor market.⁴⁸ In this sense, unemployment compensation programs have as one of their goals the same purpose underlying the mitigation doctrine: to encourage reemployment and productivity and discourage idleness.

The federal regulations do not establish any specific work search requirements, leaving them instead to the states to impose.⁴⁹ The Department of Labor has concluded nevertheless that, although not a matter for federal administrative regulation, states "should require an active search for work."⁵⁰ Accordingly, states have implemented, whether by law, regulation, or administrative practice, eligibility standards that require an active search for work in order to receive unemployment benefits. A survey of state unemployment programs reveals that all states and territories have some kind of requirement for an active search for work.⁵¹ Many jurisdictions establish specific

⁴⁵ See *NLRB v. Midwestern Personnel Serv., Inc.*, 508 F.3d 418, 424 (7th Cir. 2007). See also *NLRB v. Taylor Mach. Prods.*, 98 Fed. Appx. 424, 175 LRRM 2320 (6th Cir. 2004), enforcing 338 NLRB 831 (2003); *NLRB v. Birch Run Welding*, 860 F.2d 1080 (6th Cir. 1988) (table), enforcing 286 NLRB 1316 (1987).

⁴⁶ See 20 C.F.R. pt. 604.

⁴⁷ 20 C.F.R. pt. 604.1.

⁴⁸ See *Unemployment Compensation – Eligibility*, 72 Fed. Reg. 1890, 1891 (Jan. 16, 2007) (summary of comments to final rule).

⁴⁹ 20 C.F.R. p. 604.5(f).

⁵⁰ 72 Fed. Reg. at 1891.

⁵¹ See generally Employment and Training Administration, *Comparison of State Unemployment Insurance Laws*, ch. 5-25 (2010), <http://www.oui.doleta.gov/unemploy/comparison2010.asp>. Although this document states that Pennsylvania has no affirmative work search requirements, failure to "apply for suitable work" may be grounds for disqualification from unemployment benefits. See 43 PA. CONS. STAT. ANN. § 802.

numerical requirements for weekly applications or employer contacts.⁵² Others do not set specific numerical requirements, but require job searches that are “reasonable,” “active,” “thorough,” “diligent,” or similarly-phrased descriptions based on notions of reasonable and customary efforts.⁵³ Some jurisdictions, without requiring a set number of employer contacts, set guidelines for what is generally reasonable,⁵⁴ or provide individualized requirements to claimants.⁵⁵ In jurisdictions with no specific numeric requirements, or with variable ones, reasonableness determinations take into account individual factors such as occupation, skills, labor market, and economic conditions.⁵⁶

In short, unemployment compensation programs, in order to promote reemployment of claimants, require individuals to establish that they are actively searching for work. Unemployment offices monitor reemployment efforts either under specific objective requirements set by the states according to their evaluation of what is appropriate in that state, or under a more flexible approach that incorporates the same notions of reasonableness and individual circumstances that guide mitigation law. Given this reality, in cases in which discriminatees have been found eligible for unemployment compensation, a separate, detailed inquiry into discriminatees’ job search efforts is duplicative and unnecessary. In these cases, compliance with state requirements serves as a well-grounded proxy for the “reasonable search” that is required by mitigation law.

REGIONAL OFFICE INSTRUCTIONS

Regions should use this Memorandum as guidance when investigating compliance cases involving the application of *St. George Warehouse* and *Grosvenor Resort*, and the use of the prima facie evidence rule when discriminatees receive unemployment benefits.

⁵² Among those, the prevailing range is between one and three employer contacts per week. For example, Delaware and Louisiana require at least one employer contact each week; Hawaii and Mississippi require three or more weekly contacts; Washington, D.C., Iowa, and New Mexico require at least two contacts per week.

⁵³ These include Alabama, Arizona, California, Idaho, Maine, New Hampshire, Oklahoma, Rhode Island, South Carolina, among others.

⁵⁴ See, e.g., Alabama (providing general guidelines), Connecticut (three weekly contacts generally enough, but one or two may suffice in some instances), Maryland (two weekly contacts generally enough).

⁵⁵ See, e.g., California, Missouri, Ohio.

⁵⁶ Among these are Arkansas, California, Idaho, Maryland, Rhode Island, Virginia, West Virginia, U.S. Virgin Islands.

A. *St. George Warehouse* and *Grosvenor Resort*

The Regions should identify cases that may be proper vehicles for asking the Board to reconsider these recent changes in mitigation law and proceed as follows:

- *St. George Warehouse* — Regions are authorized to seek reversal of *St. George Warehouse* and the changed burden of production in all cases where a discriminatee's reasonable search for work is being litigated. In such cases, Regions should object to the shifted burden of production and challenge the *St. George Warehouse* rule, but should put forth the reasonable search evidence as required under that decision (consistent with this Guideline Memorandum's discussion of using receipt of unemployment benefits as prima facie evidence). In arguing against *St. George Warehouse*, Regions should use the legal argument set forth in Section II.B of this memorandum (above) and may consult the Division of Advice for further assistance in litigating this issue.
- *Grosvenor Resort* — Regions should determine, as part of their compliance investigation, what is a reasonable period of time for the discriminatee to begin to search for work. Regions are authorized to seek reversal of *Grosvenor Resort* in cases in which the Region determines that a delay of more than two weeks is reasonable.
- Regions continue to have discretion to accept backpay settlements that are amenable to all parties, including discriminatees.

B. Receipt of unemployment benefits establishes a reasonable search

In any present and future cases in which a discriminatee has received unemployment compensation, Regions should accept and use receipt of unemployment as evidence of a reasonable search for work. Because, as a rule of law, compliance with the state's requirements is enough to establish a prima facie case, we will argue that any employer contention that a state's requirements are *per se* inadequate will not be sufficient rebuttal. Rather, the employer will have to produce persuasive evidence as to how, in the particular circumstances of the case, compliance with state requirements alone was not a reasonable search, or that there was noncompliance.

We acknowledge that this approach will be of utility only in the subset of cases involving discriminatees who have received unemployment benefits. In any other case, a reasonable search will be established following the Board's "totality of the circumstances" approach, as set out in the Case Handling Manual, using any appropriate evidence, including discriminatee testimony.⁵⁷ In other words, where discriminatees have not received or are no longer receiving unemployment

⁵⁷ NLRB Case Handling Manual (Part III) Compliance ("Case Handling Manual"), Secs. 10660.4-10660.6.

compensation Regions should continue to use the Board's, not the states', requirements as the standard for what constitutes a reasonable search for work.

Accordingly, Regions should:

- Discuss with discriminatees whether they have received unemployment benefits during compliance investigations.
- Continue the current practice of advising discriminatees of their obligation to mitigate and to keep careful records of their efforts to seek employment, including, but not limited to, copies of any forms submitted to the state unemployment office to fulfill unemployment work-search requirements, and any documentation relevant to their receipt of benefits, as discussed in Case Handling Manual III (Compliance) Sec. 10558.2, in order to establish work search efforts. Regions should also continue their current practice of obtaining all these relevant work search records from discriminatees.
- Examine the relevant state's requirements and qualification processes in order to be able to establish what the state required of the qualifying discriminatee.
- In cases in which the Region is relying on receipt of unemployment as evidence of a reasonable search for work, Regions will satisfy the Board's policy of disclosure under Case Handling Manual III (Compliance) Sec. 10650.5 by producing evidence of receipt of unemployment benefits. Additional evidence of work search efforts need not be produced.
- Use the receipt of unemployment benefits as evidence of a reasonable search for work in litigated cases involving discriminatees who have received unemployment compensation, relying on the cases and principles set forth in Section III above.

If Regions have questions or concerns about the application of this memorandum in particular cases they should contact the Division of Advice.

/s/

L.S.