

Atlantic Veal & Lamb, Inc. and Knitgoods Workers' Union, Local 155, Union of Needletrades, Industrial & Textile Employees, AFL-CIO. Cases 29-CA-24484, 29-CA-24619, and 29-CA-24669

May 28, 2010

**SUPPLEMENTAL DECISION AND ORDER
AND ORDER REMANDING**

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER
AND PEARCE

On January 31, 2007, Administrative Law Judge Raymond P. Green issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions with a supporting brief, and the General Counsel filed an answering brief.

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

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

Introduction

On June 30, 2004, the Board issued the underlying decision in this case finding, in relevant part, that Respondent Atlantic Veal & Lamb, Inc. had unlawfully discharged employee George Ogando. As a result of this unfair labor practice finding, the Board ordered the Respondent to reinstate Ogando to his former position or, if that position no longer existed, to a substantially equivalent position. The Board also ordered the Respondent to make Ogando whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions. The Board's Decision and Order was subsequently enforced by the United States Court of Appeals for the District of Columbia Circuit.²

Following the issuance of a compliance specification and a hearing, the judge issued a supplemental decision ordering that the Respondent make Ogando whole for the period from June 7, 2004, until such time as the Respon-

dent makes Ogando a valid offer of reinstatement.³ The judge's supplemental decision denied Ogando backpay from the date of Ogando's discharge on August 28, 2001, until June 7, 2004.

We agree with the judge's finding that Ogando is entitled to backpay for the period from June 7, 2004, and continuing until such time as the Respondent makes Ogando a valid offer of reinstatement.⁴ We also agree with the judge that the General Counsel used a proper formula to calculate the backpay due to Ogando.⁵

For the reasons stated below, however, we find that the judge erred in failing to make findings of fact concerning Ogando's work history from the date of his discharge until June 7, 2004. Accordingly, we shall sever the issue of the backpay due to Ogando for this period of time and remand it to the judge so that he may reconsider the record evidence, make credibility determinations, and provide an analysis explaining the basis for his findings.

Analysis

In finding that Ogando was not entitled to backpay from August 28, 2001, to June 7, 2004, the judge failed to make any findings of fact concerning Ogando's work history for the period. Instead, the judge decided to exclude this entire period from Ogando's backpay computation based on discrepancies between income and job experiences that Ogando reported to the Board and those Ogando provided to third parties on a mortgage application. The judge explained his decision as follows:

[N]otwithstanding that the burden of proof is placed on the Respondent with respect to the discriminatee's search for work or interim earnings, Ogando's prevarications have so muddled the water regarding his work history or search for work from the date of his discharge until the time that he was hired at Whole Foods in 2004, that he has made it impossible for me to make any reasonable conclusions about this period of time.

³ On June 7, 2004, Ogando began his employment with Whole Foods. The judge found that Ogando was entitled to receive backpay for that period because his earnings at Whole Foods were not in dispute.

⁴ In order to make a valid offer of reinstatement, the Respondent must: (1) raise Ogando's pay rate to what it would have been but for the illegal discharge; (2) offer him an opportunity to participate in its health insurance plan; and (3) provide him the proper amount of vacation pay.

⁵ Where a respondent offers an alternative formula for determining backpay, the Board must decide which is the "most accurate" method. See *Woodline Motor Freight*, 305 NLRB 6, fn. 4 (1991), enf'd. 972 F.2d 222 (8th Cir. 1992). Here, we find that the Respondent's proposed formula fails to account for the wage increases received by most employees between 2001 and 2005. Accordingly, of the two formulas proposed, we find that the General Counsel's formula is the most accurate method for restoring the status quo ante.

¹ The Respondent excepts to the judge's denial of its motion to reopen the record so that it could subpoena records from an accountant. As set forth in Sec. 102.65(e)(1) of the Board's Rules and Regulations, however, only "extraordinary circumstances," such as the discovery of new evidence, warrant such relief. Because the Respondent has failed to establish any extraordinary circumstances that would warrant reopening the record, we find that the judge properly denied this motion.

² See *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418 (2004), enf'd. per curiam 156 Fed. Appx. 330 (D.C. Cir. 2005).

In reaching his decision, the judge failed to consider or discuss the Board's Decisions in *Cibao Meat Products*, 348 NLRB 47 (2006), and *Parts Depot, Inc.*, 348 NLRB 152 (2006). In light of those Decisions, we conclude that a remand to the judge for further analysis is necessary.

Under extant Board precedent, the mere existence of discrepancies in reported income, such as those found by the judge here, is insufficient to establish a willful concealment of earnings from the Board that would warrant the denial of backpay for the period of the concealment. See *Cibao*, 348 NLRB at 48. In *Cibao*, the respondent argued that the discriminatee had willfully concealed his interim earnings for certain quarters and, therefore, was not entitled to backpay for those periods. *Id.* at 47–48. In support of its argument, the respondent cited a mortgage application and a credit card application that had been submitted on behalf of the discriminatee, both of which listed higher levels of income than the discriminatee had reported to the Board. *Id.* at 47–48. In rejecting that argument, the Board found that the discrepancies alone between the income reported on the applications and the income reported to the Board did not establish “willful concealment of earnings from the Board.” *Id.* at 48 (emphasis in original); accord: *Atlantic Limousine, Inc.*, 328 NLRB 257, 257 (1999), *enfd.* 243 F.3d 711 (3d Cir. 2001). Rather, the Board found that the “mere suspicion and uncertainty” created by the third-party documents were insufficient to meet the employer’s burden of proving that the General Counsel’s interim earnings calculations were inaccurate. *Cibao*, 348 NLRB at 48. Thus, under *Cibao*, the judge erred in finding that discrepancies alone between the income and job experiences Ogando reported to the Board and those Ogando provided to third parties disqualified him from receiving backpay for the period at issue.⁶

Further, we are uncertain what to make of the judge’s credibility determination with respect to Ogando’s testimony regarding his interim earnings. Ogando specifically denied receiving any interim earnings from Royal

Quality General Construction Inc. or any other entity operated by Angel Diaz. While the judge stated generally that Ogando “cannot be viewed as a credible witness,” and that his “prevarications . . . muddied the water regarding his work history or search for work,” he made no specific finding regarding Ogando’s denial, which was corroborated, at least to some degree, by the testimony of Angel Diaz. In *Parts Depot*, a case similar to this one, an employee testified that she made up a laundry job on a job application to increase her chances of obtaining employment and a mortgage. 348 NLRB at 153. That employee, like Ogando here, denied at the compliance hearing that she actually worked the job. *Id.* However, unlike the judge here, the judge in *Parts Depot* discredited the employee’s denial and affirmatively found that she had earnings from the laundry that she failed to report to the Board. *Id.* The Board, in adopting the judge, then denied gross backpay for each quarter the employee concealed her employment with the laundry. *Id.* Thus, if the judge actually determined that, despite Ogando’s denial, he, in fact, had significant income in 2002 and 2003 not reported to the Board, then *Parts Depot* would call for the curtailment of Ogando’s backpay in those relevant quarters.

Thus, we remand this case to the judge and, on remand, direct the judge 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.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Atlantic Veal & Lamb, Inc., New York, New York, its officers, agents, successors, and assigns, shall make George Ogando whole for the period from June 7, 2004 until such time as the Respondent (1) raises Ogando’s pay rate to what it would be but for the illegal discharge; (2) offers him an opportunity to participate in its health insurance plan; and (3) provides him the proper amount of vacation pay, by paying him the amount following his name, plus interest accrued to the date of payment, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws:

George Ogando	\$18,514
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⁶ Member Schaumber dissented in *Cibao Meat Products*. He applies the majority’s position in that case here for institutional purposes. Member Schaumber notes, however, that the Board in *Cibao* did not find that the discriminatee himself sought to mislead third parties. 348 NLRB at 48. That has not been established yet in this case. Moreover, Member Schaumber adheres to his dissenting view, expressed in *Cibao*, that regardless of whether misrepresentations to third parties constitute “willful concealment of earnings,” as that concept has been defined by the Board, such misrepresentations may still impact backpay. Where the doubt as to the amount of interim earnings arises not from negligent recordkeeping or faulty memory, but rather from willful misrepresentations by the discriminatee, there is no reason to construe that doubt against the Respondent. Instead, Member Schaumber would hold the discriminatee to his misrepresentations for purposes of calculating backpay. See *Cibao*, *supra* at 50 (Member Schaumber dissenting).

IT IS FURTHER ORDERED that the compliance specification's allegation that George Ogando is entitled to backpay for the period from August 28, 2001, to June 7, 2004, is severed from this case and remanded to the administrative law judge for further appropriate action consistent with this decision.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a second supplemental decision containing credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Following service of the second supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

IT IS FURTHER ORDERED that nothing contained in this Decision and Order shall preclude the General Counsel from issuing a new backpay specification and notice of hearing regarding any additional backpay claimed for George Ogando after the third quarter of 2006.

Kathy Drew King, Esq., for the General Counsel.
Bryan T. Carmody, Esq. and *Don Carmody, Esq.*, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case on various dates in July and November 2006.¹ This case involves a backpay specification that was issued by the Regional Director on May 31, 2006. It is based on a Board Decision and Order issued on June 30, 2004, and enforced by the United States Court of Appeals for District of Columbia on October 27, 2005. The specification was subsequently amended on November 13, 2006, after the General Counsel had an opportunity to examine payroll records. In substance, the amended specification updated the backpay period and recalculated the gross backpay by including (a) raises that the discriminate allegedly would have received during the backpay period and (b) overtime amounts that the General Counsel claims that he reasonably would have received.

In the underlying case, the Board, with the court affirming, concluded that the Respondent unlawfully discharged George Ogando on August 28, 2001, and unlawfully suspended Modesto Lora from September 22 to 29, 2001. The Board ordered the Respondent to make whole these employees, with interest, for back wages and other benefits that they lost due to the unlawful discrimination against them.

At the hearing in the present case, the Respondent settled the allegations regarding Modesto Lora for \$610. Also, the Respondent withdrew its contention that Ogando was an undocumented foreign worker.

In its answer, the Respondent asserted that even if Ogando had been illegally discharged, he would nevertheless have been laid off at some later time for economic reasons. This conten-

tion was not supported by any evidence and the Respondent conceded that of the group who were employed in Ogando's department during the period from 2001 to 2006, Ogando would have had seniority over at least some of those people. Since there was no evidence to show that the Respondent would have laid off Ogando for legitimate business reasons at any time after his initial discharge, I reject the Respondent's contention in this respect.

Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after consideration of the briefs filed, I make the following findings and conclusions.

Findings and Conclusions

The principle issue in this case turned out to be the extent to which Ogando had interim earnings during the backpay period and whether he told truth regarding that issue.

At the time that Ogando was discharged from Atlantic Veal, he was earning \$10.75 per hour. Almost 5 years later, he was reinstated by the Respondent on March 8, 2006, at the rate of \$10.25 per hour. On or about May 23, 2006, he received a wage increase to \$11 per hour.

Epifanio, the Region's compliance officer, testified that after examining the Company's payroll records, he saw that other employees in similarly situated jobs, received raises at various times from 2001 through 2006. Based on his review of the records, which showed that most of the employees received at least two raises during that period, Epifanio opined that it is probable that during the same period, Ogando would have received two raises. In Epifanio's opinion, it is likely that Ogando would have received a raise to \$11.50 per hour effective during the 4th quarter of 2003 and a second raise to \$12.25 per hour effective during the fourth quarter of 2005.

I agree with Epifanio's testimony regarding the likelihood that Ogando would have received the above-described wage increases in the amounts and at the times described. Among other things, this means that Respondent's reinstatement of Ogando did not terminate his backpay because his pay rate at the time of the hearing, was still less than what it would have been had he not been illegally discharged.²

In addition, the amended specification added overtime earnings to the gross backpay calculations. Previously, the gross backpay was based on the assumption that Ogando would have worked a 40-hour week during the backpay period. In this regard, Epifanio utilized the payroll records of three employees who had comparable jobs to Ogando and in calculating what Ogando's likely overtime hours would have been, Epifanio averaged the actual overtime hours worked by the exemplars. This is shown in appendix C to the amended specification,

² An agreement between the Employer and the Atlantic Veal & Lamb Union, executed on October 17, 2005, was introduced into evidence. This showed that the employees were supposed to receive, commencing with the payroll period beginning October 10, 2005, a 7-percent wage increase and a 4-percent increase commencing on October 31, 2006. Thus, even if Ogando had been reinstated at the same wage rate that he earned at the time of his discharge, his rate of pay as of October 2005 should have been, at a minimum, \$11.50 per hour. And by November 2006, his rate of pay should have been, at a minimum, at \$11.96 per hour.

¹ I deny Respondent's motion to reopen the record.

which is adopted by me. (The backpay period is still open, but the revised appendix C runs up through third quarter of 2006.)

Ogando testified that because of the events of September 11, 2001, he didn't start looking for work until November 2001. To me this is a nonsequiter. 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.

According to Ogando, he started looking for work in November 2001. He testified that from that point until June 7, 2004, he mainly worked in light construction as a self-employed person. Ogando testified that he went around different neighborhoods and offered his services by knocking on doors. He claims that his only interim earnings before he got his first job at Whole Foods, was through this self-employment. Ogando claims that in 2001, after his discharge by the Respondent, he had no earnings. He claims that in 2002 he had net earnings of \$6,975; that in 2003, he had net earnings of \$4,050; and that he had no earnings in 2004 until he got his job at Whole Foods on June 7, 2004.

On June 7, 2004, Ogando got a job at Whole Foods Markets located in Manhasset, New York. His starting pay rate was \$8.50 per hour and he received a wage increase on October 1, 2005, to \$9.75 per hour. However, Ogando incurred interim expenses; these being the difference in the number of miles he drove to and from his home to Whole Foods and the number of miles that he had previously driven to Atlantic Veal. Using the Federal reimbursement mileage rate, Epifanio calculated Ogando's interim expenses as being \$57 per week from June 1, 2004, to January 31, 2005; \$61.56 per week from February 1 to August 31, 2005; \$73.72 per week from September 1, 2005, to January 5, 2006; and \$67.64 per week from January 6, 2006, until he left Whole Foods and resumed working at the Respondent.

The evidence regarding Ogando's earnings after June 7, 2004, is not in dispute. From the time that Ogando got his job at Whole Foods we know exactly what he earned, either in that job or when he returned to work for Atlantic Veal. For the period of time that he worked for Whole Foods, we can calculate what his gross backpay would probably have been had he not been discharged by the Respondent in terms of his probable hourly pay rate during the backpay period and the likely number of overtime hours that he would have worked up until the time he left Whole Foods and returned to work for Atlantic Veal. And after his reinstatement by the Respondent, Ogando's actual hours of work are recorded and his backpay is simply the difference between what his actual pay was and what it should have been, taking into account the probable wage increases that he would have received but for the discrimination against him.

The only significant question is what should we do about the period from the date of his discharge until the date that he started working for Whole Foods?

At the initial set of hearings held on July 18 and 19, 2006, the Respondent, having subpoenaed Ogando's bank records, showed that Ogando had a number of sizeable deposits made to his accounts during 2003 to 2005. From this, the Respondent argued that Ogando must have earned at lot more money than what he was claiming. However, Ogando explained that in

January 2003, he won \$25,000 in a New York State Lottery and that portions of that money were deposited in his checking and/or savings account at various times after 2003. He also testified that another large deposit was made in 2004 as a result of a pooling arrangement that he and other employees at Whole Foods had set up so that each person contributed a certain amount per week and each was given a large distribution at some later time. (In effect, a socially enforced savings plan.) Finally, some of the deposits were simply transfers from one account to the other.

When Ogando first testified in this proceeding, he identified the application form that he filled out for Whole Foods. Ogando wrote on the application that he had worked from 2000 to 2002 for Yerr's Grocery and that he had worked from 2002 to 2004 for Global Royal Roofing. He explained that he did not work for either company but got permission to put these down as references by Geraldo Nieves from Yerr's Grocery and by Angel Diaz from Global Roofing. Ogando asserted that he did this to make his application look better and to explain his lack of employment from the end of 2001 to the time that he was applying for a job at Whole Foods.

Ogando also testified that in 2003 (when he was self-employed and not earning much money), he purchased a house in Brooklyn with two friends. He testified that the purchase price was \$252,000 and that the other purchasers were Angel Diaz (from Global Roofing), and Diaz' domestic partner. According to Ogando, they all lived in the house together and the payments were \$1,677.89 per month or \$559.30 per person. He states that the couple broke up after 7 or 8 months and the house was sold for \$262,000. (A \$7000 profit.)³ When he first testified about this house, Ogando neglected to tell me (or apparently the General Counsel), that the mortgage was obtained based on his representation that he was employed by a company owned by Angel Diaz and that he had earned \$66,123 in 2002.

As a result of Ogando's testimony, the Respondent's counsel requested an adjournment in order to subpoena some of the people referenced in Ogando's testimony. I granted the extension and handed out blank subpoenas.

We resumed the hearing on November 13, 2006.

At the resumption of the hearing, Ogando identified a document that was received into evidence as Respondent's Exhibit 13. This document, which purported to be a W-2 form that was submitted with a mortgage application on a property at 455 Chestnut Street, Brooklyn, New York, stated that Ogando was employed by a company called Royal Quality General Construction Inc. and that he earned \$66,123.46 in 2002.

Respondent's Exhibit 14 consisted of two pay statements purporting to show that Ogando was issued two checks from Royal Quality General Construction on October 17 and 31, 2003. The latter statement asserts that Ogando's year-to-date pay was \$56,269.18 as of October 31, 2006. Ogando did not

³ If this was Ogando's domicile then the purchase and sale of the house would not be considered a business and therefore any profit would not be interim earnings. See *Cibao Meat Packing Co.*, 348 NLRB 47 (2006).

identify Respondent's Exhibit 14. However, Respondent's counsel and the General Counsel, based on a conference call with a bank official, stipulated that these two pay stubs were, in fact, received by the lending bank from the real estate agent who arranged for the mortgage. It was agreed that both Respondent's Exhibits 13 and 14 were the types of documents that would have been submitted with a mortgage application to show that the borrower had sufficient income to repay the loan.

In relation to the property, Ogando testified that he paid \$10,000 for the down payment and that this was from a portion of the lottery money that he received.

Royal Quality General Construction and Royal Roofing are the interchangeable names of the company that is owned by Angel Diaz. Diaz, who described himself as a good friend of Ogando, was one of the people who purchased this building along with Diaz' domestic partner, Luz Rivera. Among other things, Diaz testified that he consented to Ogando falsely asserting that he worked for his company so that Ogando could have a reference for his job application at Whole Foods.

Nevertheless, Ogando and Diaz testified that Ogando had never been employed by Diaz or by any company that Diaz was associated with. Diaz testified that he does contracting work, mostly by himself, as a sole proprietorship under the name of Royal Quality General Construction, Inc., or under the name of Global Roofing. He testified that he rarely employs anyone else and that he has never employed Ogando in any capacity. (In fact, he sarcastically commented about Ogando's ability to work with his hands by telling us that we needed only look at Ogando's fingernails.) Diaz testified that if he happens, on rare occasions, to use an employee to assist him, he pays that person in cash and never pays by check. According to Diaz, he never issued a W-4 form or any kind of paychecks to Ogando. He testified that Respondent's Exhibits 13 and 14 were not documents that he had ever seen before.

Diaz' testimony regarding the house was at least to some degree, at variance with Ogando's. He testified that Ogando put up about \$6000 for the down payment and he also testified that Ogando never lived in the house. According to Diaz, Ogando agreed to cosign the mortgage because Ogando had a better credit rating than either he or Luz Rivera.

The bottom line here is that Ogando cannot be viewed as a credible witness. Assuming that he is telling the truth now, then he did not tell the truth about his work history on at least several occasions in the past; most significantly when he submitted or agreed to the submission of documents to a bank purporting to show that he was employed and was earning over \$60,000 per year. (I note that the General Counsel did not call the real estate broker to explain how these documents happened to have been submitted to the financial institution that lent \$260,000.)

Alternatively, Ogando is not telling the truth now when he testified that his interim earnings for 2002 were \$6975 and that his interim earnings for 2003 were \$4050.

In my opinion, and notwithstanding that the burden of proof is placed on the Respondent with respect to the discriminatee's search for work or interim earnings, Ogando's prevarications have so muddled the water regarding his work history or search for work from the date of his discharge until the time that he was hired at Whole Foods in 2004, that he has made it impossible for me to make any reasonable conclusions about this period of time. I, therefore, am going to exclude this entire period from the backpay period and calculate his backpay only from the point at which he started working at Whole Foods on June 7, 2004.

[Recommended Order omitted from publication.]