

UNITED STATES GOVERNMENT
National Labor Relations Board
Office of the General Counsel



Memorandum GC 15-01

Date: January 30, 2015

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

From: Richard F. Griffin, Jr., General Counsel

A handwritten signature in black ink, appearing to be "RFG", written over the name of the sender.

Subject: Clarification of GC 11-08

GC 11-08 issued on March 11, 2011 to furnish guidance in connection with calculating backpay in light of the Board's decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010) (providing for daily compounded interest on make whole awards). In addition, the Memorandum set forth several new compliance initiatives seeking changes in current Board law and advised regional offices to plead these new remedies in their unfair practice complaints going forward. In one portion, however, the memo failed to ask Regions to plead a new remedy, but instead, merely directed them to ensure that search-for-work and work-related expenses be calculated separately from backpay and charged to a respondent regardless of whether the discriminatee received interim earnings during the period. Upon further review of Regional practices and GC 11-08 as to that portion of the memo, it was determined that a clarification was necessary.

In order to effectuate a change in the current Board law as contemplated in GC 11-08, in cases where backpay is likely to be owed, Regions should now affirmatively allege in their initial unfair labor practice complaint that search-for-work and work-related expenses are being sought regardless of whether they exceed interim earnings. Further, Regions should argue that

the Board should overrule precedent that holds such expenses are payable only to the extent they do not exceed interim earnings. In order to assist Regions when arguing this issue before the Board, the proposed language for briefing purposes is attached.

Memorandum GC 15-01

DRAFT BRIEF LANGUAGE

THE BOARD SHOULD AWARD SEARCH-FOR-WORK AND WORK-RELATED-EXPENSES REGARDLESS OF WHETHER THESE AMOUNTS EXCEED INTERIM EARNINGS

Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to maintain working for respondent. *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955); *Crossett Lumber Co.*, 8 NLRB 440, 498 (1938). These expenses might include: increased transportation costs in seeking or commuting to interim employment¹; the cost of tools or uniforms required by an interim employer²; room and board when seeking employment and/or working away from home³; contractually required union dues and/or initiation fees, if not previously required while working for respondent⁴; and/or the cost of moving if required to assume interim employment.⁵

Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This has had the effect of limiting reimbursement for search-for-work and work-related expenses to an amount that cannot exceed the discriminatees' gross interim earnings. *See W. Texas Utilities Co.* 109 NLRB 936, 939 n.3 (1954) ("We find it unnecessary to consider the deductibility of [the discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to the Respondent."); *see also N. Slope*

¹ *D.L. Baker, Inc.*, 351 NLRB 515, 537 (2007).

² *Cibao Meat Products & Local 169, Union of Needle Trades, Indus. & Textile Employees*, 348 NLRB 47, 50 (2006); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1114 (1965).

³ *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976).

⁴ *Rainbow Coaches*, 280 NLRB 166, 190 (1986).

⁵ *Coronet Foods, Inc.*, 322 NLRB 837 (1997).

Mech., 286 NLRB 633, 641 n.19 (1987). Thus, under current Board law, a discriminatee, who incurs expenses while searching for interim employment, but is ultimately unsuccessful in securing such employment, is not entitled to any reimbursement for expenses. Similarly, under current law, an employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time such that his/her interim earnings fail to exceed search-for-work or work-related expenses for that quarter, is left uncompensated for his/her full expenses. The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work⁶, but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses.

Aside from being inequitable, this current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the “primary focus clearly must be on making employees whole.” *Jackson Hosp. Corp.*, 356 NLRB No. 8 at *3 (Oct. 22, 2010). This means the remedy should be calculated to restore “the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); see also *Pressroom Cleaners & Serv. Employees Int’l Union, Local 32bj*, 361 NLRB No. 57 at *2 (Sept. 30, 2014) (quoting *Phelps Dodge*). The current Board law dealing with search-for-work and work-related expenses fails to make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the discriminatee that would not have been expended but for the employer’s unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer’s unlawful actions—i.e., those employees who, despite searching for employment following the employer’s violations, are unable to secure work.

⁶ *In Re Midwestern Pers. Servs., Inc.*, 346 NLRB 624, 625 (2006) (“To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment.”).

It also runs counter to the approach taken by the Equal Employment Opportunity Commission and the United States Department of Labor. *See* Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, Decision No. 915.002, at *5, *available at* 1992 WL 189089 (July 14, 1992); *Hobby v. Georgia Power Co.*, 2001 WL 168898 at *29 (Feb. 2001), *aff'd Georgia Power Co. v. U.S. Dep't of Labor*, No. 01-10916, 52 Fed.Appx. 490 (Table) (11th Cir. 2002).

In these circumstances, a change to the existing rule regarding search-for-work and work-related expenses is clearly warranted. In the past, where a remedial structure fails to achieve its objective, “the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole . . .” *Don Chavas, LLC*, 361 NLRB No. 10 at *3 (Aug. 8, 2014). In order for employees truly to be made whole for their losses, the Board should hold that search-for-work and work-related expenses will be charged to a respondent regardless of whether the discriminatee received interim earnings during the period.⁷ These expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts. *See Jackson Hosp. Corp.*, 356 NLRB No. 8 at *1 (Oct. 22, 2010) (interest is to be compounded daily in backpay cases).

⁷ Award of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminatees, such as medical expenses and fund contributions. *Knickerbocker Plastic Co., Inc.*, 104 NLRB 514, 516 at *2 (1953).