

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

COMPONENT BAR PRODUCTS, INC.

and

Case 14-CA-145064

JAMES R. STOUT, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S CROSS EXCEPTION TO THE
ADMINISTRATIVE LAW JUDGE'S REMEDY AND ORDER AND ARGUMENT IN
SUPPORT OF THE CROSS EXCEPTION**

Counsel for the General Counsel, pursuant to §102.46 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, respectfully excepts to the Administrative Law Judge's Remedy and Order in the Decision issued by the Honorable Charles J. Muhl on August 7, 2015, in the following particular:

To the Administrative Law Judge's failure, as part of the remedy, to order reimbursement for discriminatee James Stout's search-for-work and work-related expenses as part of the make-whole remedy for Respondent's discriminatory discharge of Stout. (ALJD p. 14, fn. 7).

Argument in Support of Exception

The General Counsel respectfully submits that the Administrative Law Judge erred when he failed to order reimbursement of discriminatee Stout's search-for-work and work-related expenses as part of the make-whole remedy. (ALJD p. 14, fn. 7). For the reasons that follow, Respondent should be ordered to reimburse Stout for expenses incurred while seeking interim employment.

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 employment;¹ the cost of tools or uniforms required by an interim employer;² room and board when seeking employment and/or working away from home;³ contractually required union dues and/or initiation fees, if not previously required while working for respondent;⁴ 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 discriminatee's gross interim earnings. See *West 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 *North Slope 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

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

² *Cibao Meat Prods.*, 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, 837 (1997).

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 full expenses. The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work,⁶ 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, slip op. at 3 (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*, 361 NLRB No. 57, slip op. at 2 (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.

It also runs counter to the approach taken by the Equal Employment Opportunity Commission and the United States Department of Labor. See EEOC Decision No. 915.002, *Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil*

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

Rights Act of 1991, 1992 WL 189089 at *5 (E.E.O.C. July 14, 1992).; *Hobby v. Georgia Power Co.*, 2001 WL 168898 at *29 (Feb. 2001), aff'd *Georgia Power Co. v. US. Dep't Labor*, No. 01-10916, 52 Fed.Appx. 490 (Table) (11th Cir. 2002).

In these circumstances, changes to the existing rule regarding search-for-work and work-related expenses are 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, slip op. at 3 (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 back pay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts. See *Jackson Hospital Corp.*, 356 NLRB No. 8, slip op. at 1 (2010) (interest is to be compounded daily in back pay cases).

In *Katch Kan USA, LLC*, 362 NLRB No. 162, slip op. at 1 n. 2 (August 4, 2015), the Board noted that the General Counsel requested "all search-for-work and work-related expenses regardless of whether [the discriminatee] received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period." The General Counsel similarly requests such reimbursement in this case. In *Katch Kan*, the Board held that because the relief sought would involve a change in Board law, the proposed remedy should be resolved after a full briefing by the affected parties. *Id.* In this case, Respondent has the opportunity to

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 (1953).

file an answering brief to this Exception under Section 102.46(f) of the Board's Rules and Regulations.

Conclusion

For the foregoing reasons, the General Counsel respectfully requests that the Board find merit to the General Counsel's Exception, but otherwise affirm the Administrative Law Judge's rulings, findings, and conclusions.

Respectfully submitted this 30th day of October 2015.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Counsel for the General Counsel's Cross Exception to the Administrative Law Judge's Remedy and Order and Argument in Support of the Cross Exception was e-filed with the National Labor Relations Board and served via electronic mail and facsimile transmission on this 30th day of October, 2015, on the following parties:

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