

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KING SOOPERS, INC., Employer

and

Case 27-CA-129598

WENDY GEASLIN, an Individual

**RESPONDENT KING SOOPERS' ANSWER TO THE
GENERAL COUNSEL'S LIMITED EXCEPTIONS**

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INTRODUCTION¹

This matter was heard before Administrative Law Judge Amita Baman Tracy (“ALJ Tracy”) on August 11-12, 2015 at the Regional Office’s Hearing Room, Byron Rogers United States Courthouse, 1929 Stout Street, Denver, CO 80294. The General Counsel (“GC”) and Wendy Geaslin (“Geaslin” or “Charging Party”) contended King Soopers, Inc. (“King Soopers” or “Respondent”) violated the National Labor Relations Act (“Act”) by: (1) interrogating Geaslin in March 2014 regarding Union activity; (2) suspending Geaslin on May 9, 2014 for refusing a work order; (3) suspending Geaslin on May 14, 2014 for engaging in inappropriate and aggressive behavior during an investigatory interview; and (4) terminating Geaslin’s employment on May 21, 2014.

This matter was originally set for trial on January, 21, 2015. On the eve of trial, the GC sought and was granted a continuance because Geaslin was hospitalized. GC Ex. 1(q). Neither the reason for Geaslin’s hospitalization nor the duration of her stay were provided. This matter was subsequently rescheduled for trial in August 2015.

On August 6, 2015, two business days prior to trial, the GC filed a Notice of Intent to Amend in which, for the first time, the GC sought to recover search-for-work related expenses regardless of the amount of Geaslin’s interim earnings. *See* GC. Ex. 1(ee). Following receipt of the GC’s Notice of Intent to Amend the Complaint, King Soopers immediately issued a subpoena to obtain information related to the new allegations. GC. Ex. 1(ii). In the subpoena, King Soopers requested documents concerning Geaslin’s fitness for employment and attempts to

¹ Citations in this Brief will be as follows: “Tr. ___:___” to indicate the hearing transcript’s page and line numbers; “R. Ex. ___” to indicate Respondent’s exhibits; “GC ___” to indicate Counsel for the General Counsel’s exhibits; “Jt. Ex. ___” to indicate joint exhibits; and “___ ALJD ___” to indicate the page (preceding ALJD) and line numbers (following ALJD) of the decision of the Administrative Law Judge.

find employment since being terminated by King Soopers, as well as the expenses Geaslin incurred as a result of such job search efforts. *Id.*

On August 10, 2015, the GC filed a Petition to Revoke the Subpoena. GC. Ex. 1(hh). Therein, the GC argued an “enhanced remedy is appropriate in response to unfair labor practices, such as the ones alleged in the Complaint, where the Respondent’s actions have wreaked havoc on an employee’s livelihood.” *Id.* at pp. 2-3. The GC went on to state that “[t]he proper issue at this stage in the proceedings is whether it is proper, as a matter of law, for the Administrative Law Judge to order the enhanced remedy requested by the General Counsel for the alleged unfair labor practices.” *Id.* at p. 3. At trial, Judge Tracy granted the Petition to Revoke, finding that the subpoenaed information was better left for a compliance proceeding. Tr. 17:23-25; 18:1-24. King Soopers did not receive any of the requested information and was prohibited from asking Geaslin about her efforts to obtain employment, as well as any search-for-work expenses she may have incurred, following the termination of her employment at King Soopers.

On October 22, 2015, ALJ Tracy issued a Decision and Recommended Order (“Decision”), which found King Soopers violated Sections 8(a)(1) and (3) of the Act by interrogating Geaslin in March 2014, suspending Geaslin on May 9 and 14, 2014, and terminating Geaslin’s employment on May 21, 2014. 26 ALJD 8-12. Among other things, ALJ Tracy also affirmed her decision to grant the GC’s Motion to Amend the Complaint to add a request for search-for-work related expenses. 10 ALJD 33-37; 11 ALJD 1-21. The added paragraph stated,

9.

As part of the remedy for the unfair labor practices alleged above in paragraphs 5 and 6 the General Counsel seeks an order requiring that the Respondent reimburse the discriminatee for 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.

GC. Ex. 1(ee). Despite permitting this addition to the Complaint, ALJ Tracy denied the GC's request for an enhanced remedy award. In so doing, ALJ Tracy stated, "the revision of this remedy must come from the Board, and accordingly, I decline to include the requested remedy in my recommended order." 11 ALJD 31-32.

On November 19, 2015, King Soopers filed a Statement of Exceptions and Brief in Support of its Exceptions challenging, among other things, ALJ Tracy's Decision to grant the GC's motion to amend the Complaint. Because King Soopers did not have notice of the GC's requested enhanced remedy prior to her Notice of Intent to Amend, the GC did not have an excuse for her delay in moving to amend the complaint, and the merits of an enhanced remedy award were not fully litigated at trial, ALJ Tracy's decision to grant the GC's motion to Amend should be reversed. *See Stagehands Referral Serv., LLC*, 347 NLRB 1167, 1171 (2006).

Also on November 19, 2015, the GC filed a Limited Exception to the Administrative Law Judge's Decision and Recommended Order ("Exception") and a Brief in Support of Limited Exceptions to the Administrative Law Judge's Decision and Recommended Order ("Brief"). The GC's only exception challenges ALJ Tracy's decision not to award search-for-work related expenses regardless of whether Geaslin had interim earnings in excess of these expenses. GC's Limited Exception, para. 1. In support of her exception, the GC restates verbatim her argument and citations from her Post-Hearing Brief. *Compare* GC's Brief In Support of Exceptions, pp. 3-6, *with* GC's Post-Hearing Brief, pp. 41-44. Both sections are directly lifted from General Counsel Griffin's January 30, 2015 clarification of Memorandum GC 11-08 and proposed language regarding search-for-work related expenses. *See* Memorandum GC 15-01. The GC's Brief neither specifically addresses ALJ Tracy's Decision nor discusses why her Decision should

be reversed. The GC also does not analyze why search-for-work related expenses should be awarded in this case.

As described below, ALJ Tracy did not error in refusing to award the enhanced remedy sought by the GC because there is no legal authority supporting such an award. Moreover, an award of search-for-work expenses in this matter would violate King Soopers' due process rights. ALJ Tracy's Decision should not be reversed and the Board should not award Geaslin search-for-work related expenses without regard for her interim earnings.²

ARGUMENT

A. The Board Should Not Award The GC's Requested Enhanced Remedy.

i. An award of search-for-work related expenses is contrary to well-settled law.

Current Board law does not permit an award of job search and other work related fees independent of interim employment earnings. Under well-established Board law, such search-for-work expenses are calculated as deductions from interim employment earnings as opposed to separate expenses. *See e.g., D.L. Baker, Inc.*, 351 NLRB 515, 537 (2007); *Cibao Meat Prods.*, 348 NLRB 47, 50 (2006), *Rice Lake Creamery Co.*, 151 NLRB 1113, 1114 (1965), *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976); *Rainbow Coaches*, 280 NLRB 166, 190 (1986); *Coronet Foods, Inc.*, 322 NLRB 837, 837 (1997); *W. Texas Utilities Co.*, 109 NLRB 936, 939 n. 3 (1954). The GC has not shown any reason to depart from this well-settled law. The purpose of the Act today is the same as it was when the Board initially established its the rules regarding recovery of search-for-work expenses. Without a change in the Act, the Board's analysis in the

² As noted above, on November 19, 2015 King Soopers filed a Statement of Exceptions and Brief in Support of the Statement of Exceptions, which highlights several fatal errors by ALJ Tracy that require reversal of the Decision. If the Board grants King Soopers' exceptions and reverses ALJ Tracy's finding that King Soopers terminated Geaslin in violation of the Act, then the GC's Exception is moot and need not be considered. The GC's Exception is also moot if the Board reverses ALJ Tracy's erroneous decision to grant the GC's last-minute motion to amend the Complaint to add a request for search-for-work related expenses regardless of Geaslin's interim earnings.

above cited cases should continue to apply. If the Board is going to change its precedent, then it must do so for a reason, not just because the GC wants to recover a greater amount of back pay for discriminatees. *See Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186 slip op. at 15 (Aug. 27, 2015) (revisiting joint employer standard because of the change in workplace employment relationships and the increase of the “procurement of employees through staffing and subcontracting arrangements”); *Austin Fire Equip., LLC* 360 NLRB No. 131 slip op. at 5 n. 14 (June 25, 2014) (noting that the Board may overrule precedent “to account for changed circumstances or experience applying the law, or to bring the Board’s precedent more in line with that of reviewing courts.”). The GC has failed to show any change in circumstances or a need to modify Board law regarding search-for-work expenses to align with reviewing courts or experience applying the law. The GC’s request to change established law must be denied.

Although search-for-work related expenses without regard for interim earnings have been requested in multiple cases, the Board has yet to award such an enhanced remedy. *See Casworth Enterprises, Inc.*, 362 NLRB No. 131, slip op. at 2 n. 2 (2015) (holding that such relief would involve a change in Board law); *Katch Kan USA, LLC*, 362 NLRB No. 162, slip op. at 1 n. 2 (2015); *East Market Restaurant, Inc.*, 362 NLRB No. 143, slip op. at 4 n. 5 (2015); *The H.O.P.E. Program*, 362 NLRB No. 128 at 2 n. 1 (2015); *Island Management Partners, Inc.*, 362 NLRB No. 158, slip op. at 3, n. 4 (2015). Thus, the NLRB has had many occasions to change the law and order reimbursement for out-of-pocket or job search expenses, but has chosen not to do so.

The enhanced remedy requested by the GC also undermines the purpose of the Act. As the GC recognized in her Brief, “when evaluating a back pay award the ‘primary focus clearly must be on making employees whole.’” Brief, p. 4 (quoting *Jackson Hosp. Corp.*, 356 NLRB No. 8 at 3 (Oct. 22, 2010)). A windfall as part of a remedy award goes beyond making an

employee whole. *See Starcon International v. NLRB*, 450 F. 3d 276, 277-78 (7th Cir. 2006) (Posner, J.) *enforcing Starcon, Inc.*, 344 NLRB 1022 (2005) (“The National Labor Relations Act is not a penal statute, and windfall remedies—remedies that give the victim of the defendant’s wrongdoing a benefit he would not have obtained had the defendant not committed any wrong—are penal.”).

Moreover, the purpose of analyzing search-for-work efforts in a compliance proceeding is to determine whether an employee fulfilled her obligation to mitigate her losses; it is not an opportunity for the employee to receive a windfall of additional expenses in addition to back pay. *See Wright Elec., Inc.*, 334 NLRB 1031, 1032 (2001) (“It is very well-settled that, in compliance proceedings, the General Counsel has the burden to establish the gross amount of backpay owed to the employee. Then, the burden shifts to the employer . . . to produce evidence that would mitigate its liability.”). An award of search-for-work related expenses without regard to Geaslin’s interim earnings and search-for-work efforts is a windfall and, therefore, must not be permitted.

The GC’s citation to EEOC and DOL regulations is unavailing. *See GC’s Brief In Support of Exceptions*, p. 5. The Act does not provide for “damages” like Title VII or other EEO statutes. As noted above, the Act is intended only to make discriminatees whole. To provide general damages because King Soopers allegedly “wreaked havoc” on Geaslin’s life would undermine the purpose of the Act and is unconstitutional absent a Congressional amendment. Simply stated, the GC’s claim that King Soopers “wreaked havoc” on Geaslin’s life is not compensable under the Act. Further, to make such an award requires discovery like in Title VII litigation to determine the extent of such damage and cause of the purported damage.

No such discovery was had here. The GC's request for search-for-work related expenses must be rejected.

ii. An award of search-for-work related expenses is speculative

A back pay award must be certain, not speculative. *See Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 900 (1984) ("it remains a cardinal, albeit frequently unarticulated assumption, that a back pay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices."); *Iron Workers Local Union 377*, 326 NLRB 375, 377 (1998) ("the Board's power to remedy violations of the Act, though broad, does not extend to imposing what amounts to punitive and speculative damages for a violation of the Act."). The GC's requested remedy is punitive and inherently speculative. Before the Board could begin to calculate the amount of these expenses, it would be required to guess as to the time discriminatees spend searching for work, traveling to and from potential places of employment, as well as the time spent and cost of using the internet (or any other search device) to search for work, among other things. Such speculation is not permitted under the Act.

Further, because of the inherently speculative nature of search-for-work expenses, such an award opens the door for myriad of enforcement issues and employees could easily abuse and falsely increase the amount of the award. Indeed, it would be nearly impossible for respondents and the Board to decipher between legitimate expenses and fabricated expenses. For example, discriminatees could submit receipts or a statement of mileage for reimbursement and neither the Board nor respondents would know whether the alleged expenses were actually incurred while searching for work or were incurred for personal non-work search related reasons. The Board cannot sanction a remedy that is statutorily unavailable, would be impossible to police, and is punitive.

iii. Discriminatees should not incur search-for-work related expenses.

Aside from the legal impediments to an award of search-for-work related expenses, there is virtually no need for a discriminatee to incur search-for-work related expenses. As Administrative Law Judge Keltner W. Locke recognized,

In a past age, a search for work might indeed have resulted in an expense for gasoline or, earlier, hay for the horse. However, the telephone and Internet make it possible to conduct a job search at no extra expense. Indeed, to a significant extent the Internet has transformed the process of looking and applying for a job. This technology has become many individuals' regular way of finding work, and the Board only requires a discriminatee to seek employment using his regular method. *Wright Electric, Inc.*, 334 NLRB 1031 (2001).

Int'l Bhd. of Teamsters, Local 71, 2014 WL 4809567 (N.L.R.B. Division of Judges) (Sept. 26, 2014). Because employees can effectively and efficiently search-for-work without incurring any expenses, there is no need to divert from Board precedent regarding these expenses. Moreover, the use of a discriminatee's telephone and internet to search for work and for personal reasons increases the speculative nature of such an award. There is simply no way to divide the cost of telephone and internet services to compensate only for the costs of searching for work. An award of speculative and uncertain damages that are no more than *de minimis* is contrary to the purposes of the Act. The GC's request for an award of search-for-work related expenses without regard for Geaslin's interim earnings is unsupportable and must be denied.

iv. The GC did not present any evidence supporting an award of search-for-work expenses in this matter.

Not only should the Board decline to modify its well-established law regarding search-for-work related expenses, but it should not award such expenses here because there was no evidence supporting such an award and granting the GC's request would violate King Soopers' due process rights.

The GC specifically argued to ALJ Tracy that King Soopers “wreaked havoc” on Geaslin’s life and reiterated in her Post-Hearing Brief the allegedly extensive *damage* King Soopers caused Geaslin by terminating her employment. *See* GC Ex. 1 (hh) at pp. 2-3; GC’s Post-Hearing Brief, pp. 41-44. The GC’s argument and untimely Notice to Amend was made solely to prejudice ALJ Tracy regarding the injury King Soopers allegedly caused Geaslin. The GC’s attempt to prejudice ALJ Tracy cannot be countenanced.

Similarly, as noted above, the GC requested a continuance of the original trial date in January 2014 because Geaslin was allegedly hospitalized. The GC ignored Geaslin’s incapacity when requesting ALJ Tracy award search-for-work related expenses without regard for her interim earnings. Of course, the reason for Geaslin’s incapacity, as well as the duration of such incapacity, goes directly to the merits of an award of back pay, including search-for-work expenses.

King Soopers specifically sought to discover the merits of a search-for-work expenses award by way of a subpoena and questioning Geaslin at trial. ALJ Tracy, however, revoked King Soopers’ subpoena and prohibited King Soopers from questioning Geaslin about her search-for-work efforts and related expenses. Tr. 17:23-25; 18:1-24. Absent ALJ Tracy’s erroneous ruling, King Soopers would have presented evidence regarding Geaslin’s chronic mental instability and drug addiction; both of which demonstrate that her alleged *damage* was self-inflicted and not caused by King Soopers. ALJ Tracy’s ruling prevented the GC’s request for an enhanced remedy from being fully litigated and the parties from discovering the merits of such an enhanced remedy. Moreover, it kept King Soopers from challenging Geaslin’s credibility on this point and deprived King Soopers of the opportunity to mitigate the prejudice

the GC caused by her inappropriate request. Because King Soopers was not permitted to present such information, an award of search-for-work related expenses is impermissible.

Even the GC admitted this information was necessary in her Petition to Revoke when she argued that “[t]he proper issue at this stage in the proceedings is whether it is proper, as a matter of law, for the Administrative Law Judge to order the enhanced remedy requested by the General Counsel for the alleged unfair labor practices.” GC Ex. 1(hh), at p. 3. To determine if the GC’s enhanced remedy request was appropriate, evidence had to be presented as to Geaslin’s ability, let alone effort, to seek interim employment. Otherwise, it is impossible to know whether King Soopers’ caused the alleged damage to Geaslin or if she caused it by failing to seek employment, being unable to seek employment, or any other reason. ALJ Tracy denied King Soopers any opportunity to present or discover evidence regarding the merits of an enhanced remedy award. An award of search-for-work related expenses under these circumstances, where the parties were precluded from litigating the merits of such award, is improper and obliterates due process for King Soopers. *See e.g., King Manor Care Ctr.*, 308 NLRB 884, 889 (1992) (denying the General Counsel’s last minute requested remedy because it was not fully litigated and would deprive respondent of due process); *Chicago Tribune Co.*, 304 NLRB 259, 262 (1991) (finding that it would not afford all parties due process to rely on evidence outside the record and not presented during trial); *George Banta Co., Banta Div. v. NLRB*, 686 F.2d 10, 17 (D.C. Cir. 1982) (“Even where the record contains evidence supporting a remedial order, the court will not grant enforcement in the absence of either a supporting allegation in the complaint or a meaningful opportunity to litigate the underlying issue in the hearing itself”) (internal quotation marks

omitted). Here, ALJ Tracy precluded a meaningful opportunity to litigate the merits of the GC's requested enhanced remedy award and, therefore, no such award can be imposed.³

The GC will likely argue that the issue of whether back pay and search-for-work expenses should be awarded is better left for a compliance proceeding. This argument is unavailing. It is of no solace that the remedy can be explored in a back pay proceeding when this specific allegation was made in a last minute amendment to the Complaint. Such a late amendment severely prejudiced King Soopers and the GC's ploy should not be permitted. Moreover, *only* the issue of the *amount* of alleged search-for-work related expenses is properly left for a compliance proceeding. The current issue, however, is whether search-for-work related expenses should be awarded at all. *See Starcon*, 450 F.3d at 279 ("There is a difference between entitlement to relief and the amount of relief to which one is entitled."). No such determination can be made without evidence as to whether Geaslin caused or contributed to her losses. Thus, the Board must deny the GC's request.

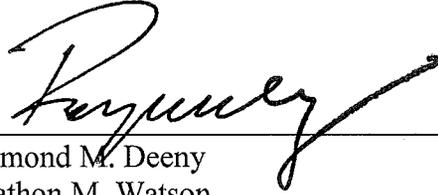
CONCLUSION

Based on the foregoing, the Board should affirm ALJ Tracy's refusal to award Geaslin search-for-work related expenses.

WHEREFORE, King Soopers respectfully requests the Board deny the GC's Statement of Limited Exceptions.

³ Not only was King Soopers deprived of the ability to litigate the merits of an enhanced remedy award, but the GC did not present *any* evidence regarding Geaslin's search-for-work efforts or interim earnings. Indeed, there was absolutely no evidence presented that Geaslin even incurred search-for-work expenses. Without evidence regarding the merits of an enhanced remedy, no such award can be made.

Respectfully submitted this 3rd day of December, 2015.



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CERTIFICATE OF SERVICE

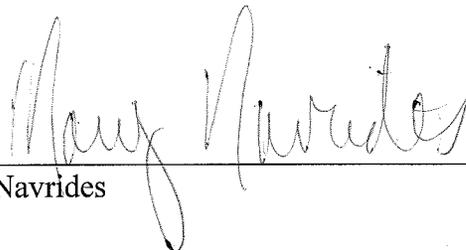
I hereby certify that on the 3rd day of December, 2015, a true and correct copy of the foregoing **RESPONDENT'S ANSWER TO THE GENERAL COUNSEL'S LIMITED EXCEPTIONS** was electronically filed addressed to the following:

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