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' SUPPLEMENTAL BRIEF REGARDING THE CGC'S REQUEST FOR AN AWARD OF SEARCH-FOR-WORK AND OTHER EMPLOYMENT EXPENSES WITHOUT REGARD FOR INTERIM EARNINGS

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INTRODUCTION

The Board requested supplemental briefing on the General Counsel's attempt to recover search-for-work related expenses without regard to interim earnings. The GC's request represents a gross expansion of the Act's remedies to include general compensatory and punitive damages. Only Congress, not the Board, has jurisdiction to expand the Act's remedies. Further, because the Act does not provide for compensatory damages like the current version of Title VII or other EEO or DOL statutes, those statutes cannot justify the Counsel for the General Counsel's ("CGC") requested expansion of the Act's remedies. If Congress intended the Act to provide discharged employees the relief the CGC now requests, then it would have included specific language in the Act contemplating such relief.

Further, this is exactly the wrong case to expand the Act's remedies. Despite the CGC's attempt to prejudice ALJ Tracy by claiming King Soopers "wreaked havoc" on Geaslin's life, King Soopers was prohibited from discovering the veracity of that claim and mitigating the damage the CGC's statement had on ALJ Tracy's ability to be unbiased. Moreover, King Soopers was prohibited from discovering the merits of an award of search-for-work related expenses to Geaslin.

The CGC's requested expansion of the Act's remedies also provides discriminatees a windfall and is punitive to the Respondent; neither of which is afforded by the Act. A discharged employee's search-for-work and other work-related expenses are directly related to his or her mitigation efforts. Extricating an employee's search-for-work efforts from his or her search-for-work expenses would eliminate employees' incentive to seek legitimate and realistic employment opportunities. Moreover, it would be subject to widespread abuse and would be nearly impossible to police. Ultimately, the CGC has provided absolutely no compelling reason

to depart from this eight decades-old law. The Board must retain its traditional treatment of search-for-work expenses absent a change in the Act.

FACTUAL AND PROCEDURAL HISTORY[1]

A. General Background.

This case involves 8(a)(1) and (3) charges filed against King Soopers, Inc. ("King Soopers," "Employer," or "Respondent") by a former employee, Wendy Geaslin ("Geaslin" or "Charging Party"). Geaslin was employed by King Soopers as a Coffee Clerk at the Starbucks located inside King Soopers' Store No. 1 in Denver, Colorado. During the course of her employment at King Soopers, Geaslin was represented by the United Food and Commercial Workers International Union, Local 7 ("Union").

On May 9, 2014, Geaslin was involved in an altercation with Store Manager, Theresa Pelo that, ultimately, led to her being suspended pending an investigation. On May 14, 2014, Geaslin returned to King Soopers with her Union Representative, Danny Craine, to meet with Pelo. During that meeting, Geaslin was again agitated, disrespectful, and argumentative with Pelo and, at the conclusion of that meeting, Geaslin was suspended pending investigation a second time. On May 21, 2014, Geaslin was terminated because of her insubordinate, inappropriate, and disrespectful behavior on May 9 and 14, 2014.

On May 29, 2014, Geaslin filed an Unfair Labor Practice Charge ("Charge") and on August 18, 2014, Geaslin filed an Amended Charge ("Amended Charge"). On October 31, 2014, the Region issued a Complaint and Notice of Hearing. In the Complaint, the CGC alleged King Soopers violated Sections 8(a)(1) and (3) of the National Labor Relations Act ("Act") by suspending Geaslin on May 9 and 14, 2014, and terminating her employment on May 21, 2014.

[1] The factual history is more fully discussed in King Soopers' September 9, 2015 Post-Hearing Brief, November 19, 2015 Brief in Support of Exceptions, and December 17, 2015 Reply in Support of Exceptions. A brief statement of the factual and procedural history is provided herein for context.

The CGC did not request an award of search-for-work related expenses without regard for interim earnings in the Complaint.

This matter was originally set for trial on January 21, 2015. On the eve of trial, the CGC sought and was granted a continuance because Geaslin was allegedly hospitalized. CGC Ex. 1(q). Neither the reason for Geaslin's hospitalization nor the duration of her stay have ever been disclosed. The CGC did not amend the Complaint following the continuance to request an award of search-for-work related expenses without regard for interim earnings.

This matter was subsequently rescheduled for trial and 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.

B. The GC's Position On Expanding The Act's Remedies.

On March 11, 2011, Acting General Counsel Solomon first announced the shift in the CGC's approach to calculating search-for-work and interim work-related expenses. *See* March 11, 2011 Memorandum GC 11-08, pp. 2-3. Acting General Counsel Solomon declared that "effective with the issuance of this memorandum, search-for-work and work-related expenses will be calculated separately from backpay and will be charged to Respondent regardless of whether the discriminatee received interim earnings during the period." *Id.* at p. 3. Acting General Counsel Solomon's 2011 memorandum single-handedly attempted to revise the Act, as well as decades-old Board law regarding the scope of remedies available under the Act.[2]

[2] Multiple courts have held that Acting General Counsel Solomon served in violation of the Federal Vacancies Reform Act. *See e.g., SW Gen., Inc. v. N.L.R.B.*, 796 F.3d 67, 74 (D.C. Cir. 2015); *Hooks v. Remington Lodging & Hospitality, LLC,* 8 F. Supp. 3d 1178, 1187–89 (D. Alaska 2014); *Hooks v. Kitsap Tenant Support Servs., Inc.*, 2013 WL 4094344 at *2 (W.D. Wash. Aug. 13, 2013). Like the underlying actions by Acting General Counsel Solomon in those cases, Acting General Counsel's unilateral attempt to expand the Act's remedies in Memorandum GC 11-08 was unauthorized and cannot support the Board's expansion of the Act's remedies here.

On January 30, 2015, General Counsel Griffin issued a second memorandum intended as a "[c]larification of GC 11-08." *See* January 30, 2015 Memorandum GC 15-01. In General Counsel Griffin's memorandum, he recognized that the previous "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." *Id.* at p. 1. In an effort to "help effectuate a change in the current Board law as contemplated in GC 11-08," General Counsel Griffin provided "proposed language for briefing." *Id.* at pp. 1-2. Regional Director Griffin's proposed language relies heavily on Acting General Counsel Solomon's reasoning in the prior memorandum; both define search-for-work expenses broadly and both analogize to damages available under Equal Employment Opportunity Commission ("EEOC") and Department of Labor ("DOL") regulations. *Id.* at pp. 3-5.

C. The CGC's Request For Search-For-Work Expenses In This Matter.

On August 6, 2015, two business days before the trial was scheduled to commence, CGC filed a Notice of Intent to Amend the Complaint. Ex. 1(ee). Therein, the CGC stated that she will move to amend the Complaint to add the following language:

> As part of the remedy for the unfair labor practices alleged above in paragraphs 5 and 6 the General Counsel seeks an order requiring <u>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,</u> or at all, during any given quarter, or during the overall backpay period.

Ex. 1(ee) (emphasis added).

Following receipt of the CGC's Notice of Intent to Amend the Complaint, King Soopers immediately issued a subpoena to obtain information related to the new allegations. Ex. 1(ii). In the subpoena, King Soopers requested documents concerning Geaslin's fitness for employment

and attempts to 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 CGC filed a Petition to Revoke the Subpoena. Ex. 1(hh). Therein, the CGC 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 (emphasis added). The CGC 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, the only explanation provided by CGC for the late amendment is that it was an "oversight" and "wasn't pled originally." Tr. 9:23-25; 10:1-6. Other than her negligence, the CGC never offered a justifiable excuse for her delay and did not deny that she intended to seek this enhanced remedy since the filing of the Complaint, eight months prior.

Also at trial, ALJ Tracy granted the CGC's Petition to Revoke, holding that the requested items relate to Geaslin's incurred expenses and her efforts to find work. 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.[3]

D. ALJ Tracy's Decision And The CGC's Exceptions.

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

[3] At the close of the CGC's case and after Geaslin left the trial venue, the CGC made an oral motion to amend the Complaint to add a claim that Geaslin was unlawfully interrogated in March 2014. ALJ Tracy granted the oral amendment at the hearing and affirmed her conclusion in her Decision. The CGC did not offer any excuse for her delay in seeking to add the interrogation claim.

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 CGC's Motion to Amend the Complaint to add a request for search-for-work related expenses. 10 ALJD 33-37; 11 ALJD 1-21. Despite permitting this addition to the Complaint, ALJ Tracy denied the CGC's request for an enhanced remedy award, stating "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, the CGC 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 CGC's only exception challenged ALJ Tracy's decision not to award search-for-work related expenses regardless of whether Geaslin had interim earnings in excess of those expenses. CGC's Exception, para. 1. The CGC restated verbatim her argument and citations from her Post-Hearing Brief, which was copied and pasted from General Counsel Griffin's January 30, 2015 proposed language regarding search-for-work related expenses. *See* Memorandum GC 15-01. On December 3, 2015, King Soopers filed an Answer in Opposition to the General Counsel's Limited Exceptions. The CGC did not file a reply brief.

E. The Board's Request For Supplemental And Amici Briefing.

On February 19, 2016, the Board issued a Notice and Invitation to File Briefs ("Notice") regarding the CGC's request that the Board modify long-standing precedent regarding the award of search-for-work and interim employment expenses. The Board requested that the parties and interested amici brief the following three questions, which King Soopers analyzes below:[4]

[4] King Soopers does not agree to the statement of the issues to be addressed. Such a process either should be left to Congressional hearings or legitimate statutorily approve rulemaking procedures.

1. Should the Board adopt the change requested by the General Counsel?

2. What considerations warrant retaining the Board's traditional treatment of search-for-work and interim employment expenses?

3. What considerations warrant making the requested changes?

ARGUMENT

A. Whether The Board Should Adopt The Change Requested By The General Counsel.

The CGC's request to expand the Act and extend the Board's remedies to include search-for-work and work-related expenses without regard for interim earnings should not be adopted. The CGC's requested change would unlawfully expand the scope of the Act. Only Congress, not the Board, has jurisdiction to amend the Act. The CGC's arguments, including her analogy to EEOC and DOL regulations, also do not support the CGC's proposed change. Not only is the CGC's requested relief improper, but expansion of the Act's remedies in this case is especially inappropriate and would result in the denial of King Soopers' right to due process.

i. The CGC's request for an award of search-for-work and work-related expenses regardless of interim earnings would unlawfully expand the scope of the Act.

The CGC's request for an award of search-for-work and work-related expenses without regard for interim earnings requires the Board to unlawfully expand the scope of the Act's remedies. With regard to remedies, the Act states:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him . . . .

29 U.S.C. § 160(c) (underlining added, italics in original) ("Section 10(c)").

The Act does not refer to *damages* of any kind, including compensatory, consequential, or punitive damages; nor does the Act mention attorney fees, costs, or front pay. Thus, Congress did not intend for those types of damages to be awarded. Instead, according to the plain language of the Act, reinstatement and back pay are the only available remedies. *See e.g., Unbelievable, Inc. v. N.L.R.B.*, 118 F.3d 795, 804 (D.C. Cir. 1997) (holding that the Board may not extend the Act's remedies to include attorney fees); *Harrington v. Vandalia-Butler Bd. of Ed.*, 585 F.2d 192, 196 (6th Cir. 1978) (noting that neither punitive damages nor compensatory damages are allowed under the Act); *Int'l Union of Operating Engineers, Local 513*, 145 NLRB 554, 563 (1963) ("The Board's power to award affirmative relief under Section 10(c) is merely incidental to the primary purpose of the Act to prevent unfair labor practices, and is certainly not intended to award full compensatory damages for injuries caused by wrongful conduct."); *Int'l Union, United Auto., Aircraft & Agr. Implement Workers of Am. (UAW-CIO) v. Russell*, 356 U.S. 634, 645 (1958) (compensatory and punitive damages not available under the Act).

Search-for-work and other work-related expenses are compensatory damages. *See e.g., Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at *2 (D. Conn. 2007) (defining compensatory damages as pecuniary losses, including moving expenses and job search expenses, among other things); BLACK'S LAW DICTIONARY 445 (9th ed. 2009) (defining "compensatory damages" as "[d]amages sufficient in amount to indemnify the injured person for the loss suffered."). As Administrative Law Judge Kenneth Chu noted when considering the General Counsel's request for an award of search-for-work and other work-related expenses without regard to interim earnings in another matter,

> Compensatory damages consist of a wide variety of relief including pecuniary and nonpecuniary damages. Pecuniary damages are intended compensation for out-of-pocket expenses incurred as a result of the employer's unlawful action and may

> include job-hunting, stationary and postage, telephone expenses, resume services, costs of transportation interviewing for jobs, and other job search fees.

Long Island Ass'n for AIDS Care, 2015 WL 5047526 at *2 n. 9 (N.L.R.B. Div. of Judges) (Aug. 26, 2015). Even the EEOC defines compensatory damages to include search-for-work and other work-related expenses.[5] *See* Office of Legal Counsel, EEOC, Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991, Decision No. 915.002 (July 14, 1992), *available at* 1992 WL 189089 at *4 ("Compensatory damages include damages for past pecuniary loss (out-of-pocket loss), future pecuniary loss, and nonpecuniary loss (emotional harm)" and defining pecuniary losses to include "moving expenses, job search expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses that are incurred as a result of the discriminatory conduct."). Accordingly, the CGC's request that the Board extend the Act's remedies to include search-for-work and other work-related expenses without regard for interim earnings is essentially a request for compensatory damages and is not supported by the Act. The CGC's request may only be accomplished by a Congressional amendment to the Act. *See Gourmet Foods*, 270 NLRB 578, 588 (1984) (citing *H. K. Porter Co. v. N. L. R. B.*, 397 U.S. 99 (1970)).

Courts have previously rejected the Board's attempts to expand the Act's remedies to those not specifically identified in Section 10(c). In *Unbelievable, Inc. v. N.L.R.B.*, 118 F.3d 795 (D.C. Cir. 1997), the District of Columbia Circuit rejected the Board's expansion of the Act regarding "attorney fee shifting," stating:

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[5] As described below, the GC's reliance on EEOC and DOL regulations in support of the requested expansion of the Act's remedies is misplaced. Even applying the GC's analogy to EEOC regulations, however, the Board should not extend the remedies under the Act to include search-for-work expenses regardless of interim earnings because there is not statutory authority to do so.

> According to the Board, however, because the NLRA 'refrains from particularizing the scope of the Board's remedial powers,' and because it 'contemplates the exercise of broad discretion by the Board in fashioning a range of remedies suitable to remedy various unfair labor practices,' the award of attorney's fees is not inconsistent with the statute. 318 N.L.R.B. at 863. The absence of a prohibition is not, however, equivalent to an authorization, much less 'clear support' therefor.

Unbelievable, 118 F.3d at 804. Similarly, here, the absence of a prohibition in the Act on awards of search-for-work and other work-related expenses without regard for interim earnings is not equivalent to a Congressional authorization for such an award. If Congress intended the Act to provide discriminatees the relief the CGC now requests, then it would have included language in Section 10(c) regarding such relief. Because Section 10(c) does not contemplate an award of *damages*, the CGC's request for damages must be denied.

ii. The CGC's arguments for expanding the Act's remedies are unavailing.

In support of her argument, the CGC claims an award of search-for-work and other work-related expenses without regard for interim earnings will bring the remedies available under the Act in line with the remedies available under EEOC and DOL regulations. Exception, p. 5. The CGC also argues that an "[a]ward 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." Exception Brief, p. 5, n. 7 (citing *Knickerbocker Plastic Co., Inc.*, 104 NLRB 514, 516 at *2 (1953)). The CGC's arguments are unavailing.

The CGC's citation to the remedies available under EEOC regulations is disingenuous. The CGC relies on the remedies available under EEOC regulations *following* the 1991 amendments to Title VII. Exception Brief, p. 5 (citing Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991, Decision No. 915.002 (July 14, 1992), available at 1992 WL 189089) (emphasis added). It has long been recognized that the *original* remedy provisions of the Civil Rights Act of 1964 were modeled on

the backpay provisions of the Act. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975) (Title VII's "backpay provision was expressly modeled on the backpay provision of the National Labor Relations Act."); *Harrington v. Vandalia-Butler Bd. of Ed.*, 585 F.2d 192, 196 (6th Cir. 1978) ("The provisions of § 2000e-5(g) of Title VII are modeled closely upon the National Labor Relations Act, 29 U.S.C. §§ 160(b) and 160(c)."); *see also* 110 Cong. Rec. 6549 (1964) (remarks of Sen. Humphrey) (noting that Congress was using the Act as a model for the remedy provisions of the Civil Rights Act of 1964).

Under both the Civil Rights Act of 1964 and the NLRA, compensatory damages, including search-for-work and other work-related expenses were not available. *See Pearson v. Western Electric Co.*, 542 F.2d 1150, 1151-53 (10th Cir. 1976); *see also Curran v. Portland Superintending School Committee*, 435 F. Supp. 1063, 1078 (D. Me. 1977) (collecting cases and stating that "[w]hile there is a split of authority on the issue, the clear majority of federal courts, upon an analysis of the language and statutory history of Title VII, have concluded that neither compensatory nor punitive damages are available in a Title VII case . . . ."). As the Sixth Circuit stated,

> Although not conclusive, the similarity of [the Civil Rights Act of 1964 and the NLRA] and the fact that Congress was aware that neither punitive nor compensatory damages were allowed under the National Labor Relations Act leads to the firm belief that Congress did not intend that any money damages other than back-pay would be granted under the present statute . . . . No reference has been made in either the Title VII or the Title VIII statutes to compensatory damages."

Harrington v. Vandalia-Butler Bd. of Ed., 585 F.2d 192, 196 (6th Cir. 1978). To be sure, it required a Congressional amendment to Title VII in 1991 before search-for-work related expenses and other damages were recoverable under that statute. *See Landgraf v. USI Film Products*, 511 U.S. 244, 247 (1994) ("The Civil Rights Act of 1991 [] creates a right to recover compensatory and punitive damages for certain violations of Title VII of the Civil Rights Act of

1964."); *see also Long Island Ass'n for AIDS Care,* 2015 WL 5047526, at *2 n. 9 (N.L.R.B. Div. of Judges) (Aug. 26, 2015) ("The 1991 Civil Rights Act made available compensatory damages in employment discrimination cases and such damages are intended to compensate a victim of discrimination for losses or suffering caused by the discriminatory act.").

The Act, on the other hand, has not received a similar Congressional expansion of remedies. The CGC's citation to the 1991 amended version of Title VII in support of her expanded interpretation of the Act is unpersuasive and does not support the argument that the Act's remedies should be expanded to include search-for-work and other work-related expenses regardless of interim earnings. In short, because the Act does not provide for compensatory damages like the current version of Title VII or other EEO statutes, those statutes cannot justify the CGC's requested expansion of the Act's remedies.

Further, the Act does not provide for discovery like Title VII or other EEO statutes. In response to claims brought under Title VII and other EEO statutes, defendant employers are able to conduct extensive discovery regarding the extent of the former employee's damages and search-for-work expenses, as well as the cause of the purported damages. *Ewing v. Direct Sec. Servs.*, 2008 WL 906297 at *2 (D. Kan. Apr. 2, 2008) (noting that defendant is able to conduct discovery regarding Plaintiff's claimed damages); *see also* Fed. R. Civ. P. 26(a)(1)(A)(iii) (A party must, without awaiting a discovery request, provide to the other parties . . . a computation of each category of damages claimed by the disclosing party."). No such discovery is permitted under the Act. Indeed, ALJ Tracy rejected King Soopers' request for information regarding Geaslin's search-for-work efforts and expenses and precluded King Soopers from questioning Geaslin regarding these issues at trial. This is true even though the CGC tried her best to prejudice ALJ Tracy by claiming these damages were necessary because King Soopers allegedly

"wreaked havoc" on Geaslin's life. Without discovery there is no basis upon which to make the award requested by the CGC and, on this record, such an award constitutes a fundamental denial of due process and inexorably prejudices Respondent. *See* Argument A(iii), *infra*,

The CGC's citation to the remedies available under DOL regulations is similarly unavailing. In her Exception, the CGC relies exclusively on *Hobby Georgia Power Co.*, 2001 WL 168898 at *29 (Feb. 2001) in support of her request in this matter.[6] In *Hobby*, the DOL Administrative Review Board considered an administrative law judge's damages award. Therein, the DOL recounted that the employee protection provision, under which the administrative law judge based his damages award, states:

> If, in response to a complaint filed under . . . [the ERA whistleblower provision], the Secretary determines that a violation . . . has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, <u>and the Secretary may order such person to provide compensatory damages to the complainant</u>.

Hobby Georgia Power Co., 2001 WL 168898 at *29 (Feb. 2001) (quoting 42 U.S.C. § 5851(b)(2)(B)) (emphasis added). Thus, the DOL regulations relied on by the CGC to support her request in this matter <u>specifically provide for compensatory damages</u>. There is no such provision in the Act and, therefore, *Hobby* provides no basis to expand the Act's remedies.

The Administrative Review Board in *Hobby* also relied on the remedies available to Title VII plaintiffs to determine the scope of remedies available under DOL regulations. Accordingly, for the same reasons described above that the Civil Rights Act does not support the CGC's request for the Board to expand the Act's remedies, neither do the DOL regulations.

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[6] The General Counsel similarly only relied on *Hobby* in support of his conclusory statement that the Board's current scheme "runs counter to the approach taken by the [EEOC] and [DOL]" in Memorandum GC 15-01.

Finally, the CGC's citation to *Knickerbocker Plastic Co., Inc.*, 104 NLRB 514, 516 at *2 (1953) is misplaced. In *Knickerbocker*, the Board's remedial order required that the respondent-employer reimburse unlawfully discharged strikers for any medical and hospitalization expenses they incurred which would have been covered by respondent's health benefit plans. *Id.* Unlike search-for-work expenses, the medical expenses involved in *Knickerbocker* were not incurred as a result of the employees' search-for-work efforts. Instead, they were due to the employer's discriminatorily motivated cancellation of health benefits coverage. Because there was no link between these health benefit expenses and the generation of interim earnings, these expenses were properly included in the gross backpay amount and not deducted from interim earnings. In contrast, in situations involving awards of search-for-work expenses, there is a direct causal connection between a discharged employee's interim earnings and her search-for-work expenses.

Further, medical expenses and health fund contributions are not subject to the same abuse and policing obstacles as search-for-work expenses.[7] Medical expenses are definitive, objective, and verifiable. Thus, by their very nature they are dissimilar from search-for-work and other work-related expenses, which are varied and unverifiable. Accordingly, *Knickerbocker* does not support the CGC's argument and the Act should not be expanded to award search-for-work and other work-related expenses without regard for interim earnings.

iii. <u>This matter is an especially inappropriate case for extending the Act's remedies as requested by the CGC.</u>

As described above, the CGC waited until two days before trial to move to amend the Complaint to add a request for search-for-work expenses without regard for Geaslin's interim earnings. In support of the CGC's untimely request to amend the Complaint, the CGC argued that King Soopers "wreaked havoc" on Geaslin's life and caused her extensive damage. The

[7] The danger of uncoupling an employee's search-for-work expenses and interim earnings, as well as the potential abuse of this expanded scheme, is discussed in more detail in Section Argument B(ii)(a).

CGC's tardy request was intended only to prejudice ALJ Tracy regarding the "injury" King Soopers allegedly caused Geaslin.

Upon receipt of the CGC's Notice of Intent to Amend Complaint, King Soopers immediately issued a subpoena and requested information regarding the merits of the CGC's enhanced remedy request. In particular, King Soopers sought to discover information regarding Geaslin's ability to obtain and keep interim employment, her search-for-work efforts, and her search-for-work expenses, if any existed. Because Geaslin was allegedly hospitalized in January 2015, it is unclear whether Geaslin was even able to work following her termination. Without information relating to Geaslin's search-for-work efforts, ability to work, and damages, there was no basis for the CGC's motion other than to prejudice ALJ Tracy with her amendment and request for search-for-work related expenses without regard for interim earnings. Moreover, discovery of Geaslin's search-for-work efforts was necessary to mitigate the prejudice caused by the CGC's allegations regarding the damage King Soopers allegedly caused Geaslin.

Based on the CGC's arguments, ALJ Tracy revoked King Soopers' subpoena and denied King Soopers any opportunity to present or discover evidence regarding the merits of the CGC's claimed causation for the enhanced damages award.[8] 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 CGC'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 CGC caused by

[8] As argued in King Soopers' November 19, 2015 Brief in Support of Exceptions and December 17, 2015 Reply in Support of Exceptions, ALJ Tracy's decision to permit the GC's untimely amendment must be reversed.

her inappropriate assertion that King Soopers "wreaked havoc" on Geaslin. Because King Soopers was not permitted to present such information, an award of search-for-work related expenses is especially impermissible in this case.

Not only did ALJ Tracy prohibit King Soopers from discovering information relating to Geaslin's search-for-work efforts and expenses, but she also barred King Soopers from rebutting CGC's allegation that King Soopers "wreaked havoc" on Geaslin's life. King Soopers was not permitted to question Geaslin regarding all of the benefits King Soopers gave to Geaslin and personal support Pelo provided Geaslin. ALJ Tracy's prohibition on the introduction of this information further prejudiced King Soopers and kept the GC's request for damages from being fully litigated.

Thus, an expansion of the Act's remedies to include an award of search-for-work expenses without regard for interim earnings under these circumstances, where the parties were precluded from litigating the merits of such an inflammatory declaration, is improper and deprives King Soopers of due process. *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 CGC's requested expanded remedy award and, therefore, no such award can be imposed in this case.

B. Whether The Board's Traditional Treatment Of Search-For-Work And Interim Employment Expenses Should Be Changed.

i. There is no change in circumstances warranting a departure from the Board's well-established precedent.

For nearly eight decades the Board has declined to award search-for-work and other work-related expenses independent from interim earnings. *See e.g., D.L. Baker, Inc.* 351 NLRB 515, 537, 351 (2007); *In Re Bauer Grp., Inc.*, 337 NLRB 395, 400 (2002); *Aircraft & Helicopter Leasing*, 227 NLRB 644, 645 (1976) ("The law is settled that transportation expenses incurred by discriminatees in connection with obtaining or holding interim employment, which would not have been incurred but for the discrimination, and the consequent necessity of seeking employment elsewhere, are deductible from interim earnings.") (citing *Crossett Lumber Company,* 8 NLRB 440, 479-480 (1938); and *Hoosier Veneer Co. a Corporation,* 21 NLRB 907, 938, fn. 26 (1940)); *W. Texas Utilities Co.*, 109 NLRB 936, 939 n. 3 (1954) ("We find it unnecessary to consider the deductibility of [charging party'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."). Instead, those expenses are deducted from interim earnings as opposed to being added to a discriminatee's gross backpay amount or awarded as stand-alone damages. *Id.*

The CGC has failed to provide 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 the law regarding recovery of search-for-work expenses. Indeed, the Act continues to provide a "make-whole remedy" to discriminatees. The language of the Act is also the same as it was nearly eight decades ago when the Board first held that search-for-work and other work-related expenses are

to be tied to a discriminatee's interim earnings. Without a change in the Act, there is no legitimate reason to change the Board's well-established law on this issue. 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." *Austin Fire Equip., LLC* 360 NLRB No. 131 slip op. at 5 n. 14 (June 25, 2014); *see also 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"). None of those circumstances exist with regard to the Board's policy on awarding search-for-work expenses. The CGC has neither pointed to changed circumstances applying the Act nor any criticism of reviewing courts that would justify her proposed departure from settled law. The CGC's request to change established law, therefore, must be denied. In her Exceptions, the CGC argued that, in the past, where a remedial structure failed to achieve its objective, the Board has revised and updated its remedial policies. Exception Brief, p. 5. The CGC, however, is not requesting an "update" to the Board's remedial policies. Rather, it is asking that the Board overturn nearly eight decades of law and expand the remedies available under the Act to include general compensatory damages. The Board made a policy decision nearly eight decades ago regarding the award of compensatory damages in the form of search-for-work expenses. Absent a statutory basis to overturn those decisions, the Board's well-settled refusal to award these damages cannot be disturbed. The CGC's entire basis for adding a request for search-for-work related expenses without regard for interim earnings – at least as it was described in her Notice of Intent to Amend – is that this enhanced remedy was necessary because King Soopers purportedly "wreaked havoc" on Geaslin's life. Ex. 1(ii) at p. 2-3. An award of search-for-work related expenses

without regard for interim earnings because an employer "wreaks havoc" on an employee's life is nothing more than an award of compensatory and punitive damages. As fully described above, neither compensatory nor punitive damages are available under the Act. Accordingly, the CGC's basis for expanding the Act's remedies and awarding search-for-work expenses without regard for interim earnings fails.

ii. Deviation from the Board's traditional treatment of search-for-work and interim employment expenses undermines the purpose of the Act's remedial provisions.

The CGC's requested expansion of the Act's remedies provides discriminatees a windfall and is punitive to the Respondent; neither of which is afforded by the Act. Further, an award of search-for-work and other work-related expenses without regard for a discriminatee's interim earnings is subject to abuse and would be impossible to police. Thus, an expansion of the Act's remedies to include search-for-work and other work-related expenses undermines the purposes of the Act.

a. An award of search-for-work expenses regardless of interim earnings is punitive and provides discharged employees a windfall.

It has long been held that the Board's power is remedial, not penal or punitive. *See e.g., N. L. R. B. v. Douglas & Lomason Co.*, 443 F.2d 291, 295 (8th Cir. 1971) (Board's remedy "should not smack of punitive action against the employer."); *Consol. Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197, 235-36 (1938) (the Board's authority under Section 10(c) "does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order."). The Board's "order must be designed to effectuate the policies of the Act. An order that is punitive rather than remedial is impermissible, *Republic Steel Corp. v. N.L.R.B.*, 311 U.S. 7, 61 (1940), and the

Board therefore may not 'apply a remedy it has worked out on the basis of experience, without regard to circumstances which may make its application to a particular situation oppressive.'" *Komatz Const., Inc. v. N.L.R.B.*, 458 F.2d 317, 324-25 (8th Cir. 1972) (quoting *N.L.R.B. v. Seven-Up Bottling Co., Inc.*, 344 U.S. 344, 349 (1953)) (emphasis added).

Similarly, an award that grants employees a windfall is not an appropriate remedial order. *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."). As the Fifth Circuit has said when discussing the distinction between remedial orders and punitive orders,

> The Board thus adverts to two different, though not mutually exclusive aspects of a remedial order: the order may be designed to make someone whole who has been deprived of a recognized interest by acts that constitute a violation of the Act and/or the order may be designed to prevent the violator from benefitting by his misdeed. If neither of those aspects is present it is hard to see how an order may be considered 'remedial' as distinct from merely punitive; every punishment made to 'fit the crime' is not necessarily remedial, especially if its purpose is more to provide 'a source of innocent merriment,' i.e. serve as an example, rather than to restore to someone a right he is entitled to or to deprive a malfeasor of an advantage unjustly seized.

N. L. R. B. v. Coats & Clark, Inc., 241 F.2d 556, 561 (5th Cir. 1957).

A discharged employee's search-for-work and other work-related expenses are directly related to his or her mitigation efforts. Nevertheless, the CGC requests that these damages be extracted from a discharged employee's mitigation efforts and be awarded regardless of the employee's interim earnings. The CGC's unlawful expansion of the Act's remedial scheme is illogical and would punish employers, while providing discharged employees a windfall. Both of these outcomes have been rejected by courts for very sound policy reasons and to encourage legitimate mitigation efforts.

If an employee's recovery of search-for-work expenses is analyzed without regard for the employee's search-for-work efforts and interim earnings, then employees have no incentive to seek legitimate and realistic employment opportunities. By extracting an employee's search-for-work efforts from his or her earnings, the CGC is asking the Board to hold employers liable for discharged employee's "search-for-work" efforts, regardless of how outlandish and unlikely those efforts are to lead to interim employment. Indeed, if the Act were expanded as the CGC requests, there would be nothing to prevent a discharged employee from traveling across the country to apply for positions he or she has no reasonable likelihood of getting, and then recover an award for these "search-for-work" expenses. There would similarly be nothing to prevent a discharged employee from accepting interim employment in a high-priced housing market and claiming the increased housing costs are work-related expenses.[9] The CGC's proposed expansion of the Act's remedies, thus, provides employees the potential windfall of recovering expenditures that were neither legitimate nor good faith search-for-work expenses. This expansion is bad policy.

On the other hand, if the current remedial structure continues and an employee's recovery of search-for-work expenses is linked to his or her interim earnings to mitigate losses, then the employee is more likely to focus his or her job search efforts on locations and jobs in which the

[9] Other examples of a discharged employee's potential abuse may entail the submission of over stated receipts or statements of mileage for reimbursement for the costs associated with traveling to apply for interim employment. Employees may also falsely increase the amount of their award by seeking reimbursement for costs associated with interim employment that were not actually required by the interim employer, including the costs of tools and uniforms. Discharged employees could also seek reimbursement for the costs of trips and vacations under the auspices that those expenses were incurred as part of their "search-for-work" efforts. Ultimately, it would be nearly impossible for employers and the Board to decipher between legitimate and fabricated expenses and policy discharged employees' "search-for-work" efforts.

employee is qualified. Offsetting a discharged employee's search-for-work expenses against his or her interim earnings is fair and entirely consistent with the Act's remedial provisions.[10]

In a parallel analysis, both the Board and the District of Columbia Circuit rejected the CGC's request that the Board expand the Act's remedies to include "gross back pay," which is a back pay award not offset by a discriminatee's interim earnings, in lieu of the Board's standard "net back pay" award, which is offset by interim earnings at other employment. *See Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. N. L. R. B.*, 445 F.2d 237, 245-246 (D.C. Cir. 1971). In that case, the Union challenged the Board's determination that only net back pay can be awarded by arguing that only gross back pay would effectuate the purposes of the Act because (1) net back pay fails to make employees whole by not accounting for inflation, humiliation of being fired, frustration of searching for another job, or loss of a discriminatee's credit, and (2) a net back pay award fails to fully compensate discharged employees and, therefore discourages them from exercising their statutory rights. *Id.* The District of Columbia Circuit rejected these arguments and affirmed the Board's holding that only net back pay could be awarded under the Act. In refusing to expand the Act's remedies to include a gross back pay award, the court said,

> [F]ull back pay is no more directly responsive to the sorts of collateral and intangible harms suffered by discharged employees than is net back pay; [the union's] claim is that the former provides 'more complete compensation' for the employees' losses. While the union persistently asserts that its proposed remedy falls well on the permissible side of the thin line between compensation and punishment, it makes no effort to place a dollar figure on the inadequacies of net back pay. Nor does it attempt to quantify the difference, as to these discharged employees, between net and gross . . . . the full back pay alternative, at least based on the union's showing here, [i]s essentially punitive. Contrarily, the net back pay order entered in this case cannot, on this record, be said to be a 'patent

[10] Had ALJ Tracy not prohibited evidence rebutting CGC's allegation that King Soopers "wreaked havoc" on Geaslin's life, King Soopers would have introduced evidence that in the retail grocery industry in Denver employees can effectively mitigate because they often switch employment among competitors. Employees terminated from King Soopers immediately go to work for competitors like Safeway, Whole Foods, and Sam's Club, among others. The fact that King Soopers was unable to present this evidence is another example that this is an inappropriate case to expand the Act's remedies.

> attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'

Id. at 246 (emphasis added). The parallel is true here. An award of search-for-work related expenses without regard for an employee's interim earnings is no more likely to make employees whole than the Board's current scheme. Instead, extracting an employee's search-for-work expenses from his or her search-for-work efforts would only grant the employee a windfall and penalize employers in violation of the policy underpinnings of the Act's remedial scheme.

b. An award of search-for-work expenses without regard for an employee's interim earnings is speculative and would be impossible to police.

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 CGC's requested expansion of the Act's remedies is inherently speculative. Before the Board could calculate the amount of a discharged employee's search-for-work expenses, it would be required to guess as to the time the employee spent 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.

Finally, an award of search-for-work and other work-related expenses without regard for interim earnings is unnecessary. In today's job-search environment, there is virtually no need for

discriminatees 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 expense, there is no need to divert from Board precedent regarding these expenses.

The fact that most employees search-for-work by telephone, computer, and internet only increases the speculative nature of an award of search-for-work related expenses without regard for interim earnings. There is simply no way to divide the cost of telephone, computer, and internet services to compensate only for the costs of searching for work. An award of speculative and uncertain damages that is subject to widespread abuse is contrary to the purposes of the Act.

C. What Considerations Warrant Making The Requested Changes?

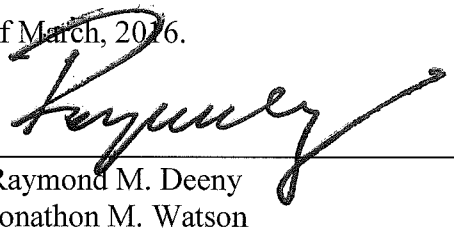
For all of the reasons described above, the Board should not expand the Act's remedies to include search-for-work and other work-related expenses without regard for a discharged employee's interim earnings. As a policy matter, it is no salvation to await a compliance proceeding. That process is also devoid of any discovery of the causation of damages and is not any better equipped to address these claimed damages. Further, a compliance officer is likely to accept all of these job search expenses on face value, which only exacerbates employee windfalls and punishment to the employer. Thus, employers would be completely deprived of their

opportunity to fully litigate the matter and there would never be sufficient evidence to determine the efficacy of such damages awards.

CONCLUSION

The Board must deny the CGC's request to expand the Act's remedies to include search-for-work and other work-related expenses without regard for interim earnings.

Respectfully submitted this 18th day of March, 2016.



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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of March, 2015, a true and correct copy of the foregoing **RESPONDENT'S SUPPLEMENTAL BRIEF REGARDING THE CGC'S REQUEST FOR AN AWARD OF SEARCH-FOR-WORK AND OTHER EMPLOYMENT EXPENSES WITHOUT REGARD FOR INTERIM EARNINGS** was electronically filed addressed to the following:

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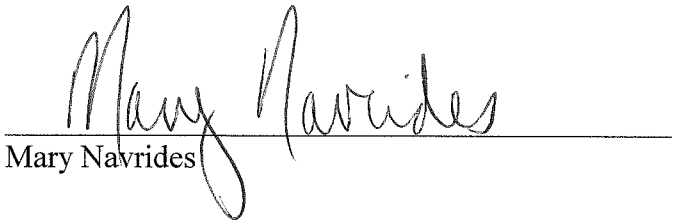

Mary Navrides