



United States Government

**NATIONAL LABOR RELATIONS  
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June 27, 2016

The Honorable Raymond P. Green  
Administrative Law Judge  
National Labor Relations Board  
120 West 45th Street, 11th Floor  
New York, New York 10036

Re: Matrix Equities, Inc.  
Case 29-CA-168345

Dear Judge Green:

Counsel for the General Counsel submits this letter in lieu of a formal brief, and requests that Your Honor find that Matrix Equities, Inc. (“Respondent”) has violated Section 8(a)(1) of the National Labor Relations Act. Specifically, Respondent discharged its employee Brian Burns as a pre-emptive strike to prevent him from engaging in protected activity. As discussed below, Respondent has not demonstrated any lawful justification for discharging Burns, and, as such, discharged him in violation of the Act.<sup>1</sup>

***Factual Overview***

Respondent is a real estate company operating in 12 states with approximately 250 employees. Tr. 10, 58. Respondent’s headquarters is located in Port Jefferson Station, New York,

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<sup>1</sup>On January 25, 2016, Brian Burns filed an unfair labor practice charge against Respondent in Case 29-CA-168345. GC 1(a). On March 25, 2016, the Regional Director issued a Complaint and Notice of Hearing. GC 1(c). The case was litigated before Administrative Law Judge Raymond P. Green on June 7, 2016.

where there are about 25 employees working in accounting, human resources, and information technology. Tr. 11. Brian Burns began working at Respondent's headquarters as a human resources assistant on August 7, 2015. Tr. 10-11. As a human resources assistant, he had responsibilities in recruiting, payroll, conducting background checks, and maintaining employee files. Tr. 12. Burns was supervised by Kathryn Puma, the office and human resources manager, who directly reported to Respondent's chief of human resources. Tr. 11-12, 29. It was Puma who, less than three weeks into Burns' employment, on August 25, 2015, discharged him. Tr. 10, 21.

After beginning his employment, Burns witnessed different incidents in the workplace that he felt were discriminatory with regard to race, gender, age, and past-conviction status. Tr. 14, 16-19, GC 2. Additionally, he believed employees' wages and benefits were lower than they should have been. Tr. 27, GC 2. Significantly, Burns concluded that many employees, including him, were being inappropriately classified as exempt-level employees when they should have classified as non-exempt. Tr. 15. As such, these employees were being denied potential overtime wages and other protections under the law. Tr. 15-16. While Burns believed he had been inappropriately classified, he also believed Respondent had similarly misclassified other employees, including Theresa LaValle and Natalie Guidry in accounts payable, and staff accountant Peter Rosario. Tr. 16. As he testified at trial, Burns believed he had a responsibility to look out for himself and other employees. Tr. 36.

On August 24, 2015, while at home, Burns drafted a letter detailing all of his concerns about the Respondent's workplace and employment practices. Tr. 14, GC 2. The next morning, Burns emailed the letter to his supervisor, Puma. Tr. 20. Burns then went to Puma's office, where he waited while she read the letter. Tr. 20. The letter set forth numerous concerns Burns had about the terms and conditions of employees' employment, including the misclassification of employees as exempt, low compensation, a lack of benefits, and hostility and bias based on race, age, and gender. GC 2. Additionally, in the letter, Burns indicated his intent to take further action

to address these problems, including contacting governmental agencies, and even considering attempting to organize and form a union. GC 2.

After reading the letter, Puma asked Burns if he was happy working for Respondent, to which he said he had no comment. Tr. 21. Puma then asked Burns if he would be leaving, to which he replied that he would not. Tr. 21. As Puma explained at trial, she felt “he wasn’t giving the company best interest [sic]...he was betraying us.” Tr. 60. In response, Puma promptly fired him. Tr. 21.

### *Argument*

#### **Respondent discharged Brian Burns as a pre-emptive strike to prevent him from engaging in protected activity.**

There is no question that Burns was fired because of what he wrote in his letter to Puma. While Respondent’s counsel characterized the writing of the letter as “disloyalty” and “insubordination” (not uncommon euphemisms for protected activity), it was the threat of action by Burns that concerned Respondent the most. As Puma explained, she discharged Burns because he “betrayed the company,” was “not working as a team player,” and therefore “he needed to go.” Tr. 51. While Burns had previously discussed the problems of employees’ inadequate salaries and benefits with Puma (Tr. 28-29), in writing the letter, he made it clear that he now planned to take action. He planned to file complaints with government agencies, he was considering pursuing a union (which necessarily involves enlisting coworkers), and, inevitably, other affected employees would become aware of his concerns and then also potentially become involved. Concerted activity most-often begins with one employee taking initiative. Respondent discharged Burns for no reason other than to prevent that from happening.

The Board has held that it is violation of the Act for an employer to pre-emptively discharge an employee to prevent their engaging in protected activity. See *Parexel International, LLC*, 356 NLRB 516 (2011). This is true even in instances where an employee has not yet actually engaged in concerted activity. *Id.* at 519. Just as an employer cannot *threaten* to

terminate an employee for protected activity, an employer cannot *actually* terminate an employee to ensure they do not engage in Section 7 activity. *Id.* “If an employer acts to prevent concerted protected activity—to ‘nip it in the bud’—that action interferes with and restrains the exercise of Section 7 rights and is unlawful without more.” While in the current case, Brian Burns had not yet been able to engage with other employees regarding his concerns, he was raising concerns on their behalf, and made it clear to Respondent that he was going to take action, including the possibility of forming a union. Respondent, in response, discharged him out of concern for what could happen if he remained employed in the workplace. As was the situation in *Parexel International*, Respondent terminated Burns to suppress protected activity before it could even begin. In doing so, Respondent clearly violated the Act.

**Respondent has not demonstrated any lawful justification for discharging Burns.**

At the hearing, Respondent presented essentially three reasons why it was justified in discharging Burns. None of those reasons has merit.

First, Respondent attacked Burns’ work performance, asserting that he was a bad employee. There is, however, no evidence establishing that Burns had any performance problems. As Burns testified at trial, the only feedback he ever received from Puma had been positive. Tr. 22. Puma had told Burns he “was always doing a good job,” and “she was pleased that [he] was computer literate because she wasn’t too savvy with the computer.” Tr. 22. As Puma admitted at trial, prior to discharging Burns, he had never been disciplined, and she had never communicated there being any problem with his work performance. Tr. 60. As Burns testified, no manager ever commented negatively on his performance during his employment with Respondent. Tr. 23. During Puma’s testimony, she never gave any example of any specific problem with Burns’ work performance prior to his discharge. To the extent Respondent claims there was a problem with Burns’ performance, Respondent is simply retroactively trying to legitimize his unlawful termination.

Second, Respondent claimed Burns had acted with “disloyalty,” such that his discharge was warranted. This claim by Respondent, however, is not supported by the law. Employees only lose the protection of the Act when they act to do unjustifiable harm to vital interests of their employer. *Jefferson Standard Broadcasting Co.*, 346 U.S. 464 (1953). For example, employees can lose protection with maliciously untrue communications to the public about their employer. *Valley Hospital Medical Center*, 351 NLRB 1250 (2007). But an employer cannot simply label protected activity “disloyal” and then retaliate against employees with impunity. While Respondent was clearly upset by the content of Burns’ letter, there is simply nothing in the letter that would constitute “disloyalty” such that Burns would lose the Act’s protections.

Three, Respondent argued that it was actually Burns’ responsibility to fix the very problems he had raised in his letter. While it might be convenient to victim-blame Burns for his concerns, he clearly had no authority or power to make the changes he sought from Respondent. Burns was only hired to be an assistant in human resources, and his duties generally involved inputting data related to recruiting and payroll. Tr. 12. As Puma admitted at trial, Burns had no ability to change employees’ wages or salaries. Tr. 57. Burns was certainly in no position, as the human resources assistant, to be responsible for the hostile and discriminatory aspects he saw in the workplace. As Burns testified at trial, he had never had those responsibilities. Tr. 43. Rather, Burns tried to effectuate change to Respondent’s workplace and employment practices by raising his concerns in a letter to his supervisor. It was only then, when he tried to raise these problems to be addressed, that he was quickly terminated.

**Burns Should Be Reimbursed for His Search-for-Work and Work-Related Expenses, in Addition to Being Awarded Backpay and Reinstatement**

As a result of Respondent’s unfair labor practices, the General Counsel seeks an Order providing the Board’s traditional make-whole remedies, including reinstatement and backpay for Burns. Additionally, as part of a make-whole remedy, Respondent should be required to reimburse Burns for the search-for-work and work-related expenses resulting from his unlawful discharge.

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 continue working for the employer. *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<sup>2</sup>; the cost of tools or uniforms required by an interim employer<sup>3</sup>; room and board when seeking employment and/or working away from home<sup>4</sup>; contractually required union dues and/or initiation fees, if not previously required while working for Respondent;<sup>5</sup> and/or the cost of moving if required to assume interim employment.<sup>6</sup>

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 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 work<sup>7</sup>,

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<sup>2</sup> *D.L. Baker, Inc.*, 351 NLRB 515, 537 (2007).

<sup>3</sup> *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).

<sup>4</sup> *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976).

<sup>5</sup> *Rainbow Coaches*, 280 NLRB 166, 190 (1986).

<sup>6</sup> *Coronet Foods, Inc.*, 322 NLRB 837 (1997).

<sup>7</sup> *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.").

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.

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 (Dept. of Labor Admin. Rev. Bd.) (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.<sup>8</sup> 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).

**Burns is entitled to be made whole for the reasonable consequential damages incurred as a result of the Respondent's unlawful conduct**

The language of Section 10(c)<sup>9</sup> of the Act is broad enough to conclude that the Board may order a remedy for the economic consequences directly resulting from an employer's unfair labor practice. Section 10(c) states that upon a finding by the Board that an unfair labor practice has been committed, the Board shall issue "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 backpay, as will effectuate the policies of the Act."

Congress granted the Board broad power under Section 10(c) of the Act to determine the proper scope of its remedial orders, particularly with respect to affirmative relief. *See, e.g., Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984) (Congress vested in Board "the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review"). The Board is not limited to an order of reinstatement and/or backpay as a remedy simply because they are the only forms of affirmative action expressly provided for in the Act. Thus, in reference to Section 10(c) the Supreme Court has noted:

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<sup>8</sup> 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).

<sup>9</sup> 29 U.S.C. § 160(c).

A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

As the Court has explained, “[t]he Act does not create rights for individuals which must be vindicated according to a rigid scheme of remedies.” *Id.* Rather, remedies “must be functions of the purposes to be accomplished” and must “heed ‘the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment.’” *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346 (1953) (quoting *Phelps Dodge Corp.*, supra at 198). Each remedy should “be tailored to the unfair labor practice it is intended to redress.” *Sure-Tan*, 467 U.S. at 900. Thus, by its plain meaning, Section 10(c) is a grant of authority to the Board to devise remedies for various unfair labor practices, so long as such remedies “effectuate the policies of the Act.” *Frontier Hotel & Casino*, 318 NLRB 857, 863 (1995), enfd in part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997) . Accordingly, the language of both Section 10(c) is broad enough to conclude that in order to restore the *status quo*, the Board may order a remedy for the economic consequences directly resulting from an employee's unlawful discharge.

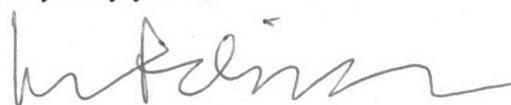
Indeed, the Board has ordered an employer to compensate an employee for the economic consequences resulting from the employer's unlawful discharge of a union supporter. In *Freeman Decorating Co.*, 288 NLRB 1235 (1988) the employer violated Section 8(a)(1) and (3) of the Act by forcibly removing from the workplace, and causing injury, to its employee when it discharged him because of his union activities. The ALJ ordered the employer to offer the employee reinstatement and backpay. In addition, the ALJ noted that if the employee showed

that he suffered loss because of his injuries, the employer should offer him backpay for periods of his disability and "costs for medical and rehabilitation treatment." *Id.* at 1241. The Board affirmed the remedy ordered by the ALJ, but stated that the employer is only required to reimburse the discriminatee for medical and rehabilitative expenses "that were incurred due to lack of insurance coverage resulting from the employees unlawful discharge." *Id.* at 1235 n. 2. The Board noted that the reimbursement for medical expenses is not compensation for the physical injuries, but is reimbursement only for those expenses incurred due to a lack of insurance coverage resulting from the employee's unlawful discharge.

### *Conclusion*

The facts in this case are clear: Brian Burns informed Respondent he planned to take action on concerns about the workplace and Respondent's employment practices, and Respondent discharged him to prevent him from acting. Consistent with the analysis above, the General Counsel requests Your Honor find this discharge unlawful, and order Respondent to reinstate Brian Burns and make him whole for the losses he has suffered, including an award of search-for-work and work-related expenses, regardless of whether these amounts exceed interim earnings, and an award for any consequential damages that resulted from Respondent's unlawful discharge.

Very truly yours,

A handwritten signature in black ink, appearing to read "Brent Childerhose". The signature is fluid and cursive, with a prominent initial "B" and "C".

Brent Childerhose  
Counsel for the General Counsel