

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

**MATRIX EQUITIES, INC.**

**Respondent**

**and**

**Case 29-CA-168345**

**BRIAN BURNS, an Individual**

**Charging Party**

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF  
IN SUPPORT OF EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION**

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## **I. Introduction**

The General Counsel files these exceptions to the July 12, 2016 decision of Administrative Law Judge Raymond P. Green. In that decision, the ALJ made errors in both fact and in law resulting in his recommendation that the complaint be dismissed. Contrary to the findings of the ALJ, the General Counsel urges the Board to find the following:

- A. Under Board law, Matrix Equities, Inc. (“Respondent”) unlawfully discharged Brian Burns as a preemptive strike to prevent him from engaging in protected activity;**
- B. Brian Burns is an employee eligible for protection under the Act; and**
- C. Brian Burns’ motive did not disqualify him from protection under the Act.**

As discussed below, these three findings are well-established in the record evidence and supported by the Board’s precedent and policies. The ALJ should be reversed.

## **II. Procedural History**

On January 25, 2016, Brian Burns filed an unfair labor practice charge against Matrix Equities, Inc. in Case 29-CA-168345 alleging he had been unlawfully discharged in retaliation for his protected activities. On March 25, 2016, the Regional Director for Region 29 issued and served on the parties a Complaint and Notice of Hearing based on that charge. (GC Ex. 1(e)).<sup>1</sup> The Complaint alleged that Respondent violated 8(a)(1) of the Act by discharging Burns because he engaged in protected activities and to discourage employees from engaging in concerted activities. On April 6, 2016, Respondent filed an answer denying the allegations. The case was heard before the ALJ on June 7, 2016. The ALJ issued his decision in the matter on July 12, 2016 recommending dismissal of the Complaint.

## **III. Factual Overview**

The most important fact is not in dispute – Respondent discharged Brian Burns because he wrote a letter raising concerns about Respondent’s employment practices. The letter set forth numerous problems with the terms and conditions of employees’ employment, including the misclassification of employees as exempt, low compensation, a lack of benefits, and hostility and bias in the workplace based on race, age, and gender. (ALJD 4:5-5:40, GC Ex. 2). On August 25,

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<sup>1</sup> References to the official record of the hearing are abbreviated as follows: “GC Ex.” denotes General Counsel’s exhibits. Citations to the transcript and administrative law judge decision will appear “Tr. \_” and “ALJD,” respectively, with numbers specifying the particular page(s) cited in the transcript

2016, Burns sent the letter to his supervisor, Kathryn Puma, who, after reading the letter, immediately discharged him. (ALJD 3:40-42, Tr. 20). At trial, Puma explained that she discharged Burns because she felt he “betrayed the company,” and was “not working as a team player.” (ALJD 5:44-45, Tr. 51). While Burns had previously raised the problem of employees’ inadequate salaries and benefits with Puma, in his letter he indicated he would take action, including contacting government agencies and pursuing a union. (ALJD 4:5-5:40, Tr. 28-29, 51, GC Ex. 2). Before Burns could involve other employees in his concerns, Respondent discharged him to prevent him from acting.

#### **IV. Argument**

##### **A. Under Board law, Respondent unlawfully discharged Brian Burns as a preemptive strike to prevent him from engaging in protected activity.**

The Board has held that it is a violation of the Act for an employer to preemptively discharge an employee to prevent them from engaging in protected activity. See *Parexel International, LLC*, 356 NLRB 516 (2011).<sup>2</sup> This is true even in instances where an employee has not yet actually engaged in concerted activity. *Id.* at 519. The Board’s holding in *Parexel* and the underlying reasoning articulated by the Board apply directly to the facts in the current case and support the conclusion that Respondent discharged Brian Burns unlawfully. The ALJ, however, failed to apply *Parexel* correctly.

In his decision, the ALJ inappropriately misstates the underlying facts of *Parexel*. In that case, an employer had discharged an employee solely to prevent her from prospectively speaking with other employees about raises. In the ALJ’s version of the facts, however, he erroneously claims the employer had retaliated against the employee for past activity. According to the ALJ, focusing on any desire by the employer to prevent future concerted activity was “simply gilding the lily.” (ALJD 6:25-27). But this is a significant misstatement of what happened, and is in conflict with the facts as set forth by both the Board and the judge in the case. While the employee in *Parexel* had previously been intentionally misinformed by another employee about raises, that conversation was not the reason she was discharged. Rather, she was discharged because the employer worried she was going to start speaking to other employees about raises. The employer discharged her to prevent future protected activities, not to retaliate for past

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<sup>2</sup> The correct spelling of the employer’s name in the case is “Parexel,” which is repeatedly misspelled in the ALJ’s decision.

activities. The ALJ misstated the facts of *Parexel*, which then allowed him to treat the holding of that case as irrelevant.

Contrary to the ALJ's decision, *Parexel* is relevant to the current case, and the ALJ erred significantly by ignoring the Board's holding with regard to preemptive strikes. Like the ALJ, the administrative law judge in *Parexel* had also declined to find that a preemptive strike was unlawful absent prior concerted activity. The Board, however, explicitly overruled him: "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." *Id.* at 519. This holding by the Board is relevant to assessing the legality of Respondent's actions.

In the current case, Brian Burns had not yet been able to engage with other employees regarding his concerns. He had only worked for Respondent for less than three weeks at the time he was discharged. However, in raising concerns to Respondent on behalf of other employees, Burns made it clear to Respondent that he planned to take further action. Clearly the concerns he was raising (e.g., the inappropriate classification of himself and other employees as "exempt") were issues that would have been of strong interest to himself and his affected coworkers. As Burns' supervisor testified at trial, she believed Burns was not being a "team player," and discharged him before he could do anything further. As in *Parexel*, Respondent moved quickly to prevent employee Burns from exercising his statutory rights, and, therefore, discharged Burns before any concerted activity could begin. Consequently, Respondent violated the Act.

**B. Brian Burns is an employee eligible for protection under the Act.**

Just as the ALJ misapplied *Parexel*, he also erroneously concluded that Burns was a managerial employee and ineligible for protection under the Act. Curiously, Burns' status as an employee was never contested by Respondent in either its answer or its brief to the ALJ. The ALJ, nonetheless, decided *sua sponte* to exclude Burns from protection under the Act. Such a decision should not be made lightly. The ALJ had no substantive evidentiary basis to do this, and as a matter of fact and law, Burns was not a managerial employee.

While managerial employees are outside the Act's protection, the Board has defined managerial employees as "those who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy." *General Dynamics Corp.*, 213 NLRB 851, 857 (1974). The managerial exception was further defined by

the Supreme Court which held that, “[m]anagerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management.” *NLRB v. Yeshiva University*, 444 U.S. 672, 682–683 (1980). Further, “an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.” *Id.* at 682–683. In applying these standards to the current facts, there is absolutely nothing in the record to support finding Burns was a managerial employee.

Brian Burns, as a “human resources assistant,” was an employee under the Act. All of his work was assigned to him by his supervisor Kathryn Puma. (Tr. 37). As Puma testified at hearing, his areas of responsibility were essentially recruiting, which included posting job openings and doing backgrounds checks, and inputting payroll information. (Tr. 48). He had no involvement in determining employee wages or benefits, and had no responsibility to handle issues like racial hostility in the workplace. (Tr. 43). There is no evidence Burns had any ability to exercise discretion within Respondent’s established policies, and he certainly could not act independently of those policies. As Burns testified at trial and asserted in his letter to Respondent, given his job duties, he did not even believe it was accurate for Respondent to treat him as an exempt employee. (Tr. 15, GC Ex. 2). While Respondent may have had managerial aspirations for Burns in the future, he certainly had no managerial authority in the position of an assistant.

While Burns did not have a managerial position, as an employee in human resources, he was likely a “confidential employee.” The Board defines such an employee as one who assists in a confidential capacity the persons responsible for formulating and effectuating management policies with regard to labor relations. *BF Goodrich Co.*, 115 NLRB 722, 724 (1956). Significantly, the Board has long held that confidential employees, while typically excluded from bargaining units, nonetheless enjoy the protection of the Act. See, e.g., *E & L Transport Company*, 315 NLRB 303 (1994). While Burns, as a human resources assistant, likely acted in a confidential capacity, the ALJ failed to consider this possibility anywhere in his decision.

It is inappropriate for the ALJ to deny Burns’ status as an employee under the Act. While, typically, it is the burden of the party asserting managerial status to prove it, Respondent has made no such assertion in this case. Rather, the ALJ, and the ALJ alone, inappropriately inflated Burns’ position as an assistant to miscategorize him as a manager. That conclusion is not

supported by the evidence. Certainly, an employee should not be so easily removed from the Act's protection. The ALJ should be reversed.

**C. Brian Burns' motive did not disqualify him from protection under the Act.**

In his decision, the ALJ questions Burns' motive in writing the letter for which he was discharged. The ALJ does this, apparently, to help justify his recommendation that the complaint be dismissed. In the ALJ's version of the facts, Burns only wrote the letter – *the letter that resulted in his discharge* – in a cynical attempt to give himself greater job security: “the only reason he wrote this letter was to see if he could retain his job by threatening legal actions against the company.” (ALJD 3:50 – 4:1). This is wrong. Not only is the ALJ's speculation as to Burns' motive both counterintuitive and incorrect, it is irrelevant with regard to whether or not Burns' actions were protected under the Act.

Contrary to what the ALJ implies, Respondent had no reason to discharge Burns prior to his writing the letter. Five days before Burns wrote the letter, he had a conversation with his supervisor Puma about his past arrest record, in which Puma mentioned his arrest record would have been an issue had she known about it before he was hired. But, as Puma confirmed at trial, Respondent did not discharge Burns for this. (Tr. 53). Further, there is no evidence whatsoever that Respondent had, or had indicated any plan to discharge Burns for his past arrest record. Despite the ALJ's speculation, Burns had no reason to fear for his job.

At the time of his discharge, not only had Burns never been disciplined, but no manager had ever communicated any problem with his job performance. (Tr. 22, 23, 60). Instead, his supervisor Puma had told him he “was always doing a good job,” and any discussions about his work performance were “always positive.” (Tr. 22). Despite the ALJ's speculation, Burns, in fact, had no concern for his job security when he wrote the letter, and there is no reason to believe he would have been discharged **but for** raising concerns about Respondent's employment practices and indicating his intent to take action. It is clear that the Administrative Law Judge's speculation about Burns' motivation should not be given any weight, especially where, as here, they are not based on any testimony or other relevant record evidence. Therefore, as discussed at length above, under *Parexel*, Respondent discharged Brian Burns in violation of the Act.

**V. Remedy**

**A. Search-For-Work and Work-Related Expenses:**

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 Greenidge. Additionally, as part of a make-whole remedy, Respondent should be required to reimburse Scott 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>3</sup>; the cost of tools or uniforms required by an interim employer<sup>4</sup>; room and board when seeking employment and/or working away from home<sup>5</sup>; contractually required union dues and/or initiation fees, if not previously required while working for Respondent;<sup>6</sup> and/or the cost of moving if required to assume interim employment.<sup>7</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

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<sup>3</sup> *D.L. Baker, Inc.*, 351 NLRB 515, 537 (2007).

<sup>4</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>5</sup> *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976).

<sup>6</sup> *Rainbow Coaches*, 280 NLRB 166, 190 (1986).

<sup>7</sup> *Coronet Foods, Inc.*, 322 NLRB 837 (1997).

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>8</sup>, 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

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<sup>8</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.”).

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>9</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).

#### **B. Consequential Damages:**

Under the Board's present remedial approach, some economic harms that flow from a respondent's unfair labor practices are not adequately remedied. *See* Catherine H. Helm, *The Practicality of Increasing the Use of Section 10(j) Injunctions*, 7 INDUS. REL. L.J. 599, 603 (1985) (traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board's standard, broadly-worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders. *E.g.*, *Graves Trucking*, 246 NLRB 344, 345 n.8 (1979), *enforced as modified*, 692 F.2d 470 (7th Cir. 1982); *Operating Engineers Local 513 (Long Const. Co.)*, 145 NLRB 554 (1963). The Board should issue a specific make-whole remedial order in this case, and all others, to require the Respondent to compensate employees for all consequential economic harms that they sustain, prior to full compliance, as a result of the Respondent's unfair labor practices.

Reimbursement for consequential economic harm, in addition to backpay, is well within the Board's remedial power. The Board has "'broad discretionary' authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 2 (Aug. 8, 2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board's remedial structure is to "make whole" employees who are the victims of discrimination for exercising their Section 7 rights. *See, e.g., Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated

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<sup>9</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).

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 J.H. Rutter-Rex Mfg.*, 396 U.S. at 263 (recognizing the Act’s “general purpose of making the employees whole, and [] restoring the economic status quo that would have obtained but for the company’s” unlawful act).

Moreover, the Supreme Court has emphasized that the Board’s remedial power is not limited to backpay and reinstatement. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943); *Phelps Dodge Corp.*, 313 U.S. at 188-89. Indeed, the Court has stated that, in crafting its remedies, the Board must “draw on enlightenment gained from experience.” *NLRB v. Seven-Up Bottling of Miami, Inc.*, 344 U.S. 344, 346 (1953). Consistent with that mandate, the Board has continually updated its remedies in order to make victims of unfair labor practices more truly whole. *See, e.g., Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 4, 5 (revising remedial policy to require respondents to reimburse discriminatees for excess income tax liability incurred due to receiving a lump sum backpay award, and to report backpay allocations to the appropriate calendar quarters for Social Security purposes); *Kentucky River Medical Center*, 356 NLRB 6, 8-9 (2010) (changing from a policy of computing simple interest on backpay awards to a policy of computing daily compound interest on such awards to effectuate the Act’s make whole remedial objective); *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717 (1962) (adopting policy of computing simple interest on backpay awards), *enforcement denied on other grounds*, 322 F.2d 913 (9th Cir. 1963); *F.W. Woolworth Co.*, 90 NLRB 289, 292-93 (1950) (updating remedial policy to compute backpay on a quarterly basis to make the remedies of backpay and reinstatement complement each other); *see also NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938) (recognizing that “the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress”). Compensation for employees’ consequential economic harm would further the Board’s charge to “adapt [its] remedies to the needs of particular situations so that ‘the victims of discrimination’ may be treated fairly,” provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge*, 313 U.S. at 194); *see Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (2014). The Board should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent’s unlawful conduct.

Reimbursement for consequential economic harm achieves the Act's remedial purpose of restoring the economic status quo that would have obtained but for a respondent's unlawful act. *J.H. Rutter-Rex Mfg.*, 396 U.S. at 263. Thus, if an employee suffers an economic loss as a result of an unlawful elimination or reduction of pay or benefits, the employee will not be made whole unless and until the respondent compensates the employee for those consequential economic losses, in addition to backpay. For example, if an employee is unlawfully terminated and is unable to pay his or her mortgage or car payment as a result, that employee should be compensated for the economic consequences that flow from the inability to make the payment: late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car for the employee.<sup>10</sup> Similarly, employees who lose employer-furnished health insurance coverage as the result of an unfair labor practice should be compensated for the penalties charged to the uninsured under the Affordable Care Act and the cost of restoring the old policy or purchasing a new policy providing comparable coverage, in addition to any medical costs incurred due to loss of medical insurance coverage that have been routinely awarded by the Board. *See Roman Iron Works*, 292 NLRB 1292, 1294 (1989) (discriminatee entitled to reimbursement for out-of-pocket medical expenses incurred during the backpay period as it is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost).

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Modifying the Board's make-whole orders to include reimbursement for consequential economic harm incurred as a result of unfair labor practices is fully consistent with the Board's established remedial objective of returning the parties to the lawful status quo ante. Indeed, the Board has long recognized that unfair labor practice victims should be made whole for economic losses in a variety of circumstances. *See Greater Oklahoma Packing Co. v. NLRB*, 790 F.3d 816, 825 (8th Cir. 2015) (upholding award of excess income tax penalty announced in *Tortillas Don Chavas* as part of Board's "broad discretion"); *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955) (unlawfully discharged discriminatees entitled to expenses incurred in searching for new

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<sup>10</sup> However, an employee would *not* be entitled to a monetary award that would cover the mortgage or car payment itself; those expenses would have existed in the absence of any employer unlawful conduct.

<sup>11</sup> Economic harm also encompasses "costs" such as losing a security clearance, certification, or professional license, affecting an employee's ability to obtain or retain employment. Compensation for such costs may include payment or other affirmative relief, such as an order to request reinstatement of the security clearance, certification, or license.

work), *enforced*, 228 F.2d 871 (6th Cir. 1955); *BRC Injected Rubber Products*, 311 NLRB 66, 66 n.3 (1993) (discriminatee entitled to reimbursement for clothes ruined because she was unlawfully assigned more onerous work task of cleaning dirty rubber press pits); *Nortech Waste*, 336 NLRB 554, 554 n.2 (2001) (discriminatee was entitled to consequential medical expenses attributable to respondent's unlawful conduct of assigning more onerous work that respondent knew would aggravate her carpal tunnel syndrome; Board left to compliance the question of whether the discriminatee incurred medical expenses and, if she did, whether they should be reimbursed); *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (Oct. 24, 2014) (Board considered an award of front pay but refrained from ordering it because the parties had not sought this remedy, the calculations would cause further delay, and the reinstated employee would be represented by a union that had just successfully negotiated a CBA with the employer). In all of these circumstances, the employee would not have incurred the consequential financial loss absent the respondent's original unlawful conduct; therefore, compensation for these costs, in addition to backpay, was necessary to make the employee whole.

The Board's existing remedial orders do not ensure the reimbursement of these kinds of expenses, particularly where they did not occur by the time the complaint was filed or by the time the case reached the Board. Therefore, the Board should modify its standard make-whole order language to specifically encompass consequential economic harm in all cases where it may be necessary to make discriminatees whole.

The Board's ability to order compensation for consequential economic harm resulting from unfair labor practices is not unlimited, and the Board concededly "acts in a public capacity to give effect to the declared public policy of the Act," not to adjudicate discriminatees' private rights. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193. Thus, it would not be appropriate to order payment of speculative, non-pecuniary damages such as emotional distress or pain and suffering.<sup>12</sup> In *Nortech Waste, supra*, the Board distinguished its previous reluctance to award medical expenses in *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168 (1986) and *Operating Engineers Local 513 (Long Construction)*, 145 NLRB 554 (1963), as cases involving "pain and suffering" damages that were inherently "speculative" and "nonspecific." *Nortech Waste*, 336 NLRB at 554 n.2. The Board explained that the special expertise of state

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<sup>12</sup> This is in contrast to non-speculative consequential economic harm, which will require specific, concrete evidence of financial costs associated with the unfair labor practice in order to calculate and fashion an appropriate remedy.

courts in ascertaining speculative tort damages made state courts a better forum for pursuing such damages. *Id.* However, where—as in *Nortech Waste*—there are consequential economic harms resulting from an unfair labor practice, such expenses are properly included in a make-whole remedy. *Id.* (citing *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 799 n.3 (1985) (respondent liable for discriminatee’s consequential medical expenses); *Lee Brass Co.*, 316 NLRB 1122, 1122 n.4 (1995) (same), *enforced mem.*, 105 F.3d 671 (11th Cir. 1996)).<sup>13</sup>

## VI. Conclusion

Respondent violated Section 8(a)(1) of the Act by discharging Brian Burns as a preemptive strike to prevent him from engaging in protected concerted activity. The General Counsel respectfully requests that the Board sustain the General Counsel’s exceptions and reverse the ALJ’s erroneous findings of fact and conclusions of law, which have no support in the record evidence. It is further urged that the Board issue an order requiring Respondent to offer immediate and full reinstatement to Brian Burns and to make him whole for any losses he suffered because Respondent unlawfully discharged him.

Dated at Brooklyn, New York, August 9, 2016.



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<sup>13</sup> The Board should reject any argument that ordering reimbursement of consequential economic harms is akin to the compensatory tort-based remedy added to the make-whole scheme of Title VII by the Civil Rights Act of 1991. *See Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994). The 1991 Amendments authorized “damages for ‘future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.’” *Id.* (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)). The NLRA does not authorize such damages. However, even prior to the 1991 Amendments, courts awarded reimbursement for consequential economic harms resulting from Title VII violations as part of a make-whole remedy. *See Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at \*3 (D. Conn. Nov. 20, 2007) (“[e]ven before additional compensatory relief was made available by the 1991 Amendments, courts frequently awarded damages” for consequential economic harm, such as travel, moving, and increased commuting costs incurred as a result of employer discrimination); *see also Proulx v. Citibank*, 681 F. Supp. 199, 205 (S.D.N.Y. 1988) (finding Title VII discriminatee was entitled to expenses related to using an employment agency in searching for work), *affirmed mem.*, 862 F.2d 304 (2d Cir. 1988).