

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4**

MID-ATLANTIC RESTAURANT GROUP
LLC d/b/a KELLY'S TAP ROOM

and

Case 04-CA-162385

ROBIN C. HELMS, an Individual

RESPONDENT'S POST-HEARING BRIEF

Respondent Mid-Atlantic Restaurant Group d/b/a Kelly's Tap Room (hereinafter "Kelly's" or "Mid-Atlantic"), by and through its undersigned attorneys, Conway Schadler, LLC, hereby files this Post-Hearing Brief and in support thereof avers as follows.

I. FACTS OF THE CASE AND PROCEDURAL HISTORY

This matter is the subject of a compliance specification action where the sole issue before the Court is Ms. Helms' failure to mitigate her damages. Respondent has averred, and the evidence has demonstrated, that Mrs. Helms failed to meaningfully seek, and did not obtain, work for several months after her discharge from Kelly's Tap Room. Ms. Helms is required to make reasonable efforts to mitigate loss; in this matter it was shown that she did not.

All parties have acknowledged that the information in the compliance specification was accurate as to Ms. Helms' work history. GC Exh. 1 at Exh. 2. It is therefore undisputed that *quarters, not just weeks, passed* before Ms. Helms obtained employment. Exhibit 2 of the Compliance Specification establishes Robin Helm's earnings after her separation from Kelly's Tap Room. *Id.* In the Second Quarter of 2015, a timeframe of 8.6 weeks, Robin Helms did not report any income from employment, resulting in a backpay award of \$2,930.81. *Id.* In the Third Quarter of 2015, a time frame of 13 weeks, Robin Helms did not report any income from employment resulting, in a backpay award of \$4,394.52. *Id.* In the Fourth Quarter of 2015, a

time frame of 13 weeks, Robin Helms reported an income of \$1,658.00 from employment, resulting in a backpay award of \$2,736.52. *Id.* In the first quarter of 2016, a time frame of 13 weeks, Robin Helms was employed by SWIF, however, only reported an income of \$190.00, resulting in a backpay award of \$4,204.52. As such, in the first quarter of 2016, Ms. Helms worked less than 3 days out of 13 weeks.

Ms. Helms testified about her job search. While at first glance it seemed thorough, it became clear that it was absurdly and unnecessarily restrictive. Ms. Helms testified that, in relation to her job search, she used Craigslist and talked to some people in the industry. *See* Transcript at 33-36. Ms. Helms' main contention about why she could not find work was on the account of child care. Ms. Helms has two young children, but she admitted that she does have several childcare options, including a babysitter that regularly watches her children on Thursdays. *See* Transcript at 26:12-27:11.

Ms. Helms testified that she went on interviews and even went to a training session for an offered job. Ms. Helms claimed that most times she could not take the job due to the prospective employer's needs for a shift outside of Thursday, Friday, and Saturday nights. More specifically, she discussed the results of her interviews and says that "[g]enerally, either there weren't bartending positions actually available or I wasn't available to fit their daytime needs" and she claimed to not be available because "I had to care for my children." *See* Transcript at 55:11-15. She states that she actually began training at a Mexican Restaurant in Wynnewood and she refused the job because they were "going to have a requirement for a steady daytime shift." *See id.* at 56:14-24.

Ms. Helms then testified about the quarters when she worked for SWIG as a contractor. This was very irregular and as noted in her earnings, led to her working very little at certain

times. She worked only for SWIG for the better part of the last quarter of 2015 and the first quarter of 2016. She testified that her work there was “[v]ery unpredictable” and slowed down greatly toward the end. *See* Transcript at 61-62. It should be noted that her working for SWIG was largely due to her only wishing to work an artificially narrow schedule.

Ms. Helms testified that she finally found regular employment at Teca in Newtown Square, PA in March of 2016. *See* Transcript at 63-65. Ms. Helms admitted that she would do other shifts for Teca and utilize combinations of her mother and her regular babysitter, Melissa. *See id.* at 65-66. More specifically in reference to shifts at Teca, Ms. Helms testified as follows:

Q. What was your schedule like at Teca, with a particular focus on how it compared to your schedule at Kelly's?

A. My open availability for them was the same, roughly, dates and times, Thursday night, Friday night, Saturday night.

Q. Did you ever work other shifts than that for Teca?

A. I did. I did. If they, if they had a need, I was -- I worked to fill it.

Q. When you say you "worked to fill it," how do you mean?

A. I would reach -- pretty much my normal method of trying to get coverage. I'd reach out to Melissa, see if she could watch them on an off day. Then see if there was a way that maybe I could drop them off to my mom on my way and then she could drive them home, and then maybe Melissa was done her activity and then she'd drop them off to Melissa sometimes. And Melissa would take over, like, dinnertime until Wayne got home from work. Sometimes they asked me to come in early, and then Wayne would meet me in the parking lot, pick the kids up, and then take them home. So there was -- ***we just made it try to work.***

See id. (emphasis added). Ms. Helms further admitted that her husband does not work on Sundays and could care for the children. *See id.* at 70:23-71:10.

Ms. Helms also testified that despite her husband being home and able to provide child care, she did not list Sundays as a time she could work on her job search materials. *See id.* at 79:1-10. Ms. Helms somewhat candidly admitted the true reason for her only wanting to work Thursday, Friday and Saturday nights, i.e. that they were the most lucrative. Ms. Helms stated specifically:

Q. Yes, and -- but you didn't put those days down as a day you could work.

A. I didn't.

Q. And that was because what your focus was here is getting the shifts that made you the most money, correct?

A. I mean, yeah, they made the most money. Yes. Absolutely.

See id. (emphasis added). These shifts are the most lucrative and they are therefore the most popular.

These facts are extremely notable because not only is it an unreasonable request on her part to only work the most lucrative shifts, it is **not** the arrangement that she had at Kelly's. Ms. Helms admitted that at Kelly's she would work other shifts. More specifically, Ms. Helms testified as follows:

Q. Okay. And in your testimony was you worked the Thursday, Friday, Saturday. Excuse me. But if somebody came to you and said, hey listen, we need to cover these shifts, then you would know and you'd say, okay, I can work the Tuesday or I can work the Wednesday, correct? I'm making those days up.

A. Broadly, yes. Yes, yes.

Q. When you say "broadly," what do you mean by "broadly?"

A. I had a system roughly in place with them. If there was a need, Kristin or Ryan or Angie would say we have this spot we need covered; can you work it? I would then reach out to basically, down my list. Melissa was first, to keep my kids home so that they would get to bed and things like that at a reasonable time. Then it would work down my list to my mom. And then maybe there was an off chance that my husband had clients out of town and so he had a hole in his schedule, that I could get him to be home with them earlier. So I did my best to work around those avenues to get the coverage so I could fill the need at Kelly's.

Q. So I understand I want to make sure I have this correct. So if you were to work a day other than a Thursday, Friday, or Saturday, it was almost like a you had to get the prior approval of you to do it

A. Yes.

Q. -- so you would know it was coming.

A. Yes.

Q. Okay. All right. And that would be and that was throughout your time at Kelly's?

A. Yes.

See id. at 74:21-75:24. Thus, Ms. Helms admitted to working other shifts at Kelly's

“throughout” her time there as long as she had notice. She also testified that this was more so at toward the end of her employment there. *See id.* at 79:24-80:3.

Ms. Helms further claimed that she restricted her search to outside of Philadelphia because of alleged, mostly unspecified travel and parking concerns. *See* Transcript at 42:1-43:11. Ms. Helms admitted that Philadelphia was within a similar radius of her home as Kelly's was. *See id.* at 85:1-18. Ms. Helms failed to state anything specific about certain jobs, she simply closed off her search to that area. Furthermore, made ridiculous assertions that she could not work in Philadelphia because she might have to "get to" her kids. *See id.* Ms. Helms did not state why her kids might suddenly need her given that she was working at night generally and the kids would be in the care of their Father or a normal caregiver as she testified to. Rather, this seems to have been a pretext to close off her search to an area where bar tender jobs would be abundant. Furthermore, she did not explain why her husband, who ran his own gym, would not be a viable option if there was a sudden need pertaining to the children.

Ms. Helms elaborated on cross examination about these shifts as follows

Q. I'd like to talk about those interviews and talk about what took place at those interviews. Did you have a conversation at those interviews as to what your scheduling requirements would be?

A. Some of them it came up, yes.

Q. Okay. And what did you tell them your scheduling requirements would be?

A. Night shifts.

Q. Okay. Did you say which days you could work night shifts?

A. I said I had availability Thursday, Friday, and Saturday nights.

Q. Okay. So you limited it to those Thursday, Friday, and Saturday nights when you interviewed?

A. With the same caveat that I had ultimately at Kelly's and that I discussed with Teca.

Q. Now, we can agree that, as you testified earlier, those are the prime shifts that every bartender would want, correct?

A. Yes.

Q. Okay. And often in the industry, when you work at a location, you have to work other shifts to balance the fact that you're working those prime and lucrative shifts, correct?

A. I guess, depending on what the business's needs are.

See Transcript at 87:6-88:5 (emphasis added). Ms. Helms admits that she limited her search to simply the most lucrative shifts and no others, and that it is often necessary to work non-prime shifts in the industry. She further admitted that if a job required a lunch shift, she simply did not apply. *See id.* at 94:9-11.

Respondent called Angie Mitchell, who is the manager of Kelly's and she elaborated on the need for persons to work shifts other than the prime shifts and what Robin Helms actually did at Kelly's. Mrs. Mitchell stated as follows:

Q. Okay. Now let's talk a little bit about Thursday the Thursday, Friday, and Saturday night bartending shifts. Why are those and we've talked a lot about them in this hearing. What is specific about those shifts?

A. Well, they're the days of the weeks that we actually have more need for bartenders. We're open on three levels on Thursday, Friday, Saturday, and they're also the most busy.

Q. And just so it's clear, when you say "three levels," you're talking about

A. Three levels within the restaurant. Floors.

Q. All right. And I don't mean to beat the point, but I just want to make sure the record's clear. So you said multiple bars in Kelly's, correct?

A. There's two bars on three levels. Yes.

Q. Okay. So you have, you have to staff all of them, is what you're saying.

A. Yes.

Q. Now, you said that they're the busiest. Does this lead to them being more lucrative?

A. Yes.

See Transcript at 106:23-107:17. Mrs. Mitchell also discussed the difficulty distributing shifts and Ms. Helms' availability:

Q. Okay. And does there ever come up an issue with scheduling people as far as it pertains to a Thursday shift versus a Tuesday shift?

A. We ask for staff to be flexible and pick up not only the best shifts but also help out on slower shifts to equally spread the shifts around and then so it's fair for everyone.

Q. And why is that?

A. I'm not -- had people with me for years. And if they, you know, take a slow shift, you know, they're going to be put on a busy shift as well. It's the only equal way distribution of shifts.

Q. And is this the way that you run things at Kelly's?

A. That is, yes.

Q. Okay. And there's been some talk -- and to be clear, you've been able to sit through the first part of this proceeding, correct?

A. Yes.

Q. With Ms. Helms's testimony. There was some testimony about her being only working on Thursday, Fridays, and Saturdays at evenings. And I'm just loosely saying that. You remember that whole testimony?

A. Yes.

Q. And what was your understanding of her time at Kelly's and your understanding with the shift?

A. She was available Thursday, Friday, Saturday. And she generally worked those shifts. She sometimes picked up other shifts as well.

Q. Okay. And when you say that "she was available," was she available any -- do you have any recollection or notes of her being available other days to work or letting people know she had other days available?

A. Not on a fixed schedule. I did recollect she was also available Sunday, but that was years ago.

See id. at 107:18-108:25.

Mrs. Mitchell also confirmed that there is high turnover in the Restaurants that she runs including the one that Ms. Helms worked at. *See id.* at 116:3-118:16. Mrs. Mitchell also confirmed that she has experience with Craigslist for jobs and that there are as many as "10 to 12" openings every day. *See id.* at 118:22-120:12.

II. ARGUMENT

Longstanding remedial principles establish that backpay is not available to a discriminatee who has failed to seek interim employment and thus incurred a willful loss of earnings. *See, e.g., Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 174 fn. 3 (2nd Cir. 1965) (It is accepted by the Board and reviewing courts that a discriminatee is not entitled to back pay to the extent that he fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason.).

"The principle of mitigation of damages does not require success, it...requires an honest good faith effort..." *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711 (2001). While a party

need not immediately search for work, a delay of longer than two weeks has been found to be unreasonable. *Grosvenor Resort*, 350 NLRB 1197 (2007); *Domsey Trading Corp.*, 351 NLRB 824, 831–832 (2007).

The respondent generally must produce evidence and prove that there were suitable jobs available for someone with the discriminatee’s qualifications *and* that the discriminatee’s job search was unreasonable. *Black Magic Resources*, 317 NLRB 721, 721–722 (1995); *Lloyd’s Ornamental & Steel Fabricators, Inc.*, 211 NLRB 217, 218 (1974). “To meet this burden, the employer must affirmatively demonstrate that the employee ‘neglected to make reasonable efforts to find interim work.’” *Rainbow Coaches*, 280 NLRB 166, 180 (1996). The Board has said that:

A good faith effort requires conduct consistent with an inclination to work and to be self-supporting and that such inclination is best evidenced not by a purely mechanical examination of the number or kind of applications for work which have been made, but rather by the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment.

Lorge School, 355 NLRB 558, 560 (2010). An examination of the evidence shows that Ms. Helms failed to make a good faith effort as required by the case law.

As stated above, it is undisputed that several quarters passed, before Ms. Helms obtained full employment. Exhibit 2 of the Compliance Specification establishes Robin Helms earnings after her separation from Kelly’s Tap Room. GC Exh. 1 at Exh. 2. In the Second Quarter of 2015, a timeframe of 8.6 weeks, Robin Helms did not report any income from employment, resulting in a backpay award of \$2,930.81. *Id.* In the Third Quarter of 2015, a time frame of 13 weeks, Robin Helms did not report any income from employment resulting, in a backpay award of \$4,394.52. *Id.* In the Fourth Quarter of 2015, a time frame of 13 weeks, Robin Helms

reported an income of \$1,658.00 from employment, resulting in a backpay award of \$2,736.52.
Id.

In the first quarter of 2016, a time frame of 13 weeks, Robin Helms was a contractor for SWIF, however, only reported an income of \$190.00, resulting in a backpay award of \$4,204.52. As such, in the first quarter of 2016, Ms. Helms worked less than 3 days out of 13 weeks. As stated above, the Parties all agree as to what Ms. Helms' actual interim earnings were. The question is really whether Ms. Helms properly conducted a search for employment during the second, third, and fourth quarters of 2015 and the first quarter of 2016. Respondent asserts that Ms. Helms' search was not reasonable and that her failure to find employment for these times amounts to a willful failure to obtain suitable employment.

Ms. Helms' job search may, at first glance, appear to be reasonable. General Counsel argued this point numerous times in the hearing, stating how Ms. Helms was active on Craigslist, applying for numerous positions in the restaurant field. Respondent does not dispute this, as on the surface Ms. Helms did just that, she applied for numerous jobs. However, this is not where Ms. Helms falls short in meeting the standard of an "an honest good faith effort" as articulated in *Atlantic Limousine, Inc.* It is the artificial limitations, and the reasons for those limitations, Ms. Helms put on her search that clearly causes her search to fall short of an honest good faith effort.

Ms. Helms, by her own admission, limited her job search to Thursday, Friday and Saturday bartending shifts. To explain this, Ms. Helms leaned heavy on the argument that she had child care issues to attend to, which limited her ability to obtain employment. However, when questioned in a more pointed manner, the reason that Ms. Helms sought these shifts became clear: they are the shifts that are most lucrative for bartenders.

Mrs. Mitchell testified that the most lucrative shifts are Thursday, Friday and Saturday nights, and that there is no problem finding employees to work these shifts. Rather, these were the shifts that existing employees sought to work. It was shifts other than Thursday, Friday and Saturday evening that Mrs. Mitchell would have difficulty filling. It just so happens – and not by coincidence – that Ms. Helms was seeking employment premised upon the fact that she was only able to work the shifts that would make her the most money.

The biggest flaw that exists in General Counsel's position that Ms. Helms engaged in an honest, good faith search is that the above stated shift restriction was not the working arrangement that she had with Kelly's Tap Room. Respondents presented Exhibit R-2, Ms. Helms' shift schedule during her time at Kelly's Tap Room. Ms. Helms often, and repeatedly, worked shifts that were not on Thursday, Friday and Saturday. In fact, when looking at the shifts Ms. Helms worked, *she worked over a quarter of her shifts* on a day other than Thursday, Friday and Saturday.

There was no testimony whatsoever as to what change took place with child care that gave Ms. Helms the freedom to work other days at Kelly's Tap Room and why, after she was separated from Kelly's Tap Room, that she had to place such heavy restrictions on her job search. She had the same number of children, her husband was at the same job and she was living in the same house. There were no change of circumstance that necessitated her limiting her job search in the manner she did, other than she wanted to ensure that she was only required to work lucrative shifts.

Ms. Helms' main reason that she gives for only seeking Thursday, Friday and Saturday is her care for her children. First, as stated above, this was not an issue just weeks/months before when she works at Kelly's Tap Room. However, there is far simpler and much more compelling

evidence that demonstrates that Ms. Helms narrowing of her search was not driven by her children, but rather by money.

Ms. Helms admitted that she omitted Sundays from her job search even though her husband was home at this time. *See* Transcript at 70:23-71:10. As testified, most jobs were looking for their bartenders to work a shift, some daytime, other than Thursday, Friday and Saturday. There was no reason whatsoever for Ms. Helms to exclude Sunday from the dates she could work, except for the fact that she did not want to work a less lucrative shift. There would have been no need for child care in this instance, as her husband would be home that day for the children. This shows that Ms. Helms true motivation was not child care issues but rather isolating and limiting her shifts to the most lucrative ones. Most importantly, as stated before, Ms. Helm's did not have this arrangement with Kelly's Tap Room.

Furthermore, Ms. Helms admitted that at both her job at Kelly's and at Teca, she would work other shifts and "make it work." She completely failed to explain why this would not apply to other jobs requiring other shifts or even the job that she apparently had and refused to take because of a daytime shift. There was nothing stated by her that suggested she could not accommodate that as she did in her other jobs.

And while Ms. Helms tried to make this about her family and her kids, at several turns she admitted that it was about money. Ms. Helms admitted that the shifts she wanted were the most lucrative. *See id.* at 79:1-9. She discussed not using her degree because bar tending was more lucrative. *See id.* at 38. She also admitted that she could work as a server but that it generally was not as lucrative. *See id.* at 89:2-18. Ms. Helms simply wanted to work the least amount of time and make the most money. There is nothing necessarily wrong with that goal,

but seeking only jobs giving her the best shifts and nothing else and was geographically constricted led to a search that was not the reasonable search she was required to make.

What Ms. Helms did, in looking at the above, was look for a job that, in all reality, did not exist. She wanted a job that would let her work the most lucrative shifts and no others. This artificial restriction placed such confines on her search that it was impossible for her to find a job. To use an analogy, it is as if a lawyer who was terminated as a first-year associate sought employment as a lawyer, however, only would accept a partner level position. The lawyer can make diligent efforts as far as applying, interview at numerous firms, but they are not going to get hired based upon the artificial, overburdensome restrictions they have placed on their search. This is precisely what Ms. Helm's did.

This position stands in stark oppose to the "honest good faith effort" as articulated in *Atlantic Limousine, Inc.* The key words at play in this case are "honest" and "good faith". There is certainly evidence to argue that Ms. Helms made an effort, but where she fails is that her search was not honest, nor in good faith. She sought a job that did not exist and wants credit because she searched. This is contrary to the applicable case law.

It is important to address and argument that General Counsel has made throughout this compliance specification. General Counsel repeatedly stated in the hearing (and has at other times) that the Court found that Ms. Helms was terminated in violation of her rights. This was repeated many times and hammered home by Counsel. While it is incontrovertible that the Court found in Ms. Helm's favor, determining a violation had occurred, it does not grant Ms. Helms the ability to run amuck over Respondent. Nor, does it alleviate her from meeting the requirements for seeking employment in an honest and good faith manner.

