

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

**MID-ATLANTIC RESTAURANT
GROUP LLC d/b/a KELLY'S TAPROOM**

and

Case 04-CA-162385

ROBIN C. HELMS

**GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW
JUDGE**

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TABLE OF CONTENTS

I. **Introduction**.....1

II. **Statement of the Case**.....1

 A. **The underlying unfair labor practice proceeding**.....1

 B. **The compliance specification**.....2

 C. **Disputed issues**.....4

III. **Analysis**.....5

 A. **The Board’s mitigation doctrine**.....5

 B. **The element’s of Respondent’s affirmative defense**.....6

 C. **Respondent failed to meet its initial burden to show the existence of substantially equivalent jobs**.....7

 1. **Testimony of Angie Mitchell**.....8

 2. **Testimony of Helms**.....12

 D. **Respondent also failed to prove that Helms’s efforts to obtain work after her discharge were unreasonable**.....13

 1. **Allocation of the burdens with regard to the second element**.....14

 2. **Helms’s job search easily met the Board’s standard**.....15

 a. **Helms was entitled to exclude from her search for work positions that were not substantially equivalent to her employment with Respondent**.....16

 i. **Helms was not obligated to seek interim employment that interfered with her childcare responsibilities**.....16

ii.	<u>Helms was not obligated to seek interim employment with a more onerous commute than what she had with Respondent.....</u>	18
b.	<u>It was reasonable for Helms to seek bartending positions to replace her bartending position with Respondent.....</u>	21
c.	<u>Helms put forth an honest, good-faith effort to find interim work.....</u>	24
i.	<u>Helms chose reasonable methods for her job search.....</u>	24
a)	<u>Helms contacted people she knew who had worked in the food and beverage service industry for job leads.....</u>	25
b)	<u>Helms asked her husband if he knew of any job leads through his business.....</u>	25
c)	<u>Helms sought jobs through Craigslist....</u>	26
ii.	<u>Helms’s conduct during the relevant timeframe demonstrates her good faith.....</u>	27
a)	<u>Helms assiduously search and applied for job openings.....</u>	27
b)	<u>Helms went to great lengths to attend job interviews.....</u>	29
c)	<u>When Helms thought she had found a position that accommodated her childcare responsibilities, she proceeded to a training shift.....</u>	31
d)	<u>Helms’s work with Swig further proves her good faith.....</u>	32
IV.	<u>Conclusion.....</u>	34

TABLE OF AUTHORITIES

1849 Sedgwick Realty LLC,
337 NLRB 245 (2001) 16

AdvoServ of New Jersey, Inc.,
363 NLRB No. 143 (2016)..... 35

Allegheny Graphics,
320 NLRB 1141 (1996)..... 28, 33, 34

American Medical Insurance Company, Inc.,
235 NLRB 1417 (1978)..... 20

Arthur Young & Co.,
304 NLRB 178 (1991)..... 14

Convergence Communications, Inc.,
342 NLRB 918 (2004)..... 2

Don Chavas, LLC d/b/a Tortillas Don Chavas,
361 NLRB 101 (2014)..... 35

Essex Valley Nurses Assn.,
352 NLRB 427 (2008)..... 5, 14, 15, 17

Essex Valley Nurses Assn.,
356 NLRB 146 (2010)..... 5

International Brotherhood of Teamsters Local 25,
366 NLRB No. 99 (2018)..... passim

Kentucky River Medical Center,
356 NLRB 6 (2010)..... 35

KSM Industries,
353 NLRB 1124 (2009)..... 3, 4, 23

KSM Industries,
355 NLRB 1344 (2010)..... 3

Lorge School,
355 NLRB 558 (2010)..... passim

Lucky Cab Co.,
366 NLRB No. 56 (2018)..... passim

Lundy Packing Co.,
286 NLRB 141 (1987)..... 5, 6

M.D. Miller Trucking & Topsoil, Inc.,
363 NLRB No. 49 (2015)..... 2

Mid-Atlantic Restaurant Group, LLC, d/b/a Kelly’s Taproom,
364 NLRB No. 153 (2016)..... passim

Midwestern Personnel Services, Inc.,
346 NLRB 624 (2006)..... passim

<i>Minette Mills, Inc.</i> , 316 NLRB 1009 (1995).....	3
<i>New Horizons</i> , 283 NLRB 1173 (1987).....	35
<i>Ohio Public Service Co.</i> , 52 NLRB 725 (1943).....	5
<i>Phelps Dodge Corp. v. NLRB</i> , 313 U.S. 177 (1941)	5
<i>Retail Delivery Systems</i> , 292 NLRB 121 (1988).....	26
<i>Richard W. Kaase Co.</i> , 162 NLRB 1320 (1962).....	17, 18, 21
<i>St. George Warehouse, Inc.</i> , 353 NLRB 497 (2008)	passim
<i>St. George Warehouse, Inc.</i> , 355 NLRB 474 (2010)	14
<i>United Aircraft Corp.</i> , 204 NLRB 1068 (1973).....	6
<i>WHLI Radio</i> , 233 NLRB 326 (1977).....	20

I. Introduction

The Board has already determined that Kelly’s Taproom (“Respondent”) fired its employee Robin Helms in retaliation for Helms exercising her rights under the Act and that Respondent must compensate Helms for her resulting losses, and the United States Court of Appeals for the Third Circuit has already enforced that determination. The purpose of the present proceeding is to determine the precise amount of those losses. The only disputed issue is whether Respondent established its affirmative defense that, between Helms’s unlawful discharge by Respondent and her hiring by Guadagnini Newtown, Inc. d/b/a Teca Newtown Square (“Teca”), Helms willfully added to her losses by failing to make reasonable efforts to obtain work to replace the job Respondent wrongfully took from her. To establish its affirmative defense, Respondent was required to prove both of two elements: first, that there were substantially equivalent jobs within the relevant geographic area during the relevant time period, and, second, that Helms unreasonably failed to apply for these jobs. Respondent did not come anywhere near establishing either element. Its affirmative defense therefore fails.

II. Statement of the Case

This is a compliance proceeding. Its purpose is to determine the specific amount of monetary damages Respondent inflicted on its employee Robin Helms by firing her for exercising her rights under the Act. The general question for decision is: how much money did Helms lose as a result of Respondent’s unlawful discharge of her?

A. The underlying unfair labor practice proceeding

The history of this case is as follows. On November 30, 2016, the Board held that Respondent, which is a restaurant, discharged Helms, who was employed by Respondent as a part-time bartender, in retaliation for her protected concerted activities—specifically, in

retaliation for Helms and her coworkers expressing concern to Respondent's supervisors that soon-to-be-hired bartenders would displace them from their preferred shifts. *Mid-Atlantic Restaurant Group, LLC, d/b/a Kelly's Taproom*, 364 NLRB No. 153, slip op. at 11-12 (2016), *enfd.* 722 Fed.Appx. 284 (3d Cir. 2018). By this conduct, Respondent violated Section 8(a)(1) of the Act. *Id.*, slip op. at 1 fn. 3. To remedy this violation, the Board ordered, among other things, that Respondent: (1) "Make Robin Helms whole for any loss of earnings and other benefits suffered as a result of the discrimination against her..."; and (2) "Compensate Robin Helms for the adverse tax consequences, if any, of receiving a lump-sum backpay award..." *Id.*, slip op. at 1.

On January 25, 2018, the United States Court of Appeals for the Third Circuit enforced the Board's Order in its entirety. *Kelly's*, 722 Fed.Appx. at 288.

"It is well settled that a respondent may not relitigate matters in the compliance stage that were decided in an underlying unfair labor practice proceeding." *M.D. Miller Trucking & Topsoil, Inc.*, 363 NLRB No. 49, slip op. at 2 (2015) (citing *Convergence Communications, Inc.*, 342 NLRB 918, 919 (2004)). The Board's determinations in the underlying unfair labor practice proceeding in the present case therefore are not subject to challenge. E.g., *ibid.*

B. The compliance specification

On June 29, 2018, the Regional Director for the Fourth Region issued a Compliance Specification and Notice of Hearing setting forth the precise amount of money Respondent owed Helms under the Board's enforced order (GC Exh. 1(c)). This included both the amount of Helms's "loss of earnings and other benefits suffered as a result of the discrimination against her" and the amount of "the adverse tax consequences...of receiving a lump-sum backpay award" (GC Exh. 1(c)). *Kelly's*, 364 NLRB No. 153, slip op. at 1.

The compliance specification began by setting forth the amount of Helms’s gross backpay (GC Exh. 1(c)). In a compliance proceeding like the present one, “[t]he General Counsel bears the burden of establishing the gross backpay due to a discriminatee.” *International Brotherhood of Teamsters Local 25*, 366 NLRB No. 99, slip op. at 1 (2018). “The objective in determining gross backpay is to reconstruct as accurately as possible what employment and earnings the discriminatee would have had during the backpay period had there been no unlawful action.” *Minette Mills, Inc.*, 316 NLRB 1009, 1012 (1995) (internal quotation marks omitted). In simple terms, where an employer unlawfully discharged an employee, gross backpay is what the discriminatee would have earned had she not been discharged but rather continued working for the employer. See, e.g., *ibid.* Here, Respondent stipulated that the amount of gross backpay set forth in the compliance specification was correct (GC Exhs. 1(c), 2). The General Counsel therefore carried his burden to establish that amount. See *Teamsters Local 25*, above, slip op. at 1-2.

“Once the General Counsel has met this burden [of establishing the gross backpay due to a discriminatee], the Respondent may establish an affirmative defense that would reduce its liability.” *Id.*, slip op. at 1. It is a “fundamental tenet of Board compliance precedent...that the burden of proving the existence, amount, and applicability of interim offsets to gross backpay figures is borne by the respondent that committed the unfair labor practices and not by the General Counsel.” *KSM Industries*, 353 NLRB 1124, 1172 (2009), *affd.* 355 NLRB 1344 (2010), *enfd.* 682 F.3d 537 (7th Cir. 2012).

However, although the General Counsel has no obligation to do so, “it is the General Counsel’s voluntary policy to assist in gathering information on interim earnings and include this

data in the compliance specification.” Ibid. This “voluntary policy is nothing more than an administrative courtesy.” Ibid. (internal quotation marks omitted).

In accordance with the aforementioned voluntary policy, in the present case, the General Counsel investigated whether the gross backpay owed by Respondent to Helms should be reduced for any reason. The General Counsel found that Helms had earned money that should be offset against gross backpay, and set forth those earnings in the compliance specification (GC Exh. 1(c)). Respondent stipulated at hearing that Helms had no earnings that should be offset against gross backpay other than those listed in the compliance specification (Tr. 8-9).

C. Disputed issues

Respondent did challenge the amount of the losses set forth in the compliance specification on one ground. Specifically, Respondent asserted the affirmative defense that Helms failed to mitigate her losses during the period running from her unlawful discharge by Respondent on April 30, 2015, *Kelly’s*, 364 NLRB No. 153, slip op. at 4, through her hiring by Teca and that the backpay Respondent owed Helms for that period should consequently be reduced (Tr. 9, 12-13). It is undisputed that Teca hired Helms in March 2016 (Tr. 81, 114; GC Exh. 4(dd)). Accordingly, Respondent asserted that Helms failed to mitigate her losses during the period from April 30, 2015 through March 2016. This is the sole matter in dispute in the present proceeding.

As explained below, Respondent’s affirmative defense plainly fails. The amount of money owed by Respondent to Helms that is set forth in the compliance specification is therefore correct.

III. Analysis

A. The Board's mitigation doctrine

In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), the Supreme Court held that an employer who discriminatorily denied an employee a job did not have to pay for “losses which [the discriminatee] willfully incurred” by engaging in a “clearly unjustifiable refusal to take desirable new employment.” *Id.* at 198-200. The Court reasoned that such a rule furthered “the healthy policy of promoting production and employment.” *Id.* at 200. At first, the Board took the view that an employee could only willfully incur a loss of earnings within the meaning of *Phelps Dodge* by (1) unjustifiably refusing to accept an already-made offer of desirable new employment or (2) unjustifiably giving up already-obtained desirable new employment. *Ohio Public Service Co.*, 52 NLRB 725, 729 (1943).

Then, in *Ohio Public Service*, the Board held for the first time that it was possible for a discriminatee’s failure to “ma[ke] a reasonable effort to obtain [desirable new] employment” to rise to the level of a willfully incurred loss of earnings. *Ibid.* The Board thereby effectively required discriminatees to “make reasonable efforts to secure interim employment” or else be found to have deliberately incurred losses. *Essex Valley Nurses Assn.*, 352 NLRB 427, 429 (2008), *affd.* 356 NLRB 146 (2010), *enfd. mem.* 455 Fed.Appx. 5 (D.C. Cir. 2012). However, the Board has emphasized that, when a respondent seeks to reduce its liability by claiming that a discriminatee failed to make reasonable efforts to find alternate employment, the ultimate standard remains the same as that established in *Phelps Dodge*: can it be said that the discriminatee engaged in a “clearly unjustifiable refusal to take desirable new employment”? *Teamsters Local 25*, 366 NLRB No. 99, *slip op.* at 2; *Lundy Packing Co.*, 286 NLRB 141, 142 (1987), *enfd.* 856 F.2d 627 (4th Cir. 1988).

This is the doctrine on which Respondent relies in the present proceeding. Respondent contends that, from Respondent's unlawful discharge of Helms on April 30, 2015 through Teca's hiring of her in March 2016, Helms's efforts to obtain a job to replace the one Respondent wrongfully took from her were so inadequate as to support the conclusion that Helms "wilfully incurred" a loss of earnings for that period "for which [Respondent] should not...be directed to reimburse [her]." *Ohio Public Service*, above at 730.

B. The elements of Respondent's affirmative defense

"In addressing such an argument, the Board is guided by well-established principles." *Teamsters Local 25*, above, slip op. at 2. "A respondent's contention that a discriminatee has failed to make a reasonable search for work generally has two elements—one, that there were substantially equivalent jobs within the relevant geographic area and, two, that the discriminatee unreasonably failed to apply for these jobs." *Ibid.* Here, Respondent failed to establish either element.

The present brief will now proceed to examine Respondent's failure to establish either element of its affirmative defense. But before doing so, it bears emphasizing, as the Board has emphasized time and time again, that "[a]ny doubt or uncertainty in the evidence must be resolved in favor of the innocent employee claimant and not the respondent wrongdoer." *Lorge School*, 355 NLRB 558, 560 (2010) (emphasis added); accord, e.g., *Midwestern Personnel Services, Inc.*, 346 NLRB 624, 625 (2006), *enfd.* 508 F.3d 418 (7th Cir. 2007) ("Doubts, uncertainties, or ambiguities are resolved against the wrongdoing respondent."); *United Aircraft Corp.*, 204 NLRB 1068, 1068 (1973) ("the backpay claimant should receive the benefit of any doubt rather than the Respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved"). Thus, in analyzing whether Respondent

proved that Helms willfully incurred a loss of earnings, the Board requires that any lack of clarity in the record be resolved in favor of Helms and against Respondent.

C. Respondent failed to meet its initial burden to show the existence of substantially equivalent jobs

To establish its affirmative defense, Respondent was required, as a threshold matter, to prove “that there were substantially equivalent jobs in the relevant geographic area.” *Teamsters Local 25*, 366 NLRB No. 99, slip op. at 2 fn. 4; accord, e.g., *Lucky Cab Co.*, 366 NLRB No. 56, slip op. at 3 (2018) (“the Company had the initial burden to present evidence that substantially equivalent cab driver jobs with other Las Vegas-area companies were actually available to Geberselasa during the relevant period”). If Respondent did not do so, its affirmative defense fails. See *Teamsters Local 25*, above, slip op. at 4 fn. 9 (“In light of our finding that the Respondent failed to meet its burden of proving substantially equivalent employment, it is not necessary for us to reach the question of whether the discriminatee’s job search was reasonable.”). Respondent came nowhere near proving this threshold element of its affirmative defense. That defense consequently fails.

The Board has detailed what a respondent must do to carry its initial burden. It is not enough for a respondent to “establis[h] the existence of *some* jobs.” *Id.*, slip op. at 2 (emphasis in original). Instead, the respondent must “establish the existence of *substantially equivalent* jobs within the relevant geographic area.” *Ibid.* (emphasis in original). This means that the respondent must not only establish that there were “some available jobs during the relevant backpay period,” but also must establish details regarding those available jobs sufficient to prove that they were “substantially equivalent” to the job the respondent took from the discriminatee. *Id.*, slip op. at 2-3. Accordingly, a respondent must introduce information about the “pay, working conditions, job duties, commutes, and work locations” of the available jobs, as well as

those jobs’ “hours, shift scheduling, and benefits”—all of which are relevant to “evaluating whether a position is substantially equivalent” to the one from which the discriminatee was discharged. *Ibid.* (internal quotation marks and footnotes omitted); *Lucky Cab*, above, slip op. at 4 (“However, substantial equivalence is determined, not just by whether the jobs have the same title or duties, but by a consideration of all the circumstances, including their respective working conditions and wages and benefits.”). Furthermore, even if a respondent establishes that a substantially equivalent job was available, it also must prove that the discriminatee “would [have been] qualified for” that job. *Teamsters Local 25*, above, slip op. at 3.

1. Testimony of Angie Mitchell

Turning to the present case, it is evident that Respondent failed to carry its initial burden. As a matter of fact, Respondent hardly attempted to carry it. Respondent’s only witness was Angelia “Angie” Mitchell. Mitchell is Respondent’s owner (Tr. 68-69, 132). *Kelly’s Taproom*, 364 NLRB No. 153, slip op. at 3-4. She was one of the individuals who made the decision to fire Helms in retaliation for Helms exercising her rights under the Act. *Id.*, slip op. at 10. Furthermore, in the underlying unfair labor practice proceeding, Mitchell was found to have given testimony that was not credible regarding Respondent’s discharge of Helms, including testimony that “appear[ed] designed to buttress the Respondent’s defense.” *Id.*, slip op. at 3; 8 fns. 16 and 19; 10; 13.

Mitchell did not provide *any* testimony about available jobs during the relevant time period (meaning the period between Helms’s unlawful discharge by Respondent on April 30, 2015 and her hiring by Teca in March 2016), let alone testimony establishing the availability of substantially equivalent jobs in the relevant geographic area for which Helms was qualified. First, Mitchell testified about the three establishments she owns—Respondent (meaning Kelly’s

Taproom), Flip and Bailey's, and Garrett Hill Alehouse (Tr. 135). She testified that "[her] restaurants...have high turnover" (Tr. 149). She went on to say that "usually in May [she] ha[s] high turnover" (Tr. 150) and "in the fall [she] get[s] some turnover" (Tr. 151).

This testimony is obviously inadequate to carry Respondent's threshold burden. There is the initial, glaring problem that Mitchell would not have hired Helms, whom Mitchell had just fired in retaliation for Helms exercising her Section 7 rights, either back at Respondent or at Mitchell's other two restaurants. Respondent's "initial burden [was] to present evidence that substantially equivalent...jobs...were *actually available to [Helms]* during the relevant period." *Lucky Cab*, 366 NLRB No. 56, slip op. at 3 (emphasis added). To the extent there were job openings at Mitchell's restaurants, they were not "actually available to" Helms because Mitchell had just unlawfully fired Helms. *Ibid.* Such openings are therefore not relevant to Respondent's affirmative defense.

But Mitchell's testimony did not even establish the existence of job openings at her own establishments during the relevant period. Mitchell testified only that, typically, she has "turnover" in May and "in the fall" (Tr. 148-152). She did not testify specifically about the period between April 30, 2015 and March 2016 at all. Thus, Mitchell's testimony did not establish that there were any job openings at any of her restaurants during the relevant time period.

Mitchell also testified that she used the website Craigslist to advertise open jobs (Mitchell did not specify for which of her three establishments she used Craigslist) (Tr. 152-154). Mitchell claimed that she visited Craigslist once or twice a week to post advertisements for open jobs and that on these occasions she checked advertisements from other businesses before posting herself

(Tr. 154-155). When asked by her attorney, “How many positions are typically listed on craigslist?” Mitchell responded, “there can be as many as 10 to 12 open every day” (Tr. 154).

This testimony is also patently inadequate to carry Respondent’s initial burden. Here again, Mitchell did not provide any testimony specific to the relevant time period. Consequently, it cannot be determined if her testimony regarding Craigslist applied to that specific period. Furthermore, even with regard to the “10 to 12” positions Mitchell claimed were “open every day” on Craigslist during some unspecified timeframe (Tr. 154), Mitchell provided absolutely no details whatsoever. Her testimony therefore clearly did not prove that the advertised positions were substantially equivalent to Helms’s position with Respondent. See, e.g., *Teamsters Local 25*, 366 NLRB No. 99, slip op. at 2 fn. 4 (“The Respondent’s burden, however, is not to establish the existence of *any* jobs, but rather to establish the existence of *substantially equivalent* jobs.”) (emphasis in original).

Mitchell’s testimony regarding Craigslist was not only woefully inadequate to carry Respondent’s initial burden, it was also (1) not credible and (2) hearsay. Regarding the testimony’s credibility, first, Mitchell claimed to post an advertisement for a job on Craigslist once or twice every week (Tr. 154-155). However, earlier in her testimony, she stated that she typically hired in May and in the fall—to use her phrase, “by cycle” (Tr. 149-151). Her testimony that she posted advertisements every week contradicts her testimony that she typically hired “by cycle.”

Furthermore, she asserted that, when she posted an advertisement for an open position, she would “see what other people are looking for as well and then look at my own postings,” and that this was how she could estimate the number of “positions” “open every day” (Tr. 154-155). But Mitchell provided no explanation as to her reasons for surveying the advertisements of other

employers every time she checked on her own advertisements, and it is implausible that she in fact did so.

Moreover, even assuming, for the sake of argument, that she did survey other employers' advertisements when posting her own, she gave no details about her survey process—for example, whether she looked at full advertisements or just glanced at advertisement headlines, whether she scrolled back through multiple days' postings or just at the current day's postings, and so on. Without such details, one cannot evaluate the reliability of her estimate as to the number of daily postings.

For these reasons, Mitchell's testimony regarding the number of positions advertised on Craigslist is not reliable and should not be credited. As with Mitchell's testimony in the underlying unfair labor practice proceeding, this testimony "appears designed to buttress the Respondent's defense." *Kelly's Taproom*, 364 NLRB No. 153, slip op. at 8 fn. 16.

The problems with Mitchell's testimony regarding Craigslist do not end there. Even assuming, again for the sake of argument, that Mitchell visited Craigslist as she testified, her testimony regarding what the postings said is being offered to prove the truth of the matter asserted—that there were in fact job openings as advertised—and is therefore hearsay.

Thus, Mitchell's testimony about Craigslist is both not credible and hearsay. However, the General Counsel wishes to emphasize that, even setting aside these problems, this testimony does not come anywhere close to carrying Respondent's initial burden to show that there was substantially equivalent employment actually available to Helms during the relevant period.

In sum, the testimony of Mitchell, Respondent's only witness, fell far short of carrying Respondent's threshold burden to show "that there were substantially equivalent jobs within the relevant geographic area" during the relevant time period. *Teamsters Local 25*, 366 NLRB No.

99, slip op. at 2; accord, e.g., *Lucky Cab*, above, slip op. at 3 (“First, as the failure to mitigate is an affirmative defense, the Company had the initial burden to present evidence that substantially equivalent cab driver jobs with other Las Vegas-area companies were actually available to Geberselasa during the relevant period.”).

2. Testimony of Helms

Nor did Respondent carry its threshold burden through the testimony of the General Counsel’s only witness, Helms. Helms testified extensively about her search for work. She testified that she would check Craigslist for job openings at least five times per week (Tr. 50), search headings for key words like “bartending, bartender, front of the house,” and the like (Tr. 50-51), click on headings that seemed promising to view the full advertisement (Tr. 51-52), and see if the full advertisement gave any information about the schedule and location of the job (Tr. 52). If, based on the advertisement, Helms believed there was a possibility that she could meet the establishment’s requirements, she would apply (Tr. 51-52).

Respondent cannot invoke Helms’s testimony to carry its threshold burden because Helms did not provide sufficient detail regarding any job opening to conclude that the job was substantially equivalent to the one from which she was discharged by Respondent. Helms had little information about the positions she viewed. She often did not know whether they were full-time or part-time (Tr. 52) or even the name of the establishment (Tr. 59, 64). She did not testify about the pay of any of the job openings, and substantially equivalent pay is an essential feature of overall substantial equivalency. See, e.g., *Teamsters Local 25*, above, slip op. at 3 (“without data as to pay, hours, or job duties it is impossible to establish” whether job openings were substantially equivalent to the discriminatee’s former positions). Furthermore, even the information Helms did have sometimes proved inaccurate (Tr. 69-71). Helms’s testimony

simply does not establish that there were substantially equivalent positions in the relevant geographic area during the relevant time period.

In conclusion, there is nothing in the record establishing that there were substantially equivalent jobs in the relevant geographic area between April 30, 2015 and March 2016. Respondent has therefore failed to carry its “initial burden.” *Lucky Cab*, above, slip op. at 3. This failure is dispositive: Respondent has not established its affirmative defense. See, e.g., *Teamsters Local 25*, 366 NLRB No. 99, slip op. at 4 fn. 9. Accordingly, Helms “is entitled to backpay for the entire backpay period, as set forth in the compliance specification.” *Id.*, slip op. at 4.

D. Respondent also failed to prove that Helms’s efforts to obtain work after her discharge were unreasonable

The preceding section discussed the first element of “[a] respondent’s contention that a discriminatee has failed to make a reasonable search for work”: “that there were substantially equivalent jobs within the relevant geographic area.” *Teamsters Local 25*, above, slip op. at 2. The second element, meanwhile, is “that the discriminatee unreasonably failed to apply for these jobs.” *Ibid.* Because “Respondent failed to meet its burden of proving substantially equivalent employment”—the first element of its affirmative defense—“it is not necessary...to reach the question of whether the discriminatee’s job search was reasonable.” *Id.*, slip op. at 4 fn. 9. However, even imagining, for the sake of argument, that Respondent had carried its initial burden of establishing the availability of substantially equivalent employment, Respondent’s affirmative defense still would have failed. This is because Helms’s efforts secure interim employment more than satisfied the Board’s requirements.

1. Allocation of the burdens with regard to the second element

If a respondent carries its threshold burden of showing that there were substantially equivalent jobs available, this triggers a limited “burden of production” for the General Counsel. See, e.g., *St. George Warehouse, Inc.*, 353 NLRB 497, 498 (2008), *affd.* 355 NLRB 474 (2010), *enfd.* 645 F.3d 666 (3d Cir. 2011). To satisfy this limited burden, the General Counsel is required “only...to present evidence of the nature and extent of [the claimant’s] job search.” *Lucky Cab*, 366 NLRB No. 56, slip op. at 5. “[T]he General Counsel may meet this burden by producing the discriminatee to testify as to his efforts to seek employment.” *St. George*, above at 498; accord, e.g., *Teamsters Local 25*, above, slip op. at 2 fn. 4 (“The General Counsel can meet this burden, however, solely through the discriminatee’s testimony...”).

“It is not required that a discriminatee corroborate her testimony.” *Lorge School*, 355 NLRB at 561. Relatedly, “[a]n employee’s poor recordkeeping or faulty memory regarding a job search that was conducted years ago will not disqualify that employee from backpay.” *Essex*, 352 NLRB at 429; accord, e.g., *Lorge School*, above at 561 fn. 6 (“The Board has ruled a discriminatee’s inability to recall the names of places they searched for work or to maintain records of such after a long period of time does not establish a failure to mitigate damages.”). “In this regard, the Board has observed that ‘it is not unusual or suspicious that backpay claimants cannot remember the names of employers to whom they applied for work.’” *Essex*, above at 429 (quoting *Arthur Young & Co.*, 304 NLRB 178, 179 (1991)).

Once the General Counsel puts on “evidence of the nature and extent of [the claimant’s] job search,” it is the respondent’s “burden to establish that [the claimant’s] job search was unreasonably restricted or inadequate.” *Lucky Cab*, above, slip op. at 5; accord, e.g., *Teamsters Local 25*, above, slip op. at 2 fn. 4 (“the respondent bears the ultimate burden of persuasion on its

contention that a discriminatee failed to make a reasonable search for work”); *Lorge School*, above at 562 (“it is Respondent’s burden to establish the unreasonableness of [the discriminatee’s] efforts”); *St. George*, above at 498 (“the burden remains on the respondent to prove that the discriminatee did not mitigate his damages by using reasonable diligence in seeking alternate employment”) (internal quotation marks omitted).

In the present case, the General Counsel satisfied his limited burden of production by “producing the discriminatee”—Helms—“to testify as to [her] efforts to seek employment.” *St. George*, 353 NLRB at 498. Respondent, on the other hand, did not establish that Helms’s “job search was unreasonably restricted or inadequate.” *Lucky Cab*, above, slip op. at 5. Respondent therefore has failed to prove the second element of its affirmative defense as well as the first. See *Teamsters Local 25*, 366 NLRB No. 99, slip op. at 2.

2. Helms’s job search easily met the Board’s standard

Helms’s efforts to obtain employment after Respondent unlawfully discharged her were more than adequate to foreclose a determination that she “willfully incurred a loss of interim earnings by a clearly unjustifiable refusal to take desirable new employment.” *Essex*, 352 NLRB at 437. “In seeking to mitigate loss of income, a backpay claimant is held only to reasonable exertions, not the highest standard for diligence.” *Lorge School*, above at 560. Put simply, if the claimant’s efforts to obtain new employment were “reasonable,” the claimant is entitled to backpay. See, e.g., *ibid.*

The definition of a “reasonable” effort to find interim work is extremely well-established. “The discriminatee must put forth an honest, good-faith effort to find interim work; the law does not require that the search be successful.” *Midwestern Personnel Services*, 346 NLRB 624, 625 (2006), *enfd.* 508 F.3d 418 (7th Cir. 2007). “A good faith effort requires conduct consistent with

an inclination to work and to be self-supporting and...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 at 560 (quoting *1849 Sedgwick Realty LLC*, 337 NLRB 245, 254 (2001)). In the present case, the evidence that Helms “put forth an honest, good-faith effort to find interim work” is overwhelming. *Midwestern*, above at 625.

a. **Helms was entitled to exclude from her search for work positions that were not substantially equivalent to her employment with Respondent**

“Board precedent is clear that the discriminatee is...not required to accept employment which is not at least the same or better than the work from which he had been discriminatorily discharged.” *Lorge School*, above at 561 (internal quotation marks omitted). “In other words, it is well established that a discriminatee’s obligation to mitigate an employer’s backpay liability requires only that the discriminatee accept substantially equivalent employment.” *Ibid.* (internal quotation marks omitted).

i. **Helms was not obligated to seek interim employment that interfered with her childcare responsibilities**

Helms is the mother of two young children, Madison and Grayson (Tr. 32). Madison was three years old for part of the period between April 30, 2015 and March 2016 and four years old for the rest of it (Tr. 32, 37). Grayson, meanwhile, was one year old for part of this timeframe and two years old for the remainder (Tr. 32, 37). During the time Helms worked for Respondent, Helms was the primary caretaker for her children during the day (Tr. 30, 38). Her schedule with Respondent accommodated her childcare responsibilities (Tr. 30-34, 139).

At the time Respondent unlawfully discharged her on April 30, 2015, Helms's childcare obligations had not changed (Tr. 37). In searching for a job to replace the one Respondent wrongfully took from her, Helms sought a position that would fit in with her childcare responsibilities, as her position with Respondent had fit in with them (Tr. 44, 52, 69, 117-118).

Helms was perfectly within her rights to limit her job search in this way. "The Board has dealt specifically with the issue of a claimant's right to reject employment which fails to accommodate personal or family needs" and has repeatedly affirmed that right. *Essex*, 352 NLRB at 438-39, and cases cited therein. Accordingly, a claimant has not willfully incurred losses by "limiting their job searches to the sort of part-time work they had previously performed" that had accommodated their family needs. *Id.* at 439.

The Board cogently explained its rationale for this principle more than a half century ago in *Richard W. Kaase Co.*, 162 NLRB 1320, 1331-32 (1962). There, a discriminatee had worked the night shift for the respondent. *Id.* at 1331. The discriminatee had chosen this shift because it allowed her to care for her grandchild. *Ibid.* After the respondent unlawfully terminated her, "she continued to care for this grandchild" and so "in her search for interim employment she sought only work on a night shift." *Ibid.* The respondent argued that, by limiting her search in this way, the discriminatee willfully incurred losses. *Id.* at 1332. The Board flatly rejected the respondent's argument, stating:

Having adjusted her own life to this schedule [meaning the night shift] it does not seem reasonable to hold that when [the respondent] unlawfully chose to sever the employment relationship, it became the duty of the innocent victim of that discrimination to change her mode of living, discontinue the care of her grandchild and accept daytime employment at some other bakery, all for the purpose of reducing [the respondent's] backpay liability and thus accommodating the wrongdoer.

Ibid.

In the present case, Helms likewise was not required to “change her mode of living” and “discontinue the care of her” two very young children “all for the purpose of reducing [Respondent’s] backpay liability and thus accommodating the wrongdoer.” *Ibid.*; accord, e.g., *Essex*, above at 438-39. Helms was free to limit her search to positions that accommodated her childcare responsibilities.

ii. **Helms was not obligated to seek interim employment with a more onerous commute than what she had with Respondent**

Both during her employment with Respondent and after Respondent discharged her, Helms resided in Clifton Heights, Pennsylvania, which is a suburb of Philadelphia (Tr. 27, 106-107). Respondent’s establishment was located in another suburb of Philadelphia, Bryn Mawr, Pennsylvania. Bryn Mawr is a wealthy community consisting mostly of single-family homes, with a commercial strip along one street, Lancaster Avenue. (Tr. 29.) When Helms worked for Respondent, she drove to work from her home and could make the trip in 20 to 40 minutes (Tr. 34-35). Helms parked, free of charge, directly across the street from Respondent’s establishment; one could see Helms’s car from inside Respondent’s establishment through the windows (Tr. 35). Although Helms’s shifts with Respondent usually ended at 3:00 AM, she was not concerned for her safety because she could very quickly walk to her car and was in view of her co-workers, who were also leaving, during the entire walk (Tr. 36).

After Respondent unlawfully discharged Helms, Helms sought positions having a reasonably comparable commute to that which she had when she worked for Respondent (Tr. 53). This meant that she did not seek jobs in Center City, Philadelphia (Tr. 53-54, 122). As Helms explained, commuting to Center City from her home was much more onerous than commuting to Respondent’s establishment in Bryn Mawr.

The only workable means of commuting from Helms's home to Center City was to drive. Although a regional rail system existed, it did not operate until the time bars closed and so was not in fact a viable means of commuting.¹ (Tr. 53-54.)

As Helms testified—and as both common sense and even passing familiarity with big-city driving indicate—driving from her suburban home to the heart of Philadelphia was by no means comparable to driving to Respondent's establishment in another suburb, Bryn Mawr. First, to work in Center City, Helms would have had to have found parking. Finding parking would have been stressful, time-consuming, and, significantly, very expensive. Furthermore, Helms would have had to park a significant distance from the bar, restaurant, or similar establishment where she was working, and that would mean she would have to walk alone from the workplace through the streets of Center City and, in all likelihood, then through a parking garage very late at night after the establishment closed. (Tr. 54.) Having to make such a walk would have exposed her to danger to which she was not subject when she worked for Respondent (Tr. 36, 54). Furthermore, Helms testified that the route to and from Center City often experiences significant traffic. This meant, among other things, that if her children were involved in an emergency while she was working in Center City and she needed to get to them quickly, she might not be able to do so. (Tr. 53.) With Respondent, on the other hand, Helms knew she could reach her children quickly if an emergency arose (Tr. 34-35, 53). In short, for Helms, commuting to Center City was dramatically more onerous than commuting to Respondent.

¹ Furthermore, because Helms drove to work with Respondent, she was entitled to insist on driving to interim employers as well. See *St. George*, 353 NLRB at 502 (finding that a discriminatee who commuted by public transit to the respondent was entitled to limit his search for interim employment to employers to which he could also commute by public transit).

Here again, Helms was firmly within her rights to limit her search to places of employment with a reasonably comparable commute to that which she had with Respondent, including by opting against seeking employment in Center City, Philadelphia. In general, “the Board and the courts have recognized that a discriminatee need not search for or accept employment which is unreasonably distant from his home.” *WHLI Radio*, 233 NLRB 326, 329 (1977) (internal quotation marks and ellipses omitted).

The Board has previously addressed the precise circumstances that exist in the present case—meaning where an employee both lives and works in the suburbs of a major city, is unlawfully discharged, and decides against seeking interim employment in the city’s downtown. Unsurprisingly, the Board has held that the discriminatee’s exclusion of the city’s downtown in these circumstances is permissible. Thus, in *WHLI Radio*, the respondent unlawfully discharged employees from positions located in Nassau County, Long Island, where the employees also resided. 233 NLRB at 326. The respondent argued that the employees “failed to make a reasonable and diligent effort to secure suitable employment by limiting their search for employment to the Nassau County, Long Island, area, where they resided and worked for the Respondent, instead of expanding their search to the New York City labor market.” *Ibid.* The Board rejected the respondent’s argument, determining that the employees were not “duty-bound to seek employment in New York City in view of the distance, time, expense, and inconvenience involved in commuting from their homes in Nassau County.” *Id.* at 329; accord, e.g., *American Medical Insurance Company, Inc.*, 235 NLRB 1417, 1422 fn. 31 (1978) (“Although [the claimant], as a resident of Nassau County, restricted her job search efforts to the Long Island Counties of Nassau and Suffolk and did not seek employment in New York City, the Respondent has not established that she was duty bound to seek employment in New York City in view of the

distance, time, expense, and inconvenience involved in such a commutation and also in view of the fact that her prior employment with Respondent also had been in Nassau County.”).

In summary, when Respondent “unlawfully chose to sever the employment relationship,” it did not “bec[ome] the duty of” Helms, “the innocent victim of that discrimination,” to assume the major additional burden of commuting to and from Center City, Philadelphia, “all for the purpose of reducing [Respondent’s] backpay liability and thus accommodating the wrongdoer.” Cf. *Kaase*, 162 NLRB at 1331-32. Helms was perfectly within her rights to seek work with a reasonably comparable commute to that which she had with Respondent.

b. It was reasonable for Helms to seek bartending positions to replace her bartending position with Respondent

Helms was a part-time bartender with Respondent (Tr. 29). *Kelly’s Taproom*, 364 NLRB No. 153, slip op. at 4. As a bartender, her principal duty was to stand behind the bar and serve drinks to customers (Tr. 30). However, during certain hours, Helms’s bartending duties also included standing behind the bar and serving food to customers (Tr. 30, 91). After Respondent fired Helms from her bartending position, Helms searched for interim employment as a bartender (Tr. 38, 50-51, 113).

During her job hunt, when it came to job duties, Helms imposed no restriction on the kinds of bartending positions for which she searched and to which she applied (Tr. 50-51). She did not require that the bartending positions have some duties and not others. Consistent with this wide-net approach, Helms’s job hunt encompassed bartending positions whose duties included food service (just as her bartending position with Respondent included food service duties). (Tr. 51, 113-114; GC Exh. 4(s), 4(cc).) Thus, in an application Helms sent on October 13, 2015, she informed the potential employer that she was “[v]ery experienced in all aspects of catering serving/bartending” (GC Exh. 4(s)). And, in an application Helms sent on March 7,

2016, she stated that she “ha[d] extensive experience in almost every facet of bartending (dining service, speed, banquet)” (GC Exh. 4(cc)).

In short, after Respondent fired her for exercising her rights, Helms searched for interim employment having roughly comparable duties to the employment Respondent unlawfully took from her. Once again, Helms was firmly within her rights to do so. The Board requires only that the scope of jobs within an employee’s search for work be reasonable. See, e.g., *Lorge School*, 355 NLRB at 561-62. For instance, in *Lorge School*, the respondent unlawfully discharged an “instructional supervisor.” Id. at 559. “[I]nstructional supervisor” was not “a widely-used job title or position,” but the discriminatee’s duties with the respondent included “responsibility for scheduling classes, assigning teachers, and generally overseeing instruction and assessment of students.” Id. at 562. The discriminatee “focused her job search on principal and assistant principal positions.” Id. at 561.

The Board rejected the respondent’s argument that this restriction amounted to a willful loss of earnings on the discriminatee’s part. Id. at 561-62. As the Board pointed out, the respondent “suggests nothing *more* equivalent to the instructional supervisor...than an assistant principal or a principal position.” Id. at 561. Furthermore, the discriminatee “continually f[ound] many assistant principal and principal openings to apply for,” “her applications were accepted,” and “[i]n many cases, she was called for interviews.” Id. at 562. The Board concluded that a search confined to assistant principal and principal positions “was not an unreasonable search for [the discriminatee] to make.” Ibid.

Similarly, in the present case, Helms’s position with respondent had been a bartending position, she “continually f[ound] many [bartending] openings to apply for” (Tr. 55), and “[i]n many cases, she was called for interviews” (Tr. 66). Ibid. Accordingly, Helms’s search for

bartending positions (using a broad definition of bartending position) “was not an unreasonable search for her to make.” Ibid.

In fact, the Board has repeatedly found that a discriminatee may satisfy her duty to make an “honest, good-faith effort to find interim work” so as to defeat a claim of willful loss of earnings even where she seeks work of a totally different nature from that which she wrongfully lost. See, e.g., *Lucky Cab*, 366 NLRB No. 56, slip op. at 5, 6, 13, 17, 19 (unlawfully discharged cab drivers were “not required to search or apply for other cab driver jobs” to satisfy their obligations as to mitigation); *Lorge School*, above at 558 fn. 2, 562-63 (discriminatee who was discharged from her position as an instructional supervisor at a school satisfied her mitigation duty by starting “a gourmet food store and catering business”). “In this regard, there is, and should be, an asymmetry in a discriminatee’s mitigation obligations: to satisfy his duty to mitigate, an employee is required to accept only substantially equivalent employment, but may look for and accept work more broadly.” *KSM*, 353 NLRB at 1165 fn. 84. “The question is whether the job search was conducted in good faith, with sincerity and an inclination to work and be self-supporting.” Ibid.; accord, e.g., *Lorge School*, above at 562-63 (“the touchstone, for measuring mitigation efforts is a good faith effort demonstrated by conduct consistent with an inclination to work and to be self supporting”) (internal quotation marks and brackets omitted). Here, Helms’s search for broadly defined bartending work plainly meets this standard.²

² One other point is worth making on the issue of the scope of positions encompassed by Helms’s search for work. Some of Respondent’s questions at hearing suggested Respondent intended to argue that Helms willfully incurred losses by not applying to “server positions” (Tr. 113-114). First, Respondent introduced no evidence as to what it meant by “server positions.” Certainly, Respondent cannot successfully argue that Helms willfully incurred losses by failing to apply to a job category that is completely undefined in the record. Second, Helms testified that the “server positions” she was qualified for earned less than bartending positions (Tr. 113). “[T]he Board has tolled backpay for discriminatees who did not look for work in their field and instead sought lower-paying jobs in a different profession.” *Teamsters Local 25*, 366 NLRB No.

c. **Helms put forth an honest, good-faith effort to find interim work**

Helms's conduct during the relevant time period was manifestly "consistent with an inclination to work." *Lorge School*, 355 NLRB at 560 (internal quotations omitted).

Respondent's affirmative defense that Helms willfully incurred losses during this period consequently fails. See, e.g., *ibid.*

When Respondent unlawfully discharged Helms, Helms immediately updated her resume in preparation for her search to find a replacement position (Tr. 38-41). More specifically, she added her experience at Respondent and altered the "Profile" section to be more appealing to employers in the food and beverage service industry. Moreover, she continued to update her resume to reflect current information throughout the relevant period. (Tr. 40-41; GC Exh. 3.)

i. **Helms chose reasonable methods for her job search**

Helms affirmatively sought interim employment in multiple ways: she reached out to contacts she had in the food and beverage service industry; she asked her husband for leads of which he was aware through his personal training and sports performance business; and she searched and applied for jobs using the website Craigslist. Helms had used the latter two methods to obtain work in the past.

99, slip op. at 2 fn. 5. Thus, had Helms "sought and obtained interim employment as a [server], at wages substantially less than she earned as [a bartender at Respondent's establishment]...Respondent would have argued that she had failed to seek substantially equivalent work and that this should be held against her." *Lorge*, 355 NLRB at 361 fn. 8. In short, any argument by Respondent that Helms willfully incurred losses by searching for and applying to bartending positions rather than the undefined position of "server" is patently meritless.

a) **Helms contacted people she knew who had worked in the food and beverage service industry for job leads**

One way Helms sought interim employment was to contact people she knew who had worked in the food and beverage service industry to see if they knew of any job openings (Tr. 42). The Board has recognized that “ask[ing]...friends for sources of work” evidences a good-faith effort to find interim employment. E.g., *St. George*, 353 NLRB at 502. Helms recalled contacting three friends: Brian Holjacker, who no longer worked in the industry (Tr. 42); Andi Sealy, who was not aware of any available positions (Tr. 43); and Kristin Lang, who offered to put her in touch with people Lang knew who owned multiple establishments in Conshohocken, Pennsylvania (Tr. 43-44). Helms pursued Lang’s offer, ultimately interviewing with the owners Lang knew, who called themselves “the Conshy girls” (Tr. 44, 62). Helms’s interview with the Conshy girls took place in the summer of 2015, within months of Respondent unlawfully discharging Helms (Tr. 44-45). However, during the interview, the owners indicated that the only positions they had open would require Helms to regularly work during times when Helms was responsible for caring for her children (Tr. 44-45).

b) **Helms asked her husband if he knew of any job leads through his business**

Helms also sought interim employment using the methods by which she had obtained employment in the past—asking her husband for leads from his business and utilizing Craigslist. Importantly, “[t]he Board has long held that, in seeking interim employment, a discriminatee need only follow his regular method for obtaining work.” *Midwestern*, 346 NLRB at 626. Helms asked her husband, the sole proprietor of a personal training and sports performance business (Tr. 32) and a trainer himself (Tr. 105), if he knew of any available positions through his clients (Tr. 45). Helms had obtained her job with Respondent through one of her husband’s

clients (Tr. 45) as well a position with another company called Swig (Tr. 45, 48-49). Thus, by inquiring if her husband knew of any job leads after Respondent unlawfully fired her, Helms was “follow[ing] h[er] regular method for obtaining work.” Ibid.

Furthermore, the Board has expressly recognized that inquiring for job leads from family members is a reasonable means of searching for interim employment. E.g., *Retail Delivery Systems*, 292 NLRB 121, 125 (1988) (“It is not unusual for individuals to rely on assistance from family, friends, and acquaintances in seeking employment.”). In *Retail Delivery*, the respondent argued that the discriminatee willfully incurred losses by “eschew[ing] nearly all normal job seeking methods in favor of securing job leads through his father, relatives and friends.” Ibid. The discriminatee’s “previous job search was made through family contacts”; indeed, he “obtained his job with Respondent through his godfather.” Ibid. The Board held that the discriminatee did not willfully incur a loss of earnings by “[f]ollowing this same pattern” after the respondent unlawfully discharged him—meaning by “s[eeking] interim employment through contacts made or suggested, by his father, other relatives and friends.” Ibid.

Similarly, in the present case, Helms’s “previous job search was made through family contacts”—namely, through clients of her husband (Tr. 45, 48-49). Ibid. In fact, she “obtained h[er] job with Respondent through” one of her husband’s clients (Tr. 45). Ibid. It was therefore reasonable for her to “[f]ollo[w] this same pattern” and seek interim employment through her husband’s clients after Respondent fired her for exercising her rights under the Act. Ibid.

c) **Helms sought jobs through Craigslist**

In addition, Helms conducted an extremely thorough job search and application process via Craigslist. Helms chose to utilize Craigslist in part because she had obtained a bartending job using this same website in the recent past (Tr. 46). Specifically, Helms had been hired as a

bartender by an establishment called Artesanos in 2012 after finding and applying for the position via Craigslist. Helms worked at Artesanos until 2013, when she quit because she was in the advanced stages of her pregnancy with her second child, Grayson. (Tr. 32, 46-47; GC Exh. 3.) Thus, by utilizing Craigslist, Helms was again “follow[ing] h[er] regular method for obtaining work,” which was all she needed to do. *Midwestern*, 346 NLRB at 626.

There is, however, still more evidence of the reasonableness of Helms’s decision to use Craigslist to seek interim employment. In the past, Helms had helped her husband place advertisements on Craigslist for personal trainer positions for his business (Tr. 47). Based on this experience, Helms knew that Craigslist charged an employer \$25 to post an advertisement for an open position. Helms reasonably concluded that this fee would ensure that the companies posting were serious about hiring. (Tr. 49.) Moreover, Angie Mitchell (who, as discussed above, owns Respondent and two other establishments (Tr. 135)) testified that she herself uses Craigslist for hiring (Tr. 152, 153). Respondent will be hard-pressed to prove that Helms willfully incurred losses by searching for work using the same platform that Respondent’s owner herself uses to find workers. In summary, the methods Helms used to search for work were eminently reasonable.

ii. **Helms’s conduct during the relevant timeframe demonstrates her good faith**

a) **Helms assiduously searched and applied for job openings**

Throughout the relevant period, Helms engaged in “conduct consistent with an inclination to work and to be self-supporting.” *Lorge School*, 355 NLRB at 560 (internal quotations omitted). Helms’s use of Craigslist in her job hunt was assiduous. Helms searched Craigslist for jobs at least five days a week (Tr. 50). She applied, on average, to one to two

positions each week in response to advertisements she found during these searches (Tr. 55). She first applied to a job in response to a Craigslist advertisement less than a week after Respondent unlawfully fired her (Tr. 56).

The General Counsel introduced substantial documentary evidence corroborating Helms's testimony regarding her use of Craigslist in her hunt for interim employment. (Though "it is important to point that there is no requirement that a discriminatee keep original source documentation of her job search efforts" and that "[i]t is not required that a discriminatee corroborate her testimony." *Lorge School*, 355 NLRB at 561.) In applying to positions being advertised on Craigslist, Helms followed the application instructions in the advertisement (Tr. 52, 56). Sometimes, the business who posted the advertisement instructed applicants to reply to the e-mail address Craigslist created for the business, which address consisted of apparently random characters (Tr. 56, 59; GC Exh. 4). Other times, the business instructed applicants to call it on the telephone, to appear in person at a particular place and time, or to go to the business's website and apply there (Tr. 56, 62-63). Helms had no formal record-keeping system when it came to the applications she made (Tr. 63); nor was she required to have such a system. E.g., *Allegheny Graphics*, 320 NLRB 1141, 1145 (1996), *enfd. sub nom. Package Service Co., Inc. v. NLRB*, 113 F.3d 845 (8th Cir. 1997).

During the course of the present unfair labor practice proceeding, the Regional Office asked Helms to search through her e-mails and pull as many records of job applications she made as she could find (Tr. 62-64). Helms did so but did not know whether she even recovered the majority of the applications she submitted by e-mail. She explained that there were a huge number of e-mails in her inbox and that she also sometimes deleted e-mails. (Tr. 63.) Nevertheless, Helms was able to recover records of thirty applications she sent via email (GC

Exh. 4).³ The earliest application she recovered was sent on May 5, 2015, a mere five days after Respondent unlawfully fired her (GC Exh. 4(a)). The most recent was sent on March 21, 2016 and was the application that led to her employment by Teca, in which employment she stayed for the remaining two years of the backpay period (GC Exh. 4(dd); Tr. 80-85, 114-115, 124). In addition to the e-mailed applications that Helms was unable to recover, either because she had deleted them or simply could not find them (Tr. 63), this group of applications also excludes the applications Helms made over the telephone, at in-person hiring events, or via establishments' own websites (Tr. 63). Thus, the actual number of jobs to which Helms applied during the relevant period is actually much higher than the 30 for which she possesses records; as already stated, and as Helms testified without contradiction, she applied on average to one to two jobs each week during the relevant period (Tr. 55).

“[T]he sincerity and reasonableness” of Helms’s efforts “to relieve h[er] unemployment” is further demonstrated by the care with which she prepared her applications. *Lorge School*, above at 560 (internal quotations omitted). Thus, when Helms applied to a position in writing, she tailored what she wrote to the particular advertisement to which she was responding in an effort to make her application as appealing as possible (Helms’s testimony on this point is corroborated by a review of the 30 applications she was able to recover, in which the language used varies from application to application) (Tr. 64; GC Exh. 4). Similarly, when Helms neglected to provide references on an application, she realized her mistake and sent a second e-mail including the references, explaining that she “was so anxious to send [her] resume over [she] forgot to send [her] references” (GC Exh. 4(n)). This conscientiousness is “consistent with

³ Helms learned of one of these 30 work opportunities—the one with Swig—from a Facebook post rather than from Craigslist (GC Exh. 4(p); Tr. 72-73). Helms’s relationship with Swig is discussed in more detail below.

an inclination to work and be self-supporting”; conversely, it is incompatible with Respondent’s assertion that Helms was willfully incurring losses. Ibid. (internal quotations omitted).

b) **Helms went to great lengths to attend job interviews**

The “honest, good-faith” nature of Helms’s effort to find interim employment is also demonstrated by her conduct with regard to job interviews. *Midwestern Personnel*, 346 NLRB at 625. During the period from her unlawful discharge on April 30, 2015 through her hiring by Teca in March 2016, Helms interviewed with eight to ten employers. Many of her interviews were the result of applications she made in response to Craigslist advertisements. Of these eight to ten interviews, six or seven were conducted in person and three or four were conducted over the phone. (Tr. 65.)

Helms never turned down an offer to interview (Tr. 65), and she often went to significant trouble to be able to participate in interviews (Tr. 65-67). After Helms had applied to a position, establishments that wanted to interview her typically asked her to be available to do so on very short notice—typically on one day’s notice (Tr. 65-66; GC Exh. 4(e), 4(h), 4(l), 4(n)). On multiple occasions, potential employers asked Helms to interview at a time when Helms was responsible for caring for her children. When this happened, Helms would go to great lengths to make herself available for the interview. First, Helms would contact her children’s babysitter, Melissa. If Melissa was available, Helms would pay Melissa so that Helms could go to the interview. (Tr. 66.) If, however, Melissa was not available, Helms would next contact Helms’s mother, who worked as the executive director of a retirement community. Helms would ask her mother to disrupt the latter’s work by watching Helms’s children so that Helms could go to the interview. (Tr. 66-67.) Finally, if neither Melissa nor Helms’s mother could watch the children, as a “last resort,” Helms would ask her husband to cancel or postpone personal training or sports

performance sessions he had scheduled with clients in order to enable Helms to go to the interview (Tr. 67).

Thus, for the sake of attending interviews that might lead to interim employment, Helms was willing to, and in fact did: spend money on a babysitter; seriously impose on her mother; and interfere with her husband's ability to conduct his business and thus earn income for her family. This conduct is powerful evidence that Helms was engaged in an "honest, good-faith effort to find interim work." *Midwestern*, above at 625. A person who was willfully incurring losses would not have braved such aggravation to go to interviews.

c) **When Helms thought she had found a position that accommodated her childcare responsibilities, she proceeded to a training shift**

The evidence of the "sincerity and reasonableness" of Helms's efforts "to relieve h[er] unemployment" goes on. *Lorge School*, 355 NLRB at 560 (internal quotations omitted). Helms had a phone interview with a manager of a Mexican restaurant in Wynnewood, Pennsylvania, the name of which restaurant Helms could not recall (Tr. 70-71, 117). During the phone interview, Helms had explained to the manager what her childcare obligations were, and the manager had assured her the position would fit in with those obligations (Tr. 71, 117). The manager asked Helms to come to the restaurant for a five-hour training shift (Tr. 70-71, 115-119). This training shift took place shortly before Helms was hired by Teca in March 2016 (Tr. 81, 116).

Although the restaurant scheduled the training shift at a time when Helms was responsible for caring for her children, Helms paid Melissa to babysit so that she could attend. The restaurant did not pay Helms for the five hours she spent training there. At this shift, a different manager notified Helms that, contrary to what the other manager had told Helms during her phone interview, the restaurant would require Helms to regularly work at a time when she

was responsible for caring for her children; as a result, Helms could not work there. (Tr. 71, 115-116, 117-119.) This episode demonstrates that, as soon as Helms found a position that was apparently substantially equivalent to her position with Respondent in terms of accommodating her childcare obligations—as the position with the Mexican restaurant seemed to be based on the phone interview—she leapt at the opportunity, incurring the cost of a babysitter to attend a training session and going through five hours of training without pay. Here again, the “honest[y]” and “good faith” with which Helms sought interim employment is evident. *Midwestern*, 346 NLRB at 628 (internal quotation marks omitted).

d) Helms’s work with Swig further proves her good faith

The “sincerity and reasonableness” of Helms’s efforts to find interim employment is further shown by her work for Swig following Respondent’s unlawful discharge of her. *Lorge School*, above at 560 (internal quotations omitted). Swig is a business that provided staff to catering companies or directly to the host of an event (Tr. 72). Helms had worked for Swig before Respondent hired her (Tr. 41, 46, 48-49).

Around September 2015, Helms was on Facebook and noticed that Sara Moody, Swig’s owner, had published a Facebook post saying Swig was in need of bartenders (Tr. 72, 73-74; GC Exh. 4(p)). Moody was attempting to bulk up her staff in anticipation of the busy holiday event season (Tr. 74). Helms texted Moody seeking work in response to Moody’s Facebook post, and Moody in turn referred Helms to an administrator for Swig, whom Helms then e-mailed (Tr. 72-73; GC Exh. 4(p)). The administrator informed Helms that Helms had to complete paperwork and to procure certain equipment in order to work for Swig, all of which Helms did (Tr. 73).

Swig did not hire Helms as an employee but rather as an independent contractor (Tr. 72). Helms commenced working for Swig despite: not having employee status (Tr. 72); receiving a

fraction of the hourly pay rate she had received with the Respondent (Tr. 34, 77); having a very unpredictable schedule (Tr. 77); receiving at most one shift per week (Tr. 77); always working at a different location (Tr. 76); having changing requirements regarding what to wear (Tr. 76); sometimes having inconvenient parking (Tr. 76); and having to perform onerous duties like loading and unloading furniture, dishes, and equipment and washing dishes without proper equipment (Tr. 76-77).

Helms continued to work for Swig until after the holiday season, when Swig no longer needed additional staff (Tr. 78-79). Throughout her time working for Swig, Helms continued to seek alternate employment in the manner discussed already in the present brief (Tr. 77-78).

Helms's conduct with regard to Swig is further evidence of her "honest, good-faith effort to find interim work." *Midwestern*, above at 625. In *St. George*, one of the discriminatees, while seeking permanent, full-time interim employment, performed work for two temporary agencies. 353 NLRB at 502. The discriminatee continued to work for the temporary agencies "as long as there was work for him"; "[h]is work there ended only when his assignments ceased." *Ibid.* All the while he was working for the temporary agencies, the discriminatee continued to seek a permanent, full-time position. *Ibid.*

The Board held that "[t]he fact that [the discriminatee] accepted work at these agencies, although he would have preferred full time work demonstrates that he conscientiously sought to work." *Ibid.* The Board also found it "significant...that he sought permanent employment and continued to seek such employment even after he was hired by the temporary agencies," which the Board reasoned negated the accusation that he was willfully incurring losses. See *ibid.* (citing *Allegheny Graphics*, 320 NLRB at 1145). Finally, the Board was impressed by the fact that the discriminatee continued to perform work for the temporary agencies for "as long as there

was work for him,” which perseverance it also found countered the argument that he was willfully incurring losses. See *ibid.*

Just as the *St. George* discriminatee’s work with the temporary agencies demonstrated the good faith of his search for work, so Helms’s work with Swig demonstrates the good faith of her search. Helms accepted work as an independent contractor with Swig under significantly worse terms and conditions than those she had as an employee with Respondent “although [s]he would have preferred” a more comparable position, thereby “demonstrat[ing] that [s]he conscientiously sought to work.” *Ibid.* Furthermore, she continued to seek a more comparable position to that which she had with Respondent while she was working for Swig. *Ibid.* Finally, Helms worked at Swig “as long as there was work for h[er],” only stopping “when h[er] assignments ceased” after the busy holiday season. *Ibid.* Thus, Helms’s work for Swig after Respondent unlawfully discharged her further demonstrates her “inclination to work and to be self-supporting.” *Lorge School*, 355 NLRB at 560.

In sum, it is absolutely evident that, after Respondent unlawfully fired her, Helms engaged in an “honest, good-faith effort” to obtain a job to replace the one Respondent unlawfully took from her. *Ibid.* (internal quotations omitted). The second element of Respondent’s affirmative defense—“that [the] discriminatee failed to make a reasonable search for work”—is therefore missing just as the first element is. *Teamsters Local 25*, 366 NLRB No. 99, slip op. at 2 fn. 4.

IV. Conclusion

Respondent did not establish either element of its affirmative defense. The defense consequently fails. The General Counsel therefore requests that Respondent be ordered to pay Helms in accordance with the compliance specification. Specifically, the General Counsel asks

that Respondent be ordered to make Helms whole by paying her \$23,333.43 in backpay, plus interest accrued to the date of payment as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, the General Counsel asks that Respondent be ordered to pay Helms an additional sum for the adverse tax consequences of the multiyear lump sum backpay award, as prescribed in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016) and *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

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