



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 31
11500 W OLYMPIC BLVD
SUITE 600
Los Angeles, CA 90064-1753

Agency Website: www.nlr.gov
Telephone: (310)235-7351
Fax: (310)235-7420

Agent's Direct Dial: (310)307-7339

May 7, 2019

Roxanne L. Rothschild, Executive Secretary
Office of Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Re: *Blue Earth Digital Printing, Inc.*
Case 31-CA-133542

Dear Ms. Rothschild:

Please consider this letter brief as Counsel for the General Counsel's Exceptions to the Decision of Administrative Law Judge Ariel L. Sotolongo ("ALJD") dated April 9, 2019, and Brief in Support of the General Counsel's Exceptions in the above-referenced case. Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("Board"), Counsel for the General Counsel files the following exceptions to the ALJD.¹ Counsel for the General Counsel also incorporates herein a Brief in Support of the General Counsel's Exceptions, which contains further details regarding the grounds, arguments, and citations of authority in support of each exception. Aside from the matters addressed below, the issues raised in the instant case have been thoroughly dealt with in the ALJD, support for which is found in the record. Therefore, the ALJD having found that Blue Earth Digital Printing, Inc. and/or

¹ In this letter brief, references to the ALJD will be designated by the page number and lines divided by a colon (i.e. ALJD page: lines).

Bonada Enterprises, Inc. (“Respondent”) violated Section 8(a)(1)² of the Act by discharging its employee Vivian Escalante (“Escalante”) on or about June 26, 2014, Counsel for the General Counsel’s letter brief is limited to addressing the ALJD’s Proposed Order, Remedy, and Notice Posting.

I. EXCEPTIONS

1. The General Counsel excepts to the ALJD’s failure to order Respondent, within 14 days, to remove from its files any reference to the unlawful termination of Vivian Escalante and, within 3 days thereafter, notify Escalante in writing that this has been done and that her termination will not be used against her in any way. (ALJD 13:26–15:6).
2. The General Counsel excepts to the ALJD’s failure to order Respondent to compensate Escalante for the adverse tax consequences, if any, of receiving a lump sum backpay award, and within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 31 a report allocating backpay to the appropriate calendar years for Escalante. (ALJD 13:26–15:6).
3. The General Counsel excepts to the ALJD’s failure to include in its Notice to Employees affirmative provisions notifying employees of Respondent’s obligations described in Exceptions 1 and 2, above. (ALJD Appendix).

II. DISCUSSION

It is well established that the Board’s standard remedy for an unlawful discharge in violation of Section 8(a)(1) of the Act includes ordering the respondent to expunge any references to the unlawful action in the discriminatee’s personnel file and to make the discriminatee whole for any loss of earnings or other benefits suffered as a result of the unlawful discrimination. *Sysco Grand Rapids, LLC*, 367 NLRB No. 111, slip op. at 3-4 (Apr. 4, 2019). Where the respondent’s unlawful action has resulted in an adverse employment action against

² The ALJ also concluded that Respondent violated Section 8(a)(3) of the Act by discharging Escalante, although the General Counsel did not plead such allegation in the Complaint. As the remedy for a violation of Section 8(a)(3) is not materially different, the General Counsel does not except to the ALJ’s conclusions of law.

the discriminatee, the Board's standard remedy includes expungement of all references to the adverse employment action. *See, e.g., Constellium Rolled Products Ravenswood, LLC*, 366 NLRB No. 131, slip op. at 5 (2018). Further, the Board's standard make whole remedy requires the respondent to compensate a discriminatee for any adverse tax consequences of receiving a lump-sum backpay award in a calendar year other than the year in which the income would have been earned had the Act not been violated. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). Moreover, where the discriminatee's backpay award is fixed after the calendar year for which the backpay is awarded, the respondent is responsible for transmitting its report allocating backpay to the appropriate calendar years to the Regional Director. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). The Board will require the respondent to notify employees of these and other affirmative actions in its Notice to Employees. *See Sysco*, 367 NLRB No. 111; *Constellium*, 366 NLRB No. 131; *AdvoServ*, 363 NLRB No. 14.

Here, the ALJD recommended certain remedies that conform with the Board's standard remedial language, including expungement of the unlawful termination, compensation for adverse tax consequences, and filing a report allocating backpay to the appropriate calendar year with the Regional Director. However, the Proposed Order issued by the ALJ failed to include an affirmative provision requiring the Respondent to remove from its records references to Escalante's unlawful termination and to notify her in writing that this had been done. Additionally, although the Proposed Order required Respondent to make Escalante whole for any loss of earnings and other benefits, it failed to include an affirmative provision requiring Respondent to allocate backpay to the appropriate years, and file that report with the Regional Director. Finally, the Proposed Order did not require that Respondent compensate Escalante for the adverse tax consequences of receiving a lump sum backpay award, even though her

discharge occurred in 2014. The ALJD also did not include the above affirmative provisions in its Notice to Employees. The General Counsel excepts to the ALJD's failure to order these remedial measures and respectfully requests that the Board issue an amended Remedy, Order, and Notice to Employees to comport with the Board's standard remedial provisions.

Very truly yours,

Nicholas Gordon

Nicholas Gordon
Counsel for the General Counsel

cc:

Fernando Bonada
Blue Earth Digital Printing
3652 Eastham drive
Culver City, CA 90232

Lauren P. McDermott, Esq.
Mooney, Green, Saindon, Murphy &
Welch, P.C.
1920 L Street, N.W., Suite 400
Washington, DC 20036

GRAPHIC COMMUNICATIONS
CONFERENCE OF THE
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS - LOCAL 140-N
750 STANFORD AVENUE
LOS ANGELES, CA 90606

Peter J. Leff, Attorney
Mooney, Green, Saindon, Murphy &
Welch, P.C.
1920 L Street, N.W. Suite 400
Washington, DC 20036