

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 3**

MICHAEL CETTA, INC. d/b/a  
SPARKS RESTAURANT

and

CASES 02-CA-142626 and 02-CA-144852

UNITED FOOD AND COMMERCIAL  
WORKERS LOCAL 342

**OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

Comes now Respondent, pursuant to Section 102.24(a) of the National Labor Relations Board's Rules and Regulations, and files this Opposition to Counsel for the General Counsel's Motion for Partial Summary Judgment.

**Background**

This dispute arises from a NLRB Decision and Order, dated May 24, 2018<sup>1</sup> finding various violations of the Act. A controversy remains regarding reinstatement offers and backpay, and the Regional Director issued a Compliance Specification on April 8, 2020. Respondent's Amended Answer was filed on June 18, 2020.<sup>2</sup>

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<sup>1</sup> 366 NLRB No. 97 (2018)

<sup>2</sup> Due to the global pandemic and various Executive Orders of the State of New York, Respondent's only location has been closed in its entirety for the duration of these formal Compliance issues. No person can access the physical records at issue in this case, because the restaurant is literally nailed shut. Heavy plywood shuttered the restaurant continuously since March 2020.

### **Legal Standards**

The Board in its discretion may deny the motion [for partial summary judgment] where the motion itself fails to establish the absence of a genuine issue, or where the opposing party's pleadings, opposition and/or response indicate on their face that a genuine issue may exist. NLRB Rules and Regulations Section 102.24(b). Such is the case here, because Respondent's Amended Answer indicates genuine issues of material fact that must be litigated.<sup>3</sup> Much of Counsel for the General Counsel's Motion is predicated upon a tautological definition of what constitutes a "general" denial, which is proscribed by Section 102.56 of the Rules and Regulations. A denial is not general simply because Counsel for the General Counsel deems it so. As explained, *infra*, Respondent's Motion meets the standards for particularity required under Section 102.56.

### **Argument<sup>4</sup>**

Counsel for the General Counsel argues that the answer to paragraph 1(a) is insufficient because it seeks to re-litigate an issue from the underlying hearing. However, the answer clearly states that vacancies did not exist as of December 19, 2014. This disputes Counsel for the General Counsel's theory as to the *number* of jobs that can commence accruing backpay as of the date in the Specification. Under the law, to meet the criteria of Section 102.56 of the Rules and Regulations, an answer must specify the basis for the disagreement with the computations contained in the specification; offer an alternative formula; furnish appropriate supporting figures; or adequately explain its failure to do so. *Flaum Appetizing Corp.*, 357 NLRB 2006, 2007 (2011), *Mining Specialists, Inc.*, 330 NLRB 99, 101 (1999) In this case,

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<sup>3</sup> Respondent stresses that all of this litigation is likely needless. Respondent filed a Motion for Appointment of a Settlement Judge on July 14, 2020. Such appointment would almost certainly resolve this entire matter, but, the Chief Administrative Law Judge has not ruled upon said Motion.

<sup>4</sup> Respondent declines to respond to arguments surrounding its own admissions.

Respondent has specified its basis for disagreement with the computation, to wit, there were insufficient job openings to support every discriminatees offer of return to work.

Respondent's answer to paragraph 1(b)(2)(A) is alleged to be deficient because it does not offer an alternative calculation of backpay. However, it specifically articulates the dates of reinstatement offers extended to Hoxhaj and his respective declinations. These offers of reinstatement would terminate Hoxhaj's right to backpay if it is established at trial that he had an obligation to accept them. Accordingly, Respondent has established its basis for disagreement.

Counsel for the General Counsel's arguments in favor of summary judgment with respect to paragraphs 1(b)(2)(B) and (C) disregard Respondent's failure to mitigate claim that permeates its Amended Answer. More importantly, Respondent's argument is that Hoxhaj's right to any damages is terminated by rejecting a legitimate offer of return to work. At a minimum, Respondent has raised a genuine issue of fact through its Answer. The date Hoxhaj's backpay would be tolled would be any date upon which he was found to have declined a bona fide offer of reinstatement.

The argument in favor of summary judgment in paragraph 1(b)(3)(A) fails because the Specification utilizes a nebulous theory for the appropriate number of discriminatees. Respondent's Answer that business needs dictate staffing levels and hours raises a material issue as to whether the *actual* staffing levels constitute how many employees were eligible for backpay on a payroll period basis or whether Counsel for the General Counsel's theory that a certain level of work, hours, customers and spend are guaranteed by an employer. In other words, Respondent is stating that the actual number of employees employed as alleged in the Specification is the alternative to Counsel for the General Counsel's artificial target of 38 employees.

Respondent argues that the individuals who returned to work, but at reduced hours were returned to equivalent positions (paragraph 1(b)(3)(D)). The motion for summary judgment

argues that Respondent's assertion that backpay ends upon a return to work is insufficiently detailed.<sup>5</sup> This argument assumes that this is a "general" denial. Respondent argues that, particularly in light of the circumstances, stating that backpay ends upon actual return to work sufficiently raises a question of fact. 102.56(b) requires a basis for disagreement or an alternative formula. See, *Mining Specialists, Inc.*, 330 NLRB 99, 101 (1999) Although lacking precision in the dates, the Amended Answer is sufficient to meet the basis (reduced work) and formula (actual return to work dates).

This is similarly true for the argument regarding paragraph 1(b)(4). Respondent states that the return to work date tolls backpay. There has been no allegation, nor any finding of constructive discharge, thus extending the backpay period until they date they resign would result in employees unjustly enriching themselves at Respondent's expense.

Counsel for General Counsel's argument regarding the gross backpay defined in 2(a) of the Specification is unavailing because it misstates Respondent's Answer. Respondent does not deny that it was required to pay employees in accordance with New York law. However, Respondent disputes the notion that any merit increases given are permissively included into individual backpay totals, because this presumes that everyone would receive identical merit raises. Thus, Respondent's Answer should be read as arguing that minimum wage by New York law is the "formula" for calculating backpay, not the highest wage paid on merit to any particular employee.

Similarly, in answering paragraph 2(d)(1) and its subparts, Respondent specifically offers a formula for ascertaining gross backpay. In particular, Respondent offers a formula that is gross earnings divided by weeks. Such a response is NOT a general denial and, in fact,

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<sup>5</sup> As repeatedly stated, the actual records with the precise dates are unavailable and have been at all material times.

definitively offers an alternative formula. *Flaum Appetizing Corp., supra*. Accordingly, a motion for summary judgment with respect to this paragraph must be denied.

With respect to seeking summary judgment for paragraph 3(a), Counsel for the General Counsel takes exception with a general denial regarding interim earnings. A general denial with respect to interim earning is permissible, because a discriminatee's interim earnings are unknown to a respondent. *Tiffany's Handbags*, 271 NLRB 621 (1984) Respondent's issue is not related to the formula, rather it relates to whether or not sufficient diligence was used to generate such earnings. This was plead with specificity.

Once again, Respondent disagrees with Counsel for the General Counsel's characterization that it has failed to satisfy its burden under Section 102.56(b) regarding paragraph 3(e). Respondent challenges the characterization that the jobs the employees were given are not "substantially equivalent." Counsel for the General Counsel's reasoning is circular on this issue, because it requires establishing an allegation as a fact. That is a factual determination for trial, not one that should be made without establishing a record. Moreover, Respondent stated in its Answer that interim earnings are underreported and that at times, individuals intentionally made themselves unavailable for work. The detailed records are simply unavailable due to the pandemic.

Counsel for the General Counsel makes identical arguments regarding paragraphs 5(c), 5(d) and 5(e), that agency search fees, job search expenses and mileage are subject to reimbursement. However, Respondent adamantly denies that the expenses listed in the respective paragraphs of the Specification are bona fide or legitimate. Therefore, summary judgment would be inappropriate regarding the named individuals and alleged expenses.

The next area of contention regards 401(k) benefits, Section 6 of the Specification. Counsel for the General Counsel incorrectly argues that Respondent took exception to the method of calculation in Section 6(b) of the Specification. Rather, Respondent takes exception

with the naked speculation of the percentage contributed by a particular employee. Section 6(b) makes no mention of “method” as argued in the Motion for Summary Judgment; and therefore, this argument must be denied.

Regarding Specification paragraph 6(d), Respondent denies that an estimated contribution rate is appropriate, rather, Respondent states that the *actual* rates historically selected by employees. This meets the standard of Section 102.56 of proposing an alternative formula. Once again, due to the pandemic, the actual records are unavailable. Nevertheless, a Motion for a Bill of Particulars would be the more appropriate remedy for this Answer, not a Motion for Summary Judgment.<sup>6</sup>

In paragraph 46 of her Motion, Counsel for the General Counsel suggest that summary judgment is appropriate in paragraphs 6 (f-h) because the Answer does not provide alternatives. Again, the Answer states that the ONLY appropriate measure of contributions is actual rates and objects to a formula that grants a windfall. It can be easily inferred that the alternative is wages earned while working at Respondent multiplied by employee’s contribution rate is Respondent’s alternative. The principle that only actual contribution rates are lawful is applicable to paragraph 6(i) of the Specification as well.<sup>7</sup>

The final arguments in the Motion pertain to tax consequences and the Board’s decision in *Don Chavas, LLC d/b/a Tortillas Don Chivas*, 361 NLRB 101 (2014). Respondent specifically denies that any such liability is appropriate and that any backpay award should be treated in a lump sum manner, as was the case prior to 2014. This is a legal dispute and appropriate for argument and briefing. The premise that this is “well-settled” law based upon a case that is only six years old is questionable at best, disingenuous at worst.

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<sup>6</sup> This logic is similarly applicable to Paragraph 45 of the Motion for Summary Judgment; Respondent’s opposition is to the estimation and urges that the appropriate percentage rates should be *actual*, not estimated.

<sup>7</sup> Respondent moves to amend its Answer, admitting that discrimantees gross and net backpay should reflect deductions for 401(k) contributions.

Finally, Respondent's affirmative defense that discriminatees failed to exercise reasonable diligence in a search for work cannot be defeated by a craftily worded Motion for Summary Judgment. It *is* well settled that an alleged discriminatee must exercise diligence in an effort to mitigate backpay loss.<sup>8</sup> This principle permeates nearly every point in Respondent's Answer and Counsel for the General Counsel's attempt to end run this legal obligation would violate Respondent's Due Process rights.

### **Conclusion**

For all of the foregoing reasons, Respondent respectfully requests that the Motion for Summary Judgment be denied regarding each of the contested provisions of the Compliance Specification.

Respectfully Submitted,

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<sup>8</sup> *Grosvenor Orlando Associates*, 350 NLRB 1197 (2007)

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## CERTIFICATE OF SERVICE

I certify that on September 22, 2020, I electronically filed Respondent's Opposition to Motion for Summary Judgment in Case 02-CA-142626 and Case 02-CA-144852 with the National Labor Relations Board using the NLRB E-Filing System, and I hereby certify that I provided copies of the same document, via electronic mail, on the following parties:

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Dated September 22, 2020

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