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## Memorandum on Tolling Employer Back Pay Liability, 1978

Warren C. Ogden

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## Memorandum on Tolling Employer Back Pay Liability, 1978

### Abstract

Memo to all consultants on how to toll employers' back pay liability in relation to alleged unlawful or discriminatory discharge, September 12, 1978.

*campaigns*

TO: ALL CONSULTANTS  
FROM: WARREN C. OGDEN  
DATE: September 12, 1978  
RE: TOLLING EMPLOYER BACK PAY LIABILITY

A recurring problem facing consultants is how to toll an employer's back pay liability where the employer is alleged to have unlawfully and discriminatorily discharged an employee. This type of situation arises because the standard remedy for employer discrimination in a discharge situation is the amount of money the employee would have earned but for the employer's unlawful act minus any interim earnings. In virtually every situation where an employer is alleged to have discriminatorily discharged an employee - whether that discrimination be on the basis of union membership, sex, race, etc. - the consultant must immediately take steps to reduce or eliminate the liability of his client.

Timing is critical in such a situation. The consultant should take immediate steps to reduce or eliminate employer liability immediately upon receipt of a charge. Agencies, particularly Title 7 type agencies, can take months or even

years to investigate a case. All that time back pay liability is growing. The alleged discriminatee knows it. The agency knows it. And there is nothing the employer can do about it unless the consultant points out the problem and gets the client working on it or works on it himself.

In certain situations, an employer is willing to offer reinstatement to the alleged discriminatee. An employer's offer of reinstatement to a discriminatorily discharged employee will normally relieve an employer from further liability for discrimination and will discontinue the accumulation of liability for back pay from the date of the offer. But it is almost impossible to place conditions on the offer, make the offer in a casual manner so that it is less likely to be accepted or otherwise shade the offer. The offer must be for substantially equivalent work and it must be made without condition.

The Board and the courts are split on the issue of whether an employer may place time limits on his offer of reinstatement. The Board would like to find that an employer's offer must be in effect a continuing

offer. But the courts generally take the view that the employer may place reasonable restrictions on the offer in terms of duration. Thus, an employer has a very good argument if an offer of reinstatement was made with a reasonable time limit on it and the employee did not respond within the time limit.

Under certain circumstances an employer who may have unlawfully discharged an employee may still argue that that individual cannot be reinstated for reasons other than discriminatory reasons. Again, the Board takes the position that a reinstatement order requires an employer to take back an employee. The courts, however, take the position that even though an employee may have been unlawfully discharged, if the employer can prove that reinstatement would create a serious difficulty, the employer need not offer reinstatement. Cf. NLRB v. Apico Inns of California, Inc., 88 LRRM 3283 (C.A. 9, 1975).

The NLRA, unlike some of the other statutes with which we deal, states in Section 2(3) that an employee is defined as including "any individual whose work has ceased as a consequence, or in connection with, any current labor dispute or because of any unfair labor practice, and who has

not obtained other regular and substantially equivalent employment. Thus, an alleged discriminatee who has found and accepted "substantially equivalent employment, ceases to be an employee of the employer."

In computing back pay, the gross amount which an employee would have earned in any quarter is reduced by his "interim net earnings" from other employment or from self-employment. Where, however, the employee is put to extra expense to obtain or retain another job, for example, employment agency fees, commuting expenses over and above usual commuting costs, or other living expenses while living away from home, such expenses are deducted in computing "net earnings" at interim jobs.

The interest rate normally used by the Board is based on the Internal Revenue Service's affected "adjusted prime interest rate" -the sliding interest scale charged or paid by IRS and underpayment or overpayment of federal taxes. The current adjusted prime rate is 7%. Florida Steel Corporation, 96 LRRM 1071.

An employee claiming back pay must have made a reasonable effort to secure other employment. If he fails to

do so, the Board must deduct the amount of wage losses wilfully incurred. Phelps Dodge Corporation v. NLRB, 8 LRRM 439 (1941). However, work needn't be accepted by the seeker unless it is "substantially equivalent" to his former position. Thus to keep back pay liability running, the alleged discriminatee need only show due diligence in seeking alternative work. Normally, the Board will look to such matters as whether the employee has signed up with the state's unemployment agency.

Where an employer with a back pay liability contends that an alleged discriminatee did not make the required effort to find other work, the wilfulness of this issue must be determined "with respect to each employee considering the record as a whole." The particular facts concerning each separate individual must be considered by the Board. The general counsel has the burden of proving the gross back pay due over the back pay period, but the burden shifts to the employer when it comes to proving that reductions should be made in the back pay bill because the employee failed to either work for or keep substantially equivalent employment or because a job would not have been available with the employer for some reason unconnected with the discrimination.

The Board's basic rules are as follows:

- A back pay claimant who makes a reasonable effort to find a substantially equivalent job, but without success, is entitled to back pay.

- A worker who refuses or unjustifiably quits a substantially equivalent job does not lose his entire claim but only the amount he would have earned if he had taken or held onto the other job.

- An employee who leaves a new job, even a permanent one, for a justifiable reason is entitled to the difference between what he earned at the new job and what he would have earned if the company had not fired him. But if the employee would have left his original job for the same reason he left the new job, or if he would have left his original job to obtain the new job, then his claim will be disallowed from that time.

- The claimant who goes into business on his own is treated similarly to one who obtains a new job. His net profits are treated as earnings from the new job.

The consultant faced with the above rules would normally therefore feel more confident if he had an offer



of reinstatement from the original employer which was either turned down by the alleged discriminatee or left unanswered. Such an offer, effectively communicated, would terminate all back pay liability. Alternatively, if the employer is unwilling or unable to reinstate the alleged discriminatee, there is always the possibility of stimulating an offer of "substantially equivalent" employment from another employer. Failure to accept such employment could, theoretically, terminate any liability on the part of the employer since it could be argued that such refusal of alternatives substantially equivalent were created by this prospect, and had the employee been diligent, there would be no back pay liability at all. Thus, if the consultant cannot stimulate an offer from the employer, immediate consideration should be given to the possibility of an offer being made by a member firm or by some contact of the employer or the consultant.

Containing potential client liability is one of the first obligations of the association. Since the basic remedy in most of our agencies is back pay, the commensurate techniques for limiting back pay liability are

indicated in the above description. First consider with the employer the possibility of an offer of reinstatement made from within the company. If this is impossible, indicate to the employer that it is necessary to take immediate action to stimulate a "substantially equivalent" employment offer. If all else fails, get an offer of work which is not "substantially equivalent" but still may have the effect of reducing back pay liability.

NLRB v. Southern Silk Mills, 39 LRRM 2647 (C.A. 6, 1957); cert. denied 40 LRRM 2680 (1957). The only point is that immediate action must be taken to protect the employer.