

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

In the Matter of

LATINO EXPRESS, INC.

&

Cases 13-CA-046528, 13-CA-046529,
13-CA-046634

CAROL GARCIA, PEDRO SALGADO, &
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 777

**GENERAL COUNSEL'S BRIEF OF POSITION
ON SOCIAL SECURITY AND INCOME TAX REMEDIES**

On July 31, 2012, the Board invited all interested parties to file briefs in the above-captioned case addressing the issues of whether, in connection with an award of backpay, the Board should routinely require a respondent to: (1) reimburse a discriminatee for any excess federal and state income taxes the discriminatee may owe from receiving a lump-sum backpay award; and/or (2) submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate calendar quarters.

I. Summary of the General Counsel's Position in Favor of the Proposed Social Security and Income Tax Remedies

Both a tax component in backpay and employer notification of social security are appropriate Board remedies. Section 10(c) of the National Labor Relations Act authorizes the Board to devise remedies to reinstate the status quo ante in order to effectuate the policies of the Act. That is, under the Act, the respondent should as nearly as possible restore discriminatees to the situation that would have obtained but for the unlawful discrimination. However, the current Internal Revenue Code hinders the NLRA's make-whole objective by taxing a discrimination award more heavily than it would have had the plaintiff earned the wages and benefits in due course. To redress this unfairness, several circuits, as well as the EEOC, now allow a discriminatee to request a "gross up" of their backpay award in order to offset the increased tax liability incurred by virtue of receiving the backpay in one lump sum. In order to fully vindicate the purposes and policies of the Act, the Board should follow suit, and routinely require a respondent to reimburse a discriminatee for any negative tax consequences from receiving a backpay award in one lump sum.

Backpay awards also may result in a decrease in a discriminatee's social security benefits. Currently, the burden to notify the Social Security Administration of backpay awards and proper allocation rests on the discriminatee. However, the discriminatee often does not have the information necessary (i.e. corporate address, employer identification number, the period of time the backpay covers, etc.) to make

such a request. It therefore is more appropriate that the respondent be given the responsibility to ensure that, for the purposes of social security, the discriminatee's backpay is allocated to the calendar quarters the discriminatee would have received the backpay absent the respondent's unlawful conduct. Accordingly, whenever the Board awards backpay, it should routinely include an order for the respondent to report the backpay to the Social Security Administration.

II. The Board has the Authority Under the Act to Include Tax Gross Ups and Social Security Notification in its Backpay Awards

The Board has broad powers under Section 10(c) of the Act, 29 U.S.C. Sec. 160(c), to fashion remedies, including affirmative orders, that will effectuate the policies of the Act. *NLRB v. Strong Roofing & Insulating*, 393 U.S. 357, 359 (1969); *Teamsters Local 115 v NLRB*, 640 F.2d 392, 399 (D.C. Cir. 1981). Making workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. *Phelps Dodge Corp. v. NLRB*, 313 US 177, 197 (1941). In applying its authority over backpay orders, the Board has not used rigid formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations. *Id.* at 198. Moreover, the Board has periodically updated and reformed these remedies to more perfectly respond to new "devices and stratagems for circumventing the policies of the Act." *See id.* at 194. Indeed, the Supreme Court has commanded the Board to

“draw on enlightenment gained from experience” in crafting new remedies designed to undo the effects of unfair labor practices. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

III. Make-Whole Relief Should Require Respondents to Shoulder Any Excess Federal and State Income Taxes Occasioned by a Lump-Sum Payment to the Discriminatee

1. Lump-Sum Back Payments May Cause Substantial Negative Tax Consequences for Discriminatees Under Current Tax Law

A victim of discrimination who receives a lump-sum backpay award may incur a heightened tax burden as a result. This is because the Internal Revenue Service (“IRS”) considers a backpay award to be taxable income earned in the year the award is paid, regardless of when the income should have been earned and received. *See United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001) (finding that for tax purposes backpay is income the year it is actually paid, even if for Social Security benefits purposes backpay is allocated to the years it should have been paid). *See also* Rev. Rul. 75-64, 1975-1 C.B. 16; Rev. Rul. 57-55, 1957-1 C.B. 304. Consequently, if a back payment pushes a discriminatee into a new tax bracket by virtue of paying several years of wages all at once, a discriminatee may owe more in federal and state income taxes than would have been the case if the wages were paid in due course. *See* Gregg D. Polsky & Stephen

F. Befort, *Employment Discrimination Remedies and Tax Gross Ups*, 90 Iowa L. Rev. 67, 74–76 (2004); Eirik Cheverud, Note, *Increased Tax Liability Awards After Eshelman: A Call for Expanded Acceptance Beyond the Realm of Anti-Discrimination Statutes*, 56 N.Y. L. Sch. L. Rev. 711, 714, 714 n.14 (2011-2012) (noting that the most extreme possible example of this under current tax code would be a movement from the 10% tax bracket to the 35% tax bracket).

2. Discriminatees Rarely Faced Negative Tax Consequences Before the Tax Reform Act of 1986

Before 1986, discriminatees who received lump-sum backpay awards under a statute protecting an employee’s right to employment or wages could counter the negative tax consequences of the lump-sum payment through income averaging. Income averaging was a process that under certain circumstances allowed an individual to average large year-to-year differences in income over several years, reducing the tax burden from a one-time income peak. *See* 26 U.S.C. §§ 1301–1304 (1982) (allowing for averaging over a five-year period) (repealed 1986).¹ Because income averaging served to mitigate the disproportionate tax burden that might otherwise have resulted from a backpay award, courts and the Board found it unnecessary to order respondents to compensate discriminatees for avoidable negative tax consequences of backpay awards. *See, e.g., Blim v. W. Elec. Co.*, 731 F.2d 1473, 1480 (10th Cir. 1984) (ruling that compensating ADEA discriminatee for

¹ For a history of income averaging, see Cheverud, *supra*, at 715–21.

negative tax consequences was improper due to availability of income averaging); *Hendrickson Bros., Inc.*, 272 NLRB 438, 440 (1985), *enforced mem.*, 762 F.2d 990 (2d Cir. 1985); *Laborers Local 282 (Austin Co.)*, 271 NLRB 878, 878 (1984). Indeed, to have done so may very well have been punitive rather than remedial. *Cf. Consol. Edison Co. of N.Y., Inc. v. NLRB*, 305 U.S. 197, 255–56 (1938) (finding the Act does not empower the Board to make punitive orders).

However, income averaging itself was not always completely effective at eliminating the negative tax consequences of lump-sum back payments. In *Sears v. Atchison, Topeka & Santa Fe Ry. Co.*, a class of Title VII discriminatees was awarded backpay covering a period of seventeen years. 749 F.2d 1451, 1456 (10th Cir. 1984). The court found that not only did income averaging not adequately address a backpay period of such length, but forty percent of the class was deceased and thus no longer even eligible for income averaging. *See id.* Accordingly, the court ruled that while a tax component may not be typical for Title VII cases, the trial court's inclusion of a tax component in the remedy was an appropriate exercise of its wide discretion in making the victims whole. *See id.* at 1456–57.

In 1986, Congress removed income averaging from the tax code for everyone besides farmers and fishermen. *See Tax Reform Act of 1986*, Pub. L. No. 99-514, § 141, 100 Stat. 2085 (1986). Many states followed suit, and while there have been repeated efforts to revive income averaging at the federal level, those efforts have

gained little traction. *See, e.g.*, Civil Rights Tax Relief Act of 2011, H.R. 3195, 112th Cong. (2011); Civil Rights Tax Relief Act of 2009, H.R. 3035, 111th Cong. (2009); Civil Rights Tax Fairness Act of 2000, S. 2887, 106th Cong. (2000); Civil Rights Tax Fairness Act of 1999, H.R. 1997, 106th Cong. (1999). With the repeal of income averaging, discriminatees now face the full negative tax consequences of lump-sum back payments.

3. Including a Tax Component in Backpay Remedies Will Better Effectuate the Remedial Purpose of the Act by Restoring Discriminatees to the Position They Should Have Occupied

Now that discriminatees can no longer take advantage of income averaging, it is incumbent upon the Board to ensure that its make-whole remedy truly restores the situation, as nearly as possible, “to that which would have obtained but for the illegal discrimination.” *See Trustees of Boston University*, 224 NLRB 1385 (1976) (quoting *Phelps Dodge Corp.*, 313 U.S. at 194), *enforced*, 548 F.2d 391 (1st Cir. 1977)). The status quo ante should be measured based on the discriminatee’s after-tax income. *See Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 493–94 (1980) (recognizing that “after-tax income, rather than one’s gross income before taxes . . . provides the only realistic measure” of lost income under the Federal Employer’s Liability Act). Otherwise, discriminatees might, through no fault of their own, receive only a portion of the after-tax income they would have received absent the unlawful discrimination. As one court put it, “[i]t’s not how much you make, it is

how much you *keep*.” *O’Neill v. Sears, Roebuck & Co.*, 108 F. Supp. 2d 443, 447 (2000) (including a tax component in its ADEA make-whole remedy).

The Board should adopt former Member Liebman’s dissenting position in *Unite Here Local 26*, in which she argued that the Board should order tax compensation as part of its backpay remedy. 344 NLRB 567 (2005). In that case, the General Counsel, in accordance with GC Memorandum 00-07,² initially excepted to an ALJ’s decision to not include a tax component in a backpay award. Before the Board ruled on the issue, a new General Counsel moved to withdraw the exception, and a Board majority granted the motion to withdraw. *Id.* at 567 n.2. Member Liebman disagreed with the Board’s decision, and argued that the Board should adopt a tax compensation remedy. *Id.* at 567 (Liebman, dissenting in part).

Member Liebman argued that a tax component was necessary to truly make a discriminatee whole. She also explained that such a remedy was in keeping with the Board’s right to fashion remedies to undo the effects of violations of the Act. *Id.* at 568. For instance, the Board’s longstanding practice of including interest in backpay awards, even though Section 10(c) of the Act does not specifically provide for interest, supports the view that tax compensation is an appropriate component of a make-whole remedy. Just as discriminatees’ loss of use of their money must be

² *Reimbursement for Excess Federal and State Income Taxes which Discriminatees Owe as a Result of Receiving a Lump-sum Backpay Award*, GC Memorandum 00-07, dated Sept. 22, 2000.

redressed to make them whole, so must discriminatees who face a higher tax liability because they received a lump-sum payment be compensated accordingly. *Unite Here Local 26*, 344 NLRB at 568.

In addition, as Member Liebman pointed out, including a tax component in backpay awards would also effectuate the policies of the Act by strengthening the Board's remedies. *Id.* The weakness of the Board's remedies for unlawful discrimination, especially when compared to the remedies granted under other federal employment law, is notorious. *Id.* (citing Cynthia Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527, 1552 (2002)). By making the respondent liable for a greater portion of a discriminatee's lost pay, the Board would also improve the deterrent effect of its backpay award. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417–18 (1975) (finding that equitable backpay under Title VII also serves a deterrent function). Accordingly, the Board should adopt Member Liebman's reasoning in *Unite Here Local 26* and routinely include a tax component in its backpay remedies.

4. Tax Components in Backpay Remedies Are Gaining Acceptance in the Circuits

The three principal federal anti-discrimination statutes, namely Title VII,³ the ADEA,⁴ and the ADA,⁵ all share a common make-whole objective, and all “vest

³ Title VII, 42 U.S.C. § 2000e-17 (2000).

trial courts with a similar broad discretion in awarding such legal or equitable relief as the courts deem appropriate.” *McKnight v. GMC*, 973 F.2d 1366, 1369 n.1 (7th Cir. 1992) (quoting *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149 (7th Cir. 1981)). The NLRA has the same make-whole objective as these statutes. *See Polsky & Befort*, 90 Iowa L. Rev. at 99. Indeed, the remedial models of Title VII and the ADA were both explicitly patterned after the NLRA. *See* 110 Cong. Rec. 7,214 (1964) (interpretive memorandum by Sens. Clark and Case); *id* at 6,549 (statement of Sen. Humphrey). *See also* 42 U.S.C. § 12117. Thus, federal court decisions finding that these statutes authorize tax components in backpay awards are instructive for the Board.

Federal courts in most of the circuits that have addressed this issue have endorsed a tax component in backpay awards. As mentioned above, the Tenth Circuit led the way by recognizing that in a case where income averaging was ineffective, it was equitable to include a tax component to ensure that the discriminatee was made whole. *See Sears*, 749 F.2d at 1456. The Third Circuit has agreed, finding in an ADA case that without this type of equitable relief, it would not be possible “to restore the employee to the economic status quo that would exist but for the employer’s conduct.” *Eshelman v. Agere Sys., Inc.*, 554 F.3d 426, 442 (3d

⁴ Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2000).

⁵ Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2000).

Cir. 2009) (quoting *In re Cont'l Airlines*, 125 F.3d 120, 135 (3d Cir. 1997)). The court relied on the “now-universal acceptance of another form of equitable relief—prejudgment interest on backpay awards.” *Id.* As with prejudgment interest, an award to compensate prevailing discriminatees for their increased tax burdens “represents a recognition that the harm to a prevailing employee’s pecuniary interest may be broader in scope than just a loss of back pay.” *Id.* See also *O’Neill*, 108 F. Supp. 2d at 446–47 (finding that compensation for adverse tax consequences was necessary to comply with make-whole doctrine of the ADEA).

The Eighth Circuit also has found a tax enhancement remedy “analogous to the prejudgment interest remedy . . . as an element of making persons whole for discrimination injuries.”” See *Arneson v. Callahan*, 128 F.3d 1243, 1247 (1997). While the court in that case ruled that such a remedy, like prejudgment interest, would not be available against the federal government absent an express waiver of sovereign immunity by Congress, it left open its availability as a remedy to private parties. See *id.* at 1247 n.7. Recently, moreover, at least one district court in the Eighth Circuit has interpreted *Arneson* to support the award of a tax remedy as part of backpay in an FMLA case against a private party. See *Powell v. N. Ark. Coll.*, No. 08-CV-3042, 2009 WL 1904156, at *2–3 (W.D. Ark. July 1, 2009).

A district court in the Eleventh Circuit also relied on *Sears* in finding that it could include a tax component in a lump-sum backpay award. *EEOC v. Joe’s Stone*

Crab, Inc., 15 F. Supp. 2d 1364, 1380 (S.D. Fla. 1998). However, the court did not do so because the plaintiff had not provided enough evidence to calculate what the tax component should be. *Id.*

Although the D.C. Circuit has not joined the other circuits in endorsing tax components in backpay awards, it also does not appear that the court has directly considered the issue. In *Dashnaw v. Peña*, 12 F.3d 1112, 1116 (D.C. Cir. 1994) (per curium), the D.C. Circuit, in one paragraph, rejected such a tax component in an ADEA case on the basis that it could find no authority to do so, without considering *Sears v. Atchison, Topeka & Santa Fe Ry. Co.*, which had been decided ten years beforehand. Later, in *Fogg v. Gonzales*, the D.C. Circuit overturned a district court's tax award in a U.S. Marshal's Title VII case on the basis that *Dashnaw v. Peña* constituted "binding circuit precedent." 492 F.3d 447, 455–56 (D.C. Cir. 2007). *Fogg* is best read not as a reaffirmation of *Dashnaw*, but as a rebuke to the district court for not even having addressed *Dashnaw* in its decision; the D.C. Circuit found that the district court abused its discretion by solely relying on Tenth Circuit precedent, while failing to consider or even acknowledge the facially applicable precedent of its own circuit. *Id.* (citing *Peyton v. DiMario*, 287 F.3d 1121, 1126 (D.C. Cir. 2002)). In neither *Dashnaw* nor *Fogg* did the court actually discuss the legal rationale behind tax gross ups. Further, it is significant that in both those cases the defendant was the federal government. As noted by the Eighth Circuit in *Arneson v. Callahan*, tax components of backpay awards would be subject to sovereign immunity unless

explicitly waived by Congress. 128 F.3d at 1247 (ruling that a tax component of a backpay award is analogous to the pre-judgment interest remedy, which is not available against the government unless waived by Congress). Although the D.C. Circuit did not explicitly address sovereign immunity in either *Fogg* or *Dashnaw*, these cases are readily distinguishable from cases endorsing tax gross ups against private defendants. See Tim Canney, Comment, *Tax Gross-Ups: A Practical Guide to Arguing and Calculating Awards for Adverse Tax Consequences in Discrimination Suits*, 59 Cath. U.L. Rev. 1111, 1131 (2010).

Other federal agencies have also begun to include a tax component as part of their backpay awards. Relying on the reasoning of the Tenth and Third Circuits, the Equal Employment Opportunity Commission has decided that discriminatees may request compensation for adverse tax consequences of receiving a lump-sum backpay award. *Van Hoose*, EEOC Decision No. 01990455, 2001 WL 991925, at *3 (Aug. 22, 2001).⁶

⁶ Some state courts have also ruled on the availability of tax gross ups to discriminatees. However, their analyses of the tax gross-up issue are not particularly instructive for the Board because they are interpreting state anti-discrimination laws rather than federal ones, and their analysis focuses on the issue of damages rather than make-whole relief. Compare *Ferrante v. Sciarretta*, 839 A.2d 993, 996 (N.J. Super. Ct. Law Div. 2003) (finding that the New Jersey Laws Against Discrimination authorizes tax compensation as actual damages) with *Blaney v. IAM District No. 160*, 87 P.3d 757, 763–64 (Wash. 2004) (en banc) (ruling that tax compensation would be consequential damages not authorized under the Washington Law Against Discrimination). By contrast, federal courts have recognized that a tax gross-up is an equitable remedy like pre-judgment interest, and not a form of damages at all. See, e.g., *Eshelman*, 554 F.3d at 442.

5. The Board's Inclusion of a Tax Component in Back Pay Should Be Routine.

The Board should routinely include a tax component in all its backpay awards. Board cases can last for years before finally being resolved, and a discriminatee facing no tax consequences in the beginning stages of the case may face huge tax liability by the time the Board order is enforced. A determination of the specific tax consequences is best saved for compliance proceedings, which is the Board's routine process for making backpay calculations, such as determining whether discriminatees are owed reimbursement for their search for work or for their interim work expenses. *See, e.g., Nelson Metal Fabricating*, 259 NLRB 1023 (1982). In federal court, by contrast, where plaintiffs in Title VII, ADA, and ADEA cases ordinarily must prove negative tax consequences at trial, federal trial judges typically deal with such calculations when they reach a decision on the merits. *See, e.g., Hukkanen v. IUOE Local No. 101*, 3 F.3d 281, 287 (8th Cir. 1993) (denying tax award because discriminatee had failed to establish evidence of negative tax consequences); *Joe's Stone Crab, Inc.*, 15 F. Supp. 2d at 1380 (same). *But see Powell*, 2009 WL 1904156, at *3 (ordering post-trial evidentiary hearing to determine any negative tax consequences since plaintiff had failed to prove them at trial). In NLRB cases, though, the Board's decision on the merits does not conclude the matter, and the calculation of backpay usually does not occur until the compliance stage. Thus, the Board should not require the General Counsel to offer evidence of

or specially plead negative tax consequences before ordering respondents to reimburse discriminatees for excess federal and state income taxes.

IV. Respondents Should Be Responsible for Reporting Back Pay to the Social Security Administration

Aside from tax consequences, lump-sum backpay awards may also adversely impact the benefits a discriminatee eventually receives from social security. As discussed above, backpay awards, for tax purposes, are considered wages the year they are paid, not the year they ought to have been paid. *See Cleveland Indians Baseball Co.*, 532 U.S. at 219. Yet, each year's wages are important in calculating an individual's social security benefits, and receiving several years of wages all in one year may negatively impact those benefits. As the Supreme Court observed, "[e]ligibility for these benefits and their amount depends upon the total wages which the employee received *and the periods in which wages were paid.*" *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 364 (1946) (emphasis added). The Supreme Court has determined that unlike taxes, backpay awards under the NLRA⁷ can be allocated to past years for the purposes of social security benefit calculations. *Id.* at 370. However, before the Social Security Administration will allocate backpay to previous years, it requires that either the employer or the employee give it notice with the proper paperwork. IRS, Dep't of the Treasury, Pub. No. 957, Reporting

⁷ The Social Security Administration has expanded this ruling to also include backpay awards pursuant to other state and federal labor and employment laws. *See* 20 CFR § 404.1241 (2010).

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(2010).

The Board should order respondents to complete the necessary paperwork so that discriminatees do not lose social security benefits due to the respondent's unlawful discrimination. The respondent has access to all of the needed information, including its own corporate address, its employer identification number, the employee's social security number, the amount of backpay and the period it covers, and whether the employer has paid any other wages to the discriminatee the year the backpay is awarded (if for instance the discriminatee was reinstated). *See id.* at 2, 3 tbl.1. Indeed, other than the allocation of the backpay award, an employer normally must provide all of this information to the Social Security Administration anyway in its annual Form W-2 submission. *See* IRS, Dep't of the Treasury, Form W-2, Wage and Tax Statement (2012), *available at* <http://www.irs.gov/pub/irs-pdf/fw2.pdf>. Moreover, not only is the respondent in a better position to give the Social Security Administration the information it needs, but since the respondent's unlawful conduct is the cause of the discriminatee's possible loss of benefits, it is equitable for the respondent to remedy these adverse consequences. *See Transmarine Navigation Corp.*, 170 NLRB 389, 389 (1968) ("In fashioning an appropriate remedy, we must be guided by the principle that the wrongdoer, rather than the victims of the wrongdoing, should bear the consequences of his unlawful conduct, and that the remedy should 'be adapted to

the situation that calls for redress.”) (citing *NLRB v. Mackay Radio*, 304 U.S. 333 (1938)). Accordingly, whenever it awards backpay, the Board should as a matter of course require respondents to complete the appropriate paperwork and submit it to the Social Security Administration.

V. Conclusion

A backpay award under the Act is meant to place discriminatees in the position they would have occupied had they never been discriminated against. Unfortunately, a simple one-time payment of the money originally owed will not achieve this end. As the Board has already acknowledged, interest must be added to the award to compensate for the lost use of the money. The Board should now also include in the backpay award measures to ensure that the award does not lose value due to an increased tax penalty or decreased social security benefits. The Board can easily achieve this equitable goal by routinely grossing up backpay awards to account for any increased tax burden, and by routinely ordering employers to submit the necessary paperwork to the Social Security Administration. By doing so, the Board will better effectuate the purpose of the Act by more adequately restoring the status quo ante and vindicating the rights of discriminatees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of GENERAL COUNSEL'S BRIEF OF POSITION ON SOCIAL SECURITY AND INCOME TAX REMEDIES in Cases 13-CA-046528, -046529, and -046634 was served in the manner indicated to the parties listed below on this 25th day of September, 2012.

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