

Ernst and Young, formerly known as Arthur Young and Company and Nina Bloom. Case 2-CA-22164

August 21, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On February 22, 1991, Administrative Law Judge Howard Edelman issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings,² and conclusions and to adopt the recommended Order.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Ernst and Young, formerly known as Arthur Young and Company, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹The Respondent argues that it was precluded from presenting evidence of alleged willful misconduct which caused Nina Bloom's discharge by two interim employers. Although the judge did not allow the testimony of Bloom's former supervisors, he did allow the Respondent to make an offer of proof. We have reviewed the Respondent's offer of proof and agree with the judge that the evidence, even if credited, would not warrant a finding of willful loss of employment.

²The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Additionally, the Respondent contends that the judge was biased and deprived the Respondent of a fair hearing. After a careful examination of the entire record, we are satisfied that this allegation is without merit.

³Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and accrued to the date of payment. Backpay and interest shall be paid minus tax withholdings required by Federal and state laws.

James M. Mells, Esq., for the General Counsel.
Lois Chamberlain, Esq. and *Elizabeth Healy, Esq.*, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on May 29 through 31, 1990, in New York, New York.

304 NLRB No. 37

On September 28, 1988, the National Labor Relations Board issued a Decision and Order in Case 2-CA-22164, directing Ernst & Young, formerly called Arthur Young & Company (Respondent), to make Nina Bloom and Lisa Cohen whole by offering reinstatement and paying backpay due to Bloom and Cohen. On August 28, 1989, The United States Court of Appeals for the Fourth Circuit enforced the Board's Order.

On December 13, 1989, a controversy having arisen over the amount of backpay due to the above individuals, under the Board's Order as enforced by the court of appeals, issued the instant backpay specification and notice of hearing.

Respondent, in its amended answer admitted the formula used in the specification to compute gross backpay and the net interim earnings set forth in the specification.

Respondent contends that Bloom and Cohen failed to make a reasonable search for work following their discharge from Respondent.

The credible and uncontradicted testimony of Bloom and Cohen establishes the following. Bloom was unlawfully discharged by Respondent on February 27, 1987. Bloom credibly testified that following her discharge she examined the employment advertisements in the New York Times on a weekly basis. Additionally, she utilized the services of several employment agencies on an unspecified periodic basis. Such agencies included Accountemps, Kelly, and Crystalline, seeking proofreading jobs. Additionally, she utilized the Yellow Pages of the Manhattan telephone directory. During her employ at Respondent, she had earned a yearly salary of \$16,500. During her job search she testified that she was seeking a salary of \$18,000, because she could no longer live on her former salary. Bloom testified that she spent several days per week and several hours per day contacting various companies whose names she obtained from the Times or the Yellow Pages for suitable employment. Bloom was unable to recall the names or the employers she contacted, nor did she keep records of such contacts. However she credibly testified that the New York State Board of Unemployment Compensation required that she produce evidence of her continuing search for work to be eligible for benefits and that she had never been denied employment benefits.

As a result of the search, described above, Bloom was able to obtain employment with another employer, Rosen & Read, within about 4 months from the date of her discharge from Respondent, and employment within a similar period with Seidman & Seidman following her discharge from Rosen, and once again employment within a similar period with her present employer, Weiss Dorwid, following her discharge from Seidman.

Cohen credibly testified that she reviewed advertisements in the Times and went to various employment agencies, including Typographer's Personnel, F.E.G.S., Asta, Kelly, and Cosmopolitan, and applied to various companies without success. She also made independent application to NBC, ABC, American Express, Simon & Schuster, and various other specified companies without success. After about 4 months of unemployment, during which time she earned about \$450 performing some freelance work as a proofreader, she obtained temporary employment through an application with Temps America, the employment agency she had used to obtain her employment with Respondent. Cohen continued her temporary employment for about 6 months, until sometime

during the first quarter in 1988 when she obtained full-time employment with Virgin Atlantic Airlines. Cohen is currently employed by Virgin. Her duties at Virgin are unrelated to those she performed at Respondent.

During her search for interim work, Cohen did not limit herself to applications for proofreading jobs. While she was unemployed, she filed for unemployment benefits and was required to document her search. Cohen was never denied unemployment benefits.

Respondent called two expert witnesses to testify as to the availability of proofreading jobs in the area. Dr. David Stein, a vocational consultant paid by Respondent for his testimony, testified that following an analysis of Times advertisements for which Bloom and Cohen would have been qualified, he concluded that there were substantial numbers of proofreading jobs available to proofreaders with similar qualifications as Bloom and Cohen. William Henderson, the director of a proofreading employment agency, who used to have Respondent as a regular account, testified that he regularly ran advertisements in the Times as well as other newspapers, and that the 1987–1988 period was the best period of the decade for employment of proofreaders, and that if Bloom or Cohen had applied with his agency during this period, he could have easily placed them. However, Henderson's credibility is highly suspect. He no longer had Respondent for an account, and I'm sure his testimony was given largely, if not wholly, in an attempt to regain Respondent as a client. Such conclusion is reinforced by his testimony that he was neither subpoenaed by, or paid by Respondent for his testimony, but rather testified out of the "goodness of his heart."

A discriminatee is required to make a reasonable search for work in order to mitigate loss of income and the amount of backpay. *Lizdale Knitting Mills*, 232 NLRB 592, 599 (1977). The Board and the courts hold however, "that in seeking to mitigate loss of income a backpay claimant is held . . . only to reasonable exertions in this regard not the highest standard of diligence. . . . The principle of mitigation of damages does not require success, it only requires an honest good faith effort . . . *NLRB v. Arduini Mfg. Co.*, 394 F.2d 420, 422–423 (1st Cir. 1968); *NLRB v. Madison Courier*, 550 F.2d 1101 (8th Cir. 1977); or that he wilfully incurred losses of income or was otherwise unavailable for work during the backpay period." *NLRB v. Pugh & Bass, Inc.*, 231 F.2d 588 (4th Cir. 1956); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569 (5th Cir. 1966). Moreover, in applying these standards, all doubts should be resolved in favor of the claimant rather than the respondent wrongdoer, *United Aircraft Corp.*, 204 NLRB 1068 (1973).

Neither Bloom's nor Cohen's testimony as to their search for work is contradicted by Respondent. Bloom credibly testified that her primary reference for job openings was the Times advertisements and the Yellow pages. She credibly testified that she spent several days per week and several hours per day making calls or applications for jobs. Although Bloom did not document her search, nor could she recall the names of places to which she made calls or applications such failure does not diminish her credibility. The Board has repeatedly held that it is not unusual or suspicious that backpay claimants cannot remember the names of employers with whom they applied. *Amsher Associates*, 234 NLRB 791 at fn. 7 (1978); *United Aircraft Corp.*, 204 NLRB 1068 (1973); *Lizdale Knitting Mills*, supra; *Neely's Car Clinic*, 255 NLRB

1420 (1981). Cohen, on the other hand, did document her search for work to a greater degree. She testified as to various employment agencies to which she contacted and various employers to which she applied for work. Moreover, both Bloom and Cohen obtained work within a short period of several months following their discharge from Respondent and Bloom's discharge from subsequent interim employers.

The testimony of Respondent's witnesses Stein and Henderson, even if credited is speculative. Such testimony does not in any way contradict the testimony of Bloom or Cohen. Moreover, the Board has held that the existence of employment advertisements or a favorable job market does not meet the employer's burden of proof that the backpay claimant failed to make a reasonable search. *Associated Grocers*, 295 NLRB 806 (1989); *Groves Truck & Trailer*, 294 NLRB 1 (1989). The Board has held that the existence of advertisements for jobs does not establish that such jobs would have been available or that the claimant would have been selected had he applied. *Airport Service Lines*, 231 NLRB 1272 (1977). As set forth above, in applying the applicable backpay standards all doubts should be resolved in favor of the claimant, rather than the employer wrongdoer. *United Aircraft Corp.*, supra.

Accordingly, I conclude that both Bloom and Cohen made a reasonable search for work.

Respondent contends that Bloom and Cohen wilfully concealed interim earnings and that based on the rational set forth in *American Navigation Co.*, 268 NLRB 426 (1983), backpay should be denied for the quarters such earnings were wilfully concealed. Of course it must first be determined if there was such willful concealment.

The compliance officer, Ester Morales, testified that she calculated the compliance specification based on conversations and documents submitted to her by Bloom and Cohen. With respect to Bloom's earnings from Rosen in 1987, Morales testified that she calculated such earnings based on a conversation she had with Bloom in which Bloom told her she earned \$356 per week. Bloom did not supply Morales with her W-2 forms. Bloom did bring with her for the trial of this case her W-2 forms. The total of the W-2 forms established that Bloom's interim earnings with Rosen over the second, third, and fourth quarters was \$114.81 more than set forth in the compliance specification. Neither Bloom nor Morales was able to account for this discrepancy.

With respect to Bloom's earnings at Seidman in 1988 and 1989, Morales testified that she calculated such earnings based on a conversation she had with Bloom. Bloom told Morales that when she started her employment with Seidman, she was earning \$21,500 per year, and that later in July 1988 she received a \$1000 raise. The W-2 forms submitted by Bloom established that Bloom's earnings over the four quarters in 1988 were \$220.04 more than set forth in the compliance specification. Neither Bloom nor Morales was able to account for this discrepancy.

With respect to Bloom's earnings with Seidman during the first quarter in 1989, Morales based her calculations on Bloom's interim earnings based on Bloom's \$22,500 salary. The W-2 forms for this period established that Bloom earned \$102.67 more than set forth in the compliance specification. Neither Bloom or Morales was able to explain this discrepancy. Additionally, Respondent's counsel brought to counsel for the General Counsel's attention that on Bloom's dis-

charge from Seidman in the first quarter of 1989, Bloom failed to include \$866 severance pay. Morales testified that Bloom did report such severance pay but that she had inadvertently forgotten to include it in the specification.

With respect to Cohen's interim earnings in March through June 1987, Cohen testified she performed freelance work for Official Books. Cohen submitted receipts showing payment of \$450 which was the amount set forth in the compliance specification. During the trial of this case, Cohen testified that entries totaling \$563.99 were entered in a booklet created at the New York State Unemployment Compensation, and submitted by her to the compliance officer prior to the issuance of the specification, and were the accurate figures representing her interim earnings during this period. This represented a discrepancy of \$113.99. Neither Cohen or Morales could explain the discrepancy.

Pursuant to a motion by the General Counsel the specification was amended to include the accurate figures established by the records submitted by the claimants at the trial and by Morales' testimony that she had inadvertently forgot to include Bloom's severance pay.

In *American Navigation Co.*, supra, the Board held that backpay claimants found to willfully conceal interim earnings from the Board will be denied backpay for all quarters in which they concealed such employment earnings. See also *Ad Art, Inc.*, 280 NLRB 985 (1986). The Board has further held that it is for the administrative law judge to determine, based on his reasoned evaluation of objective criteria whether a discrepancy is the result of a willful concealment or due to an honest error. *American Navigation*, supra at 428 fn. 7; *Rainbow Tours*, 280 NLRB 166 (1986).

An excellent example of a willful concealment under *American Navigation*, is *Arthur Briggs, Inc.*, 281 NLRB 789 (1986), in which the Board upheld the administrative law judge's finding of a willful concealment. In *Arthur Briggs*, the judge found that a backpay claimant willfully concealed interim earnings when he denied working at a barber shop where he was paid off the books. A willful concealment was established when his testimony during the backpay trial wherein he denied working at a barber shop during the first quarters of 1981 was contradicted by his prior testimony during the underlying unfair labor practice trial where he testified that he worked in the barber shop on weekends. This testimony was further contradicted by the credible testimony of a private investigator who testified that during the first two quarters of 1981, he visited the barber shop during the week on several occasions and while the claimant was cutting his hair, he admitted that he worked Tuesday through Saturday. The facts of the *Briggs* case represent an obvious willful concealment of interim earnings. On the other hand, the Board has held that a simple underestimation of earnings, is insufficient to establish a willful concealment. *Lundy Packing Co.*, 286 NLRB 141, 158 (1987).

Based on the facts of this case, I conclude that the discrepancies in Bloom and Cohen's interim earnings were not the result of a willful intention to conceal. In this connection, with respect to Bloom, she disclosed the severance pay she received from Seidman to the Board. It was Morales who inadvertently failed to include it in the specification. With respect to the actual earnings of Bloom, Morales credibly testified she calculated such figures based on Bloom's statements to her as to her yearly earnings, including a raise. Morales

then divided her yearly salary by 52 to establish the weekly earnings which were then multiplied by the number of weeks in the quarter. Morales did not have the accurate W-2 forms to work with. It was Bloom who furnished the W-2 forms at the trial. Such conduct hardly represents an attempt to willfully conceal.

With respect to Cohen, she submitted both the receipts and the unemployment document to the compliance officer in order that her earnings could be calculated. It was the Region through its agents who used the receipts rather than the unemployment document to calculate the interim earnings. It is clear that such error which apparently resulted in the discrepancy cannot be attributed to Cohen.

Based on an examination of the facts in this case, it is clear to me that the discrepancies in Bloom and Cohen's interim earnings were inadvertent. I find no evidence of a willful concealment, and no merit to Respondent's contention.

Respondent contends that Bloom's backpay award should be reduced because she failed to maintain substantially equivalent employment. In this connection, Respondent contends that Bloom engaged in willful misconduct which resulted in her discharge from Rosen and Seidman. The Board held that a discriminatee's entitlement to backpay may be reduced when the employer has shown that the discriminatee has engaged in a willful loss of earnings during the interim period, either by an unreasonable quit, or by engaging in such conduct, resulting in discharge, which amounts to a willful loss of pay. *Associated Grocers*, supra; *A. A. Superior Ambulance Service*, 292 NLRB 835 (1989); *Sylvan Health Care Center*, 270 NLRB 72 (1984).

Bloom was hired by Rosen on or about June 22, 1987. During her employ she performed various bookkeeping type jobs that she did not perform while employed with Respondent. Such functions included footing and accounting ledgers. According to the credible and uncontradicted testimony of Bloom, she was discharged because of a personality conflict with her supervisor. It would appear that Rosen had no problems with Bloom's work performance, because when her second interim employer, Seidman, requested a reference as to Bloom's work Rosen gave her a good reference and she was hired by Seidman. Bloom was employed by Seidman during all four quarters of 1988 and 1989 until her discharge on January 23. Bloom performed similar work for Seidman that she had performed for Rosen. Bloom initially performed her work well at Seidman because on or about July 1988, she was given a \$1000 raise. Shortly thereafter, her work performance declined, and she received warning that her performance was not satisfactory. Bloom's performance did not improve and she was discharged on January 23, 1989, for "carelessness" and failure to "follow departmental procedures." There is no evidence as to what procedures she failed to follow, nor is there any evidence that her unsatisfactory performance in either area was willful. There is no evidence that her unsatisfactory performance in both areas was willful.

The issue presented is whether Bloom's conduct in either or both jobs amounted to a willful act by Bloom which resulted in her discharge from Cohen and Seidman. The Board has repeatedly held that a discharge based on poor work performance does not constitute a willful loss of earnings. *Kansas Refined Helium Co.*, 252 NLRB 1156, 1162 (1980); *A. A. Superior Ambulance Service*, supra. The Board has

also held that an employee's discharge resulting over an argument with a supervisor concerning working conditions over an argument with a supervisor concerning working conditions does not constitute a willful loss of employment. *Artrim Transportation System*, 193 NLRB 179, 183 (1971). Applying the applicable law to the credible and uncontradicted facts set forth above, I conclude that Bloom's conduct which resulted in her discharges from Cohen and Seidman did not amount to a willful loss of earnings. I therefore conclude there is no merit to Respondent's contention in this connection.

Accordingly, I conclude the backpay is as follows:

Conclusions and Recommended Order

Gross Backpay of Nina Bloom

Period/Qtr.	Backpay Period	Gross Backpay
1977		
1st	4 weeks x \$310	\$1,240
2d	13 weeks x 310	4,030
3d	13 weeks x 310	4,030
4th	13 weeks x 310	4,030
1988		
1st	13 weeks x \$326 ¹	\$4,238
2d	13 weeks x 326	4,238
3d	13 weeks x 326	4,238
4th	13 weeks x 326	4,238
1989		
1st	13 weeks x \$349 ²	\$4,537
2d	13 weeks x 349	4,537
3d	6 weeks x 349	2,094

¹ Bloom received a 5% wage increase.

² Bloom received a 7% wage increase.

Interim Earnings of Nina Bloom

Period/Qtr.	Interim Employer	Earnings
1987		
1st	Severance Pay	\$930
2d	Rosen & Read	856
3d	" "	4,615
4th	" "	3,905
		+ 115
1988		
1st	Seidman & Seidman	\$1,239
2d	" "	5,369
3d	" "	5,629
4th	" "	5,629
		³ + 220
1989		
1st	Seidman & Seidman	⁴ \$2,598
2d	Weiss, Dorwid, Fross, Zelnik & Lehrman, P.C.	962
3d	" "	6,253
4th	" "	2,886

³ The \$115 and \$220, amounts should be added to the interim earnings of Bloom based upon her actual earnings established by her W-2 forms.

⁴ The \$2598 amount represents severance pay of \$866 which was inadvertently omitted by the compliance officer.

Net Backpay for Nina Bloom

Period/Qtr.	Gross Backpay	Interim Earnings	Net Backpay
1987			
1st	\$1,240	\$930	\$310
2d	4,030	356	3,674
3rd	4,030	4,615	0
4th	4,030	3,905	125
		+ 115	- 115
1988			
1st	\$4,238	\$1,239	\$2,999
2d	4,238	5,369	0
3d	4,238	5,629	0
4th	4,238	+ 220	- 220
1989			
1st	\$4,537	\$2,598	\$1,939
2d	4,537	962	3,575
3d	4,537	6,253	0
4th	2,094	2,886	0
Total Plus Interest			\$12,287

Gross Backpay of Lisa Cohen

Period/Qtr.	Backpay Period	Gross Backpay
1987		
1st	4 weeks x \$285	\$1,140
2d	13 weeks x 285	3,705
3d	13 weeks x 285	3,705
4th	13 weeks x 285	3,705
1988		
1st	13 weeks x \$302 ⁵	\$3,926
2d	13 weeks x 302	3,926
3d	13 weeks x 302	3,926
4th	13 weeks x 302	3,926
1989		
1st	13 weeks x \$326 ⁶	\$4,238
2d	13 weeks x 326	4,238
3d	13 weeks x 326	4,238
4th	6 weeks x 326	1,956

⁵ Cohen received a 6% wage increase.

⁶ Cohen received an 8% wage increase.

Interim Earnings of Lisa Cohen

Period/Qtr.	Interim Employer	Earnings
1987		
1st	Severance Pay	\$570
2d	Self Employed	7564
3d	Temps America	2,170
4th	Temps America	2,170
1988		
1st	Virgin Airlines	\$4,160
2d	" "	4,160
3d	" "	4,160
4th	" "	4,160

Interim Earnings of Lisa Cohen—Continued

<i>Period/Qtr.</i>	<i>Interim Employer</i>	<i>Earnings</i>
<i>1989</i>		
1st	Virgin Airlines	\$4,745
2d	" "	4,745
3d	" "	4,745
4th	" "	2,190

⁷This figure represents Cohen's interim earnings established by the New York State Employment Booklet.

Net Backpay for Lisa Cohen

<i>Period/Qtr.</i>	<i>Gross Backpay</i>	<i>Interim Earnings</i>	<i>Net Backpay</i>
<i>1987</i>			
1st	\$1,140	\$570	\$570
2d	3,705	564	3,141
3d	3,705	2,170	1,535
4th	3,705	2,170	1,535
<i>1988</i>			
1st	\$3,926	\$4,160	\$0
2d	3,926	4,160	0
3d	3,926	4,160	0
4th	3,926	4,160	0

Net Backpay for Lisa Cohen—Continued

<i>Period/Qtr.</i>	<i>Gross Backpay</i>	<i>Interim Earnings</i>	<i>Net Backpay</i>
<i>1989</i>			
1st	\$4,238	4,745	0
2d	4,238	4,745	0
3d	4,238	4,745	0
4th	1,956	2,190	0
Total Plus Interest			\$6,781

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, Ernst and Young, formerly known as Arthur Young and Company, New York, New York, its officers, agents, successors, and assigns, shall

Pay to Nina Bloom \$12,287 and to Lisa Cohen \$6,781, together with interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

⁸If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.