

**OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management**

MEMORANDUM OM 08-54

May 15, 2008

TO: Regional Directors, Officers-in-Charge,
Resident Officers, Compliance Supervisors and Compliance Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Grosvenor Orlando Associates, LTD., 350 NLRB No. 86

On September 11, 2007, the Board issued its decision in *Grosvenor Orlando Associates, LTD., d/b/a The Grosvenor Resort, and its general partners Grosvenor Properties, Ltd., Donald E. Werby and Robert K. Werbe*, 350 NLRB No. 86. In this decision, the Board found “that reasonably diligent discriminatees should at least have begun searching for interim work at some time within the initial 2-week period. . .” Thus, a discriminatee will lose backpay if there is more than a 2 week period after his/her termination, layoff or refused hire in which s/he does not engage in a search for work. However, even if the discriminatee fails to search for work during this 2 week period, the backpay period does not terminate. If a discriminatee unreasonably delays an initial search, the Board will toll backpay for that period, but the backpay period will commence if and when a reasonably diligent search begins. See *Marlene Industries Corp.*, 183 NLRB 50 (1970).

An examination of discriminatees’ efforts to search for work has always been part of the compliance investigation. The Board’s decision in *Grosvenor*, however, requires greater emphasis on compliance issues during the initial stages of case processing. Because discriminatees can be disqualified from receiving backpay if they do not promptly initiate efforts to mitigate backpay liability, it is imperative that they are made aware of their obligation to search for work as early as possible. While this can be achieved early in the investigation when the investigating agent takes the first affidavit, additional efforts to ensure that individuals and organizations who regularly file charges in our offices are aware of the changes in the law will assist in this effort. The following is a list of suggested steps to be taken to ensure the public is aware of the new obligation.¹

1. Many Regions now have Newsletters that are sent out on a regular basis as part of Outreach efforts. An article regarding the Board’s decision in *Grosvenor* and the impact it has on the calculation of backpay will help educate the public

¹ Special thanks to the Compliance Officers who vetted many of these ideas during the February Compliance Officer Roundtable.

regarding the need to promptly search for work after a termination. Attachment A contains a sample article.

2. When an individual/union visits the Information Officer, they should be notified of their obligation to promptly search for work if their inquiry involves a termination or failure to hire. Attachment B contains sample language for the notification.
3. Special language should be provided when the case is docketed to the charging party (either by inserting language in the initial docketing letter or by including a separate enclosure with the docketing letter) advising potential discriminatees who have been discharged or refused hire of their obligation to immediately begin their search for work and to maintain records of that search. (See Attachment B)
4. Information from charging parties/potential discriminatees concerning backpay and search for work should be obtained by all agents during the initial affidavit. The basic information necessary to calculate gross backpay, i.e. position held prior to discrimination, number of regular and overtime hours normally worked, wage rate received, overtime rate etc, should be contained in the initial affidavit. Acknowledging that the initial affidavit is often difficult and time consuming, it is left to the Region's discretion whether to collect additional information necessary to calculate backpay, i.e. search for work and/or interim earnings information, during the initial appointment or wait until a later date. At a minimum, the charging party/potential discriminatee should be reminded during the affidavit that, in order to be eligible for backpay, s/he must make a reasonable search for work and should be urged to maintain records of his or her attempts to find work, including the date work was sought, the method used, i.e. newspaper, Internet, face to face etc., the name of the company contacted, name of person to whom they spoke, the position sought and the response to the application for work.² If the Region determines it would be prudent not to collect the information during the initial affidavit, follow up with the discriminatee should be done shortly thereafter. When the Region solicits search for work and/or interim earnings

² Upon issuance of complaint, discriminatees should be contacted and reminded of their obligation to search for work and maintain records of their efforts to obtain interim employment and of their earnings from interim employment. See Section 10508.8 of the Compliance Manual. Discriminatees should be contacted on a regular basis thereafter to solicit information necessary to calculate backpay. These contacts should continue until compliance is achieved. At the same time the Region should maintain up-to-date backpay computations in order to be prepared to issue a backpay specification setting forth the current amounts of any backpay or other monetary liability or to provide an affidavit setting forth, in a form defensible in court, an estimate of such amounts. This will enable the Agency to act expeditiously should the need arise, e.g. when it is necessary to seek a protective restraining order pursuant to Section 10(e) or 10(j) of the Act, or pursuant to the prejudgment remedy provisions of the Federal Debt Collection Procedures Act. Such running computations will also allow the Region, when necessary, to discuss settlement options with respondents and/or to participate in court related mediation. In addition, correspondence should be forwarded to charging parties and discriminatees urging them to be the agency's "eyes and ears" with regard to a respondent's financial status. Thus, if they observe situations which would warrant a concern about the respondent moving, going out of business or establishing an alter ego, that information should be shared with the Region as soon as possible.

information, care should be taken to avoid creating the impression that requesting this information indicates the Region already considers the charge meritorious. Thus, it is appropriate to explain to the charging party/potential discriminatee that the Agency collects such information so that it will be prepared for potential settlement discussions *in the event* a charge is found to have merit. Sample questionnaires are attached as Attachment C and D. In addition, care should be taken to obtain the potential discriminatee's social security number, a permanent address where they or someone who can reach them resides and copies of payroll checks.

5. Training should be conducted on the importance of "thinking about compliance" as soon as a charge is filed. Information contained in Section 10504 of the Compliance Manual as well as OM 98-12 provide material for discussion

By raising these issues early and collecting this data at the initial stage of the investigation, the Region is taking a proactive approach that will ultimately protect the viability of the Board's backpay orders when they reach the compliance stage. In addition, as soon as the Region identifies a case as raising complex compliance matters, the Region should notify the Contempt and Compliance Branch.

If you have any questions concerning these matters, please contact your AGC or Deputy or the undersigned.

/s/
R. A. S.

cc: NLRBU
Release to the Public

Outreach Article

On September 11, 2007, the Board issued its decision in *Grosvenor Orlando Associates, LTD., d/b/a The Grosvenor Resort, and its general partners Grosvenor Properties, Ltd., Donald E. Werby and Robert K. Werbe*, 350 NLRB No. 86. In this decision, the Board found “that reasonably diligent discriminatees should at least have begun searching for interim work at some time within the initial 2-week period. . .” Thus, a discriminatee will lose backpay if there is more than a 2 week period after his/her termination, layoff or refused hire in which s/he does not engage in a search for work. However, even if the discriminatee fails to search for work during this 2 week period, the backpay period does not stop. If a discriminatee unreasonably delays an initial search, the Board will toll backpay until such time as a reasonably diligent search begins.

As a result of this decision, it is important to remember that if backpay and/or other reimbursement is due as part of the remedy for the unfair labor practice, for instance, an unlawful discharge or refusal to hire, the Board requires discriminatees to mitigate (offset) the backpay by beginning to look for another job in the same or similar line of work promptly. If a discriminatee is unable to establish that s/he actively sought to mitigate damages, s/he may face the risk of having whatever money is owed reduced.

Accordingly, discriminatees are urged to keep careful records of when and where they sought employment.

QUALIFYING FOR BACKPAY AND OTHER MONETARY REMEDIES

We have just begun the process of investigating your charge, thus no determination has been made with regard to the merits of your case. However, it is important that you understand your obligations to look for work in order to qualify for backpay in the event we should determine that your case has merit.

In the event that backpay and/or other reimbursement is due to you as part of the remedy for the unfair labor practice you are alleging—for instance, an unlawful discharge or refusal to hire—the Board requires that you mitigate (offset) the backpay by beginning to look for another job in the same or similar line of work promptly. If you are not able to establish that you have actively sought to mitigate damages, you face the risk of having whatever money is owed to you to be tolled (cut off.) We strongly urge you to keep careful records of when and where you have sought employment. To make this easier, we are providing you with a form which you should keep updated as to your search for work.

If this charge is being filed by a labor organization on behalf of one or more employees, we urge the union to provide the region with a list of the names and addresses of all discriminatees who might be entitled to backpay. Please speak to the agent assigned to this case about identifying any and all potential backpay claimants.

The information above should be added in the docketing letter or as a separate attachment to the docketing letter for all alleging a termination and/or a refusal to hire violation.

Short-Form Back Pay Sheet

Case Name _____ Case No. _____

Full Name _____

Address _____

Phone # _____ Cell # _____

E Mail Address _____

Respondent Employer _____

Position _____

Date of Hire _____ Date of Termination _____

Days and Hours Worked Per Week _____

Hourly Rate of Pay _____

Gross Weekly Pay _____

Fringe Benefits _____ CBA? (Y/N) _____

SS # _____ (for location purposes only)

Interim Earnings

Employer _____

Address _____ Phone # _____

Position _____

Date of Hire _____ Date of Separation _____

Reason for Separation _____

Days and Hours Worked Per Week _____

Hourly Rate of Pay _____

Gross Weekly Pay _____

Fringe Benefits _____ CBA? (Y/N) _____

Alternate Contact _____

Address _____

Phone # _____

Cell # _____

E Mail Address _____

Please remind the discriminatee that, in order to be eligible for backpay, s/he must make a reasonable search for work. S/he should be urged to maintain records of his or her attempts to find work, including the date work was sought, name of the company, name of person to whom s/he spoke, the position sought and the response to the application for work.

COMPLIANCE INFORMATION FORM

CASE NAME: _____
CASE NUMBER: _____

Name:			
Social Security Number:		Date of Birth:	
Address:			
Telephone Number:	Day:	Night:	Cell:
Driver's License Number:			
Employer's Federal ID Number			
Days/Hours of Work <u>Per Week</u>	Straight time:	Overtime:	
Wage Rate			
Wage Increases	Frequency of:	Amount per Hour:	
	Automatic: Yes [] No []	Amount(s):	
Benefits:	Vacation Pay? Yes [] No [] How is vacation pay calculated? Were you paid your accrued vacation days at the time of your discharge? Yes [] No [] If yes, how many vacation days were you paid, and what was the amount of that payment?		
	Bonus Pay? Yes [] No [] If yes, when did you receive bonus pay? (For example, was it given at a fixed time of the year, was it given occasionally, was it triggered by productivity?) How was the bonus pay calculated? (For example, was it based on a fixed dollar amount by the Employer, or was it based upon a percentage either fixed by the Employer or based on wages or production?) What were the amounts, and dates received, of each of the bonuses that you received in the last 3 years?		
	Health Insurance. Were you covered by health insurance? Yes [] No [] Did the plan provide for deductibles? If so, what were those amounts? Did the plan provide for co-pays (such as 80% Employer and 20% employees?) If so, what were those percentages?		

Benefits (continued)	<p>401(k) Plan or Profit-Sharing Funds: Were you covered by or a participant in such a fund? Yes [] No [] If yes, how did the Plan or Fund work:</p> <p>If the Employer contributed, What amount or percentage did the Employer make? If a percentage, was it based on your gross wages, or a fixed dollar amount? Was the Employer's contribution a matching amount depending upon your contribution? If so, what was the Employer's matching amount, and what was your contribution?</p>	
	Other Benefits:	
<p>At this time, are you interested in reinstatement to the Employer? Yes [] No [] <i>(Your response is not binding in the absence of a valid offer of reinstatement from the Employer.)</i></p>		
INTERIM EMPLOYMENT: OBTAIN COPIES OF PAY STUBS AND W-2 FORMS		
Interim Employer:		
Address:		
Date Hired		Position:
Date Left Employment		Why?:
Days/Hours of Work <u>Per</u> <u>Week</u>	Straight time:	Overtime:
Hourly Wage Rate:	Gross Wages Received Per Week:	
Additional Mileage To/From Interim Employer each day:	Number of round trip miles to/from Interim Employer: _____	
Number of days per week on average _____	Number of round trip miles to/from Charged Party Employer: _____	
SEARCH FOR INTERIM EMPLOYMENT		
Remind them to keep a diary of their search for interim employment efforts to include the following:		
Date Searched		
Method of Search (newspaper, Internet, face to face, etc.)		
Employer Contacted		
What did Interim Employer say when applied for job:		
Expenses Incurred:	Mileage	
	Meals	
	Lodging	

MEDICAL EXPENSE CLAIMS	
(If they were covered by a health insurance policy from the Charged Employer)	
Out-of-pocket Expenses?	List nature of medical expenses (prescriptions, doctor visits, hospital bills), date of expense, the amount(s) of the expense(s), and evidence that you either paid the bill(s) or the amount is still outstanding. (attached additional sheets as needed)
	Were you covered by health insurance at your interim employer? Yes [] No [] If so, list any out of pocket expenses you had that were not covered by the interim employer's health insurance that you believe would have been covered by your previous plan, giving the same information as noted above. (attach additional sheets as needed)
REFERENCES so that we can locate discriminatee	
Closest Relative:	
Address:	
Telephone Number:	
Notes:	