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LABOR LAW-BACK PAY AWARDS-DUTY OF DISCHARGED EMPLOYEE TO SEEK OTHER EMPLOYMENT

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LABOR LAW—BACK PAY AWARDS—DUTY OF DISCHARGED EMPLOYEE TO SEEK OTHER EMPLOYMENT—The National Labor Relations Board issued a back pay order¹ in favor of the victim of a discriminatory discharge, computing the award on the basis of the earnings of the dischargee's replacement during the period of discrimination less the amount actually earned by the dischargee in other employment during the same period. The dischargee had registered with the state unemployment agency but had earned only \$294.20 over a two-year period. On petition for enforcement of the order, *held*, order set aside and case remanded. Where a dischargee earns only a small amount of money over a long period of time, mere proof of registration with a state unemployment agency is not sufficient evidence that the defendant has fulfilled his duty to use reasonable diligence in seeking other employment. *NLRB v. Pugh & Barr, Inc.*, (4th Cir. 1953) 207 F. (2d) 409.

The NLRB has statutory authority to issue orders for the reinstatement, with back pay, of employees who are discharged as the result of an unfair labor practice.² The awarding and computation of back pay in a reinstatement order are matters largely within the discretion of the Board.³ This discretion is limited by the requirement that there be deducted from the pay losses of the employee any earnings which he willfully failed to earn,⁴ including those which he did not earn as a result of a failure to use reasonable diligence in seeking employment elsewhere.⁵ This duty to "mitigate damages" is based upon the theory that the general purpose of a Board order is remedial, not punitive,⁶ and that the purpose of a back pay order is therefore to make the employee whole rather than to penalize the employer.⁷ It has also been

¹ *Pugh & Barr, Inc.*, 102 N.L.R.B. 562 (1953).

² Labor-Management Relations Act, 1947, 61 Stat. L. 136 (1947), 29 U.S.C. (Supp. V, 1952) §160(b).

³ *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 73 S.Ct. 287 (1953); *NLRB v. Gullet Gin Co.*, 340 U.S. 361, 71 S.Ct. 337 (1950); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 61 S.Ct. 845 (1941).

⁴ *Phelps Dodge Corp. v. NLRB*, note 3 *supra*.

⁵ *NLRB v. Cheney California Lumber Co.*, (9th Cir. 1945) 149 F. (2d) 333; *NLRB v. Cowell Portland Cement Co.*, (9th Cir. 1945) 148 F. (2d) 237; *NLRB v. Condenser Corp. of America*, (3d Cir. 1942) 128 F. (2d) 67.

⁶ *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 59 S.Ct. 206 (1938).

⁷ *Phelps Dodge Corp. v. NLRB*, note 3 *supra*; *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 61 S.Ct. 77 (1940). The view that back pay orders are designed to redress private wrongs, rather than to discourage the committing of unfair labor practices, has been criticized. See, e.g., 42 *Col. L. Rev.* 443 at 451-453 (1942), and Justice Murphy's dissent in the *Phelps Dodge* case, note 4 *supra*, at 200. The language of the decisions has been consistently in accord with this view, but the actual holdings have not. In some cases the dischargee has been made more than "whole." See, e.g., *NLRB v. Seven-Up Bottling Co.*,

said that this requirement is fair⁸ and promotes production and employment.⁹ The instant case presents two problems regarding the application of this policy: (1) Who should have the burden of proof in showing presence or absence of reasonable diligence on the part of the employee in seeking other employment? (2) What facts will constitute substantial evidence supporting a Board finding that such diligence has been used? In an ordinary civil action by an employee for the breach of an employment contract, the burden of proof as to the employee's reasonable diligence in seeking other employment rests with the wrongdoing employer.¹⁰ There seems to be no good reason for not applying the same rule to cases involving the computation of back pay under an NLRB reinstatement order. Since 1943, the Board has adhered to the policy of holding registration with a state or federal employment agency to be conclusive proof of reasonable diligence on the part of the dischargee.¹¹ Under this rule, the proof of such registration has precluded the employer from producing other evidence to show a lack of reasonable diligence and has limited him to showing that the employee unreasonably refused an offer of similar employment.¹² The instant case indicates that a heavier burden may rest upon the employee who earns only a small amount of money, or is unemployed, over a long period of time. The court in such a case appears ready to treat the mere failure to find employment as strong evidence of a failure to use reasonable diligence in seeking employment.¹³ This inference not only deprives the evidence of registration with an employment agency of the substantiality required to support a finding of reasonable diligence, but it also creates a presumption against the use of reasonable diligence and in effect places the burden of proof in such cases upon the discharged employee. This result cannot be justified if the inference thus drawn is not clearly reasonable. Its reasonableness, however, must necessarily depend upon a number of variable factors such as the nature of the local economy and the condition of the local labor market. It also presupposes serious doubts as to the efficiency of government employment services. In addition to the doubtful logic of the inference, it may also be criticized because of the complexities in NLRB procedure that may be occasioned by its application. The reasonable dili-

note 3 *supra* (as a result of back pay being computed on a quarterly basis); *NLRB v. Gullet Gin Co.*, note 3 *supra* (as a result of unemployment compensation benefits not being deducted). It has often been held that the duty to pay created by a back pay order is of a public and not a private nature. *Amalgamated Utility Workers (C.I.O.) v. Consolidated Edison Co.*, 309 U.S. 261, 60 S.Ct. 561 (1940); *Waterman S. S. Corp. v. NLRB*, (5th Cir. 1941) 119 F. (2d) 760; *NLRB v. Stackpole Carbon Co.*, (3d Cir. 1942) 128 F. (2d) 188; *Nathanson v. NLRB*, 344 U.S. 25, 73 S.Ct. 80 (1952).

⁸ *Phelps Dodge Corp. v. NLRB*, note 3 *supra*, at 198.

⁹ *Id.* at 200.

¹⁰ *McCORMICK*, DAMAGES §159 (1935); 5 *CORBIN*, CONTRACTS §1095 (1951); 134 *A.L.R.* 257 (1941).

¹¹ *Ohio Public Service Co.*, 52 N.L.R.B. 725 (1943), enforced (6th Cir. 1944) 144 F. (2d) 252; *Harvest Queen Mill and Elevator Co.*, 90 N.L.R.B. 320 (1950).

¹² *Harvest Queen Mill and Elevator Co.*, note 11 *supra*.

¹³ "It is incredible that Bramer could not have earned more than this during that period if he had made reasonable efforts to find employment. . . ." Principal case at 409.

gence requirement was adopted by the United States Supreme Court over objections by the Board that it would unduly complicate the administration of its functions.¹⁴ Justice Frankfurter answered these objections by saying that the Board could retain a flexible control of its own procedures and thus properly limit the scope of the inquiry.¹⁵ By denying the power of the Board to give proof of registration with a government employment agency conclusive effect, the court in the instant case appears to ignore this express admonition of the Supreme Court and thus appears to endanger the effective administration of the labor relations acts.

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¹⁴ *Phelps Dodge Corp. v. NLRB*, note 3 supra, at 198.

¹⁵ *Id.* at 199-200.