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NLRB MODIFIES STANDARD IN HIRING DISCRIMINATION CASES

In *Toering Electric Co*, 351 NLRB No. 18, the Board, in a 3-2 decision, ruled that an applicant for employment must be genuinely interested in seeking to establish an employment relationship with the employer in order to qualify as a Section 2(3) employee and thus be protected against hiring discrimination based on union affiliation or activity. The Board explained that "one cannot be denied what one does not genuinely seek." The Board further held that the General Counsel bears the ultimate burden of proving an individual's genuine interest in seeking to go to work for the employer.

The Board majority of Chairman Battista and Members Schaumber and Kirsanow held in *Toering* that the presumption that any individual who submitted an application was entitled to protection was inconsistent with the text of the Act and its basic purposes. Only applicants who are statutory employees within the meaning of Section 2(3) are entitled to protection against hiring discrimination, and statutory employee status, in turn, requires the existence of "at least a rudimentary economic relationship, actual or anticipated, between employee and employer." *WBAI Pacifica Foundation*, 328 NLRB 1273, 1274 (1999). No such economic relationship is anticipated in the case of applicants with no genuine aspiration to work for an employer. Thus, job applicants without a genuine interest in an employment relationship are not employees within the meaning of Section 2(3).

Although some salts, paid or unpaid, may genuinely desire to work for a nonunion employer and to proselytize co-workers on behalf of a union, other salts clearly have no such interest. According to the Board, "submitting applications with no intention of seeking work but rather to generate meritless unfair labor practice charges is not protected activity. Indeed, such conduct manifests a fundamental conflict of interests ab initio between the employer's interest in doing business and the applicant's interest in disrupting or eliminating this business." Such conduct, the Board observed, also collides with the employer's right, recognized by the Supreme Court, to insist on employee loyalty and on a cooperative employee-employer relationship. *NLRB v. IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464, 472 (1953).

For these reasons, the Board imposed on the General Counsel in all hiring discrimination cases the burden of proving that the alleged discriminatee was genuinely interested in seeking to establish an employment relationship and was thereby qualified for protection as a Section 2(3) employee. The Board explained that this requirement embraces two components:

> (1) there was an application for employment, and (2) the application reflected a genuine interest in becoming employed by the employer. As to the first component, the General Counsel must introduce evidence that the individual applied for employment with the employer *or* that someone authorized by that individual did so on his or her behalf. ….As to the second component (genuine interest in becoming employed), the employer must put at issue the genuineness of the applicant's interest through evidence that creates a reasonable question as to the applicant's actual interest in going to work for the employer. In other words, while we will no longer conclusively presume that an applicant is entitled to protection as a statutory employee, neither will we presume, in the absence of contrary evidence, that an application for employment is anything other than what it purports to be.

The Board concluded that although some evidence in *Toering* suggested the alleged discriminatees' genuine interest in seeking employment, other evidence suggested the opposite. In these circumstances, the Board remanded this case to the judge in order to apply the new analytical framework to the facts of this case.

Members Liebman and Walsh, dissenting, would have retained without modifications the standard for litigating hiring discrimination cases set forth in *FES,* 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). They commented that the Board's decision in *Toering*, reached without the benefit of briefs, oral argument, or even a request to reconsider precedent, "continues the Board's roll-back of statutory protections for union salts who seek to uncover hiring discrimination by non-union employers and to organize their workers" by legalizing hiring discrimination in some, perhaps many, cases involving salts.

In the dissent's view, the majority's new approach cannot be reconciled with the Act, its policies, or Supreme Court precedent. They pointed out that in *Phelps Dodge,* the Supreme Court stated that

> Discrimination against union labor in the hiring of men is a dam to self organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which ... is recognized as basic to the attainment of industrial peace.

According to the dissent, the Act's aims are, therefore, furthered by finding unlawful an employer's refusal to hire or consider an applicant because of his union affiliation, even where it cannot be established that an applicant would have accepted a job if offered.

The dissent noted that Section 2(3) and 8(a)(3) make clear that the employer's motive, and not the applicant's intentions, is the proper focus in cases like this one. If Congress had intended to exclude "non-genuine" job applicants, they argue, it presumably would have done so. Instead, Congress has repeatedly declined to enact numerous anti-salting bills in the 12 years

since the Supreme Court decided *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995) (unanimously approving Board's holding that paid union organizers who seek employment are statutory employees).

The dissent further stated that the majority's new standard, even considered on its own terms, is critically flawed because it fails to provide clear guidance with respect to determining an applicant's genuine status. Moreover, they observe that the new standard places an unfair burden on the General Counsel by allowing an employer to first raise the genuineness issue during the unfair labor practice hearing. And, they argue, it will both spawn and prolong the course of litigation by creating a new fact-intensive defense.

The dissenters summarized their disagreement with the majority in the following terms:

> By any measure, today's decision represents a failure in the administration of the National Labor Relations Act. The majority unnecessarily overturns carefully considered precedent and implements an untenable approach that will not even accomplish the majority's professed goals. Worse, the Board now creates a legalized form of hiring discrimination, a step that would have been considered unthinkable by the *Phelps Dodge* Court when it held that the prevention of hiring discrimination against union members was "the driving force behind the enactment of the National Labor Relations Act." 313 U.S. at 186. Because we still believe that it is crucial to the Act's basic mandate to uncover and redress discrimination against union members, we dissent.

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