77 U. Cin. L. Rev. 1247

University of Cincinnati Law Review
Spring 2009

Case Note
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HOLD THE SALT: SHOULD NON-GENUINE APPLICANTS BE TREATED AS EMPLOYEES UNDER THE NLRA?--TOERING ELECTRIC CO., 351 N.L.R.B. NO. 18, 2007 WL 2899733 (SEPT. 29, 2007)

I. Introduction

In 2000, during a job interview with a would-be employer, James Kilkenny made fun of a hiring official's Asian accent, openly urged on-duty workers to leave their jobs to go work for a union contractor, and refused to leave the jobsite despite repeated requests from company officials.[1] In 1999, job applicant Timothy Browne put his arm around a hiring official at a would-be employer and threateningly said, "you're messing with the union now."[2] In 1994, eighteen union members filed into an employer's office en masse to fill out job applications while videotaping the proceedings.[3]

While such actions seem irrational coming from a job applicant, they are not irrational when taken in the context of the on-going battle between unions and non-union employers, where both sides look to capitalize on the advantages the law affords them.

Historically, employers could deny employment to applicants discovered to be paid union organizers.[4] These organizers, known as "salts,"[5] tried to gain employment in order to circumvent the legal restrictions employers may place on outside union organizers, but not on employees.[6] In a victory for unions and the salting practice, the Supreme ***1248** Court ruled in 1995's NLRB v. Town & Country Electric, Inc.[7] that salts applying for jobs are "employees" under the National Labor Relations Act (NLRA or the Act),[8] and, therefore, are entitled to the same protections that other employees and job applicants receive under the Act.[9]

With the Town & Country protection in place, union organizers applying for employment with a nonunion employer have an incentive to make their union affiliation known because it places the employer in a position of either having to hire a known salt or risk facing unfair labor practice charges for hiring discrimination.[10] Unions can use salting campaigns and the threat of litigation stemming from hiring discrimination claims as a way to increase nonunion employers' costs.[11] This type of economic weapon might be used to "punish" nonunion employers for refusing to unionize or as a means to pressure the nonunion employer to unionize.[12]

This was the situation in the 2007 National Labor Relations Board (NLRB) case, Toering Electric Co.[13] The facts suggested the purpose behind the Local International Brotherhood of Electrical Workers' (IBEW) salting campaign was not to gain better access to Toering Electric employees, but instead, in the words of the Local IBEW's president, to "drive the non-union element out of business" for refusing to unionize.[14] To achieve this, the Local IBEW tried to establish a prima facie case of statistical discrimination by having many of its members apply for jobs with Toering, even if the members had no real interest in employment.[15] However, in a 3-2 decision, the NLRB granted a blow to this type of salting practicing by holding that non-genuine applicants do ***1249** not receive NLRA protections; and, furthermore, that the NLRB's General Counsel, not the employer, bears the ultimate burden of proving an applicant's genuine interest in employment.[16]

This Case Note addresses whether denying NLRA protections to non-genuine applicants is the best means for controlling abusive and expensive litigation meant to financially harm employers. Part II of this Case Note looks at the history of discrimination against union-affiliated job applicants, as well as the development of the proof structure for establishing a hiring discrimination case under the NLRA. Part III outlines the Board's holding in Toering, as well as the dissent's problems and concerns with that holding. In Part IV, there is a discussion as to whether focusing on applicant disloyalty and flagrant misconduct instead of applicant genuineness would be a better means for controlling abuse. Finally, Part V concludes that the Board's holding in Toering was overly broad when it focused on the question of whether a non-genuine applicant is an employee under the NLRA; instead, if the Board hears cases similar to Toering in the future, or if a circuit court hears Toering or a similar case on appeal, it should adopt an approach that ignores the issue of applicant genuineness, and instead focuses on conduct that can strip an applicant of NLRA protections, specifically disloyal and flagrant misconduct.

II. A Brief History of Hiring Discrimination Under the NLRA

Under the NLRA, an employee can file an unfair labor practice charge against a union or employer following NLRB procedures. [17] In order to determine if someone, such as an applicant with no genuine interest in employment, is an "employee" with NLRA protections, Administrative Law Judges (ALJs), the NLRB (the Board), and the courts look to the relevant provisions in the NLRA, as well as how the courts and the NLRB have interpreted and applied these provisions in various circumstances in the past. [18] Finally, in addition to defining who should receive NLRA protections, the Board and the courts have had to determine who bears the burden of proving whether someone does or does not belong to a protected group.

A. The NLRA and the Board

The National Labor Relations Act of 1935 gives private sector ***1250** workers the right to organize, engage in collective bargaining, and take part in concerted activity in support of their labor demands without fear of repercussions from their employer. [19] Specifically, § 7 of the NLRA states that workers have a right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." [20] Section 8 of the Act protects those rights by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." [21]

The NLRB, the federal agency created under the NLRA, is in charge of overseeing union elections and investigating unfair labor practices. [22] The Board consists of five members and the General Counsel, all of whom are appointed by the President with approval from the Senate. [23] The primary job of the Board's General Counsel is to investigate and prosecute unfair labor practice claims, while the Board acts as the adjudicative body. [24]

B. Hiring Discrimination and Defining "Employee"

One way an employer might "interfere with, restrain, or coerce employees" in the exercise of their § 7 rights is by discriminating against employees for taking steps towards organizing workers or for past union affiliation. [25] Section 8(3) says that an employer violates § 7 when it discriminates "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." [26]

Since 1941, the Supreme Court has made clear that job applicants, as well as current employees, [27] qualify as "employees" under ***1251** § 2(3) of the NLRA, [28] and, therefore, are entitled to protections under § 8(3). [29] In Phelps Dodge Corp. v. NLRB, the employer refused to hire two men because of their union affiliation. [30] As the Court noted, § 8(3) specifically prohibits discrimination in regard to hiring. [31] The effect of such discrimination, the Court said, goes beyond a denial of employment because "it inevitably operates against the whole idea of the legitimacy of organization." [32] Discriminating against applicants

for their union affiliation undermines the NLRA's intended policy of attaining industrial peace and maintaining the free flow of commerce. [33]

In 1995, the Supreme Court weighed in on the issue of whether applicants who were paid union organizers, or "salts," should receive employee status and protection under the NLRA. [34] In NLRB v. Town & Country Electric, Inc., an employer refused to interview or hire union members because the members were being paid by the local union; thus, argued the employer, the applicants abandoned their service to the company. [35] The NLRB concluded, however, that there was no reason why a paid union organizer could not function as an employee in a nonunion company. [36] The Court upheld the NLRB's order, stating that the courts should grant the Board great discretion when it makes determinations as to what constitutes an "employee" under the NLRA. [37] The Board's holding that these salts were in fact statutory employees ***1252** was consistent with the NLRA and common law definitions of "employee." [38] As the Court stated, a "person may be the servant of two masters . . . at one time as to one act, if the service to one does not involve abandonment of the service to the other." [39]

In recent years, since the Town & Country decision, the NLRB has put a hold on who should be granted employee status by requiring that some form of an economic relationship, whether real or anticipated, exist between the employee and the employer. In 1999's WBAI Pacifica Foundation [40] decision, the Board ruled that unpaid staff workers are not "employees" under § 2(3). To come to this conclusion, the Board examined the ordinary definitions of the words "employee" [41] and "hire," [42] determining that both included a contemplation of an economic relationship. [43] Under the NLRA, the Board said, the assumption that the word "employee" contemplates some form of an economic relationship is "inescapable." [44] In the eyes of the Board, this lack of an economic relationship was the distinguishing trait between the unpaid workers in WBAI Pacifica and the workers or applicants who received NLRA protections in previous NLRB and court decisions: "in each case where the Court found statutory employee status, there was at least a rudimentary economic relationship, actual or anticipated, between employee and employer." [45]

C. Employee Disloyalty and Flagrant Misconduct

While § 8 protects employees from unfair labor practices, some types of conduct are grounds for losing NLRA protection. Such conduct includes illegal activity [46] and insubordination. [47] Disqualifying conduct also includes employee disloyalty, as was the issue in the 1953 Supreme ***1253** Court case NLRB v. Local 1229, International Brotherhood of Electrical Workers, better known as the Jefferson Standard case. [48] In that case, employees distributed handbills to the public that disparaged the quality of the employer's product. [49] Nowhere on the handbill was there information in regards to the labor dispute, nor was there any attribution to the union. [50] The employer subsequently discharged the employees. [51] The Supreme Court ruled that distributing the disparaging handbills bore no relation to the labor dispute and was therefore not protected concerted activity under the NLRA. [52] The Court said that such conduct was "indefensible," and, "[e]ven if the attack were to be treated . . . as a concerted activity . . . within the scope of those mentioned in § 7, the means used by the [employees] in conducting the attack have deprived the attackers of the protection of that section." [53] Therefore, the employer could discharge the employees without violating the NLRA. [54] The majority held that the NLRA is not meant to interfere with an employer's normal exercise of selecting and discharging employees. [55]

The issue of employee loyalty was also prevalent in Town & Country, the Supreme Court case upholding an NLRB ruling that said paid union organizers/job applicants are entitled to employee status. [56] The Court ruled that even if the main objective of the salts was to help organize the employees on behalf of the union, this was not disloyal in and of itself, so long as the role of union organizer did not interfere with the employee's duty to the employer. [57] Without more, simply being a paid union organizer does not qualify as disloyal activity, and, therefore, the employer cannot refuse to hire paid union organizers, just as they could not refuse to hire applicants with union affiliation in Phelps Dodge. [58]

Flagrant misconduct, similar to disloyalty, can also rise to a level as to deprive an employee of NLRA protections. [59] In Carleton College v. ***1254** NLRB, [60] an employee-adjunct professor who had organized a committee of other adjunct professors was denied a contract offer by the dean because, during a meeting with the dean, the professor was overly sarcastic, vulgar,

belittled the department he worked for, and refused the dean's request for commitment to abide by the school's professional expectations. [61] The Board, adopting the ALJ's findings, ruled that the professor's involvement in organizing a committee was protected concerted activity under the NLRA, that the college had animus towards the committee, and that the college's reasons for refusing to offer the professor a contract were merely pretext. [62] However, on appeal, the Eighth Circuit held that it was irrelevant whether the creation of the adjunct professor committee was concerted activity because of the professor's misconduct. Specifically, the court said, that "misconduct that is 'flagrant or renders the employee unfit for employment' is unprotected." [63] According to the court, the nature of the misconduct, the nature of the workplace, and the effect of the misconduct on the employer's authority are factors that should be considered when determining whether employee misconduct makes the employee unfit for employment. [64]

D. Making the Case for Discrimination

While it is impermissible for an employer to discriminate against an employee or applicant because of union affiliation, the employer still has a right to discharge or refuse to hire these workers for other reasons. [65] The NLRB's standard for establishing a prima facie case in such "mixed motive" discharge situations is based on its 1980 decision in Wright Line. [66] Under Wright Line, the Board's General Counsel bears the initial burden of showing that an employer's antiunion animus was a motivating factor in the employer's decision to take adverse action, such as discharge, against an employee who partook in protected conduct. [67] Once the General Counsel is able to establish this, the burden shifts to the employer to show that the adverse action would have taken place ***1255** regardless of the employee's union activity. [68]

Applying the Wright Line test in hiring cases, however, is much more difficult than in discharge cases. [69] For the sake of illustration, assume an employer with antiunion animus hired non-union applicants over union applicants. Under Wright Line, because there is antiunion animus and an adverse action towards the applicant, the employer automatically bears the burden of proving that it would have hired the nonunion applicant regardless of the applicant's union affiliation. So, even if the union applicant was clearly not qualified or had sent his or her application in long before an opening became available, the employer would still bear the burden of proof. Because of the difficulty this placed on employers, Wright Line has been inconsistently upheld by the circuit courts when used in hiring discrimination cases. [70]

As a response to this difficulty in application, in 2000's FES, [71] the Board made Wright Line more specific to hiring cases by adding a "job matching" prong to the test. [72] In FES, the Board established a standard that requires that the General Counsel establish the following at a hearing on the merits:

> (1) that the [employer] was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. [73] Essentially, in addition to showing the employer's antiunion animus and that an applicant was not hired or considered, the General Counsel must also be able to show that the applicant was a viable candidate who could have filled the position for which the employer was actually hiring. [74] Only if the General Counsel is able to establish that the applicant was a viable candidate will the burden shift to the employer to show that it would not have hired the applicant even in the absence of union activity or affiliation, just like under the Wright Line test. [75]

***1256** Of course, even if the General Counsel presents enough evidence to meet the FES test and establish a prima facie case, an employer can still overcome this by proving that it based its decision not to hire the applicant on reasons unrelated to its antiunion animus. [76] For instance, if an employer can prove that it reasonably believed that an applicant was not genuinely interested in employment, and, furthermore, that it based its decision not to hire the applicant on this reasonable belief, then the employer will not be found guilty of hiring discrimination under the NLRA.

III. Toering Electric Co.

In an attempt to protect employers from the type of union salting practices described at the beginning of this Case Note--where unions attempt to generate unfair labor practice litigation as an economic penalty on nonunion employers--the NLRB added another caveat to the FES proof structure for establishing a hiring discrimination case in 2007's Toering Electric Co. In a 3-2 decision, the Board ruled that job applicants who are not "genuine[ly] interest[ed]" in obtaining employment are not protected as statutory employees under the NLRA; and, furthermore, General Counsel, not the employer, bears the ultimate burden of proving the applicant's "genuine interest." [77] While the Board and the Supreme Court have given job applicants, [78] including salts, [79] employee status protections under the NLRA before, the majority in Toering said that employee status should not be extended to non-genuine applicants. [80]

A. Majority Opinion

The majority's analysis begins by acknowledging that applicants' can be statutory employees per § 2(3) of the NLRA, which entitles them to receive protections under § 8(a)(3), as affirmed in Phelps Dodge. [81] However, in interpreting what constitutes a statutory employee, the majority stated: "the general policy of not discouraging employees from union activity by protecting applicants for employment does not justify ***1257** protecting all applicants for employment." [82] While § 2(3) does mention workers excluded from NLRA protections, [83] the majority argued that this does not require the Board to extend the protections to all other workers who are not specifically excluded. [84] Therefore, the majority worked through case law to make a determination as to whether non-genuine applicants should be included as § 2(3) employees. [85] It concluded that they should not. [86] Subsequently, the majority discussed how an employer can bring an applicant's genuine interest into question, concluding that it is the Board's General Counsel, not the employer, who should bear the ultimate burden of proving that an applicant had genuine interest in employment. [87]

1. No Genuine Interest Means No Economic Relationship

Based on previous Board rulings and Supreme Court precedent, the Toering majority concluded that the NLRA only protects employees or applicants who have or seek some sort of economic relationship with the employer. [88] In Phelps Dodge, the Supreme Court ruled that applicants are employees under the NLRA. [89] Furthermore, in 1995's Town & Country decision, the Supreme Court upheld the Board's ruling that even job applicants who were paid union organizers, or salts, are entitled to protections as employees. [90]

However, the Toering majority said the applicants in Phelps Dodge and Town & Country had something that the union members applying to Toering Electric did not--a contemplation of an economic ***1258** relationship. [91] Therefore, the majority argued, the Toering job applicants were more like the unpaid workers in WBAI Pacifica because they neither had, nor contemplated having, any sort of economic relationship with the employer. [92] Quoting the Board's WBAI Pacifica decision, the majority said there must be "at least a rudimentary economic relationship, actual or anticipated, between employee and employer" in order for an applicant to be considered a statutory employee under the § 2(3). [93] If an applicant does not have genuine interest in employment, then the applicant is not anticipating an economic relationship with the employer. [94] In this respect, the Board said, non-genuine applicants are "indistinguishable" from the unpaid staff workers in WBAI Pacifica, and are, therefore, not employees within the meaning of § 2(3). [95]

2. Remedial Provisions Require Genuine Interest

In addition to the economic relationship argument for genuine interest, the Board's majority said the remedial provisions of the NLRA, found in § 10(c), further support the idea that the Act assumes applicants must have a genuine interest in employment to be considered employees. [96] There is no provision in the NLRA for punitive remedies or back pay windfalls. [97] Instead, "the Board's remedies are limited to effecting 'a restoration of the situation, as nearly as possible, to that which would have obtained but for illegal discrimination.'" [98] In other words, the remedial provisions of the Act can only apply to applicants

who were actually deprived of employment opportunities. [99] If an applicant did not genuinely seek employment, the applicant was not wrongfully deprived of anything, and, therefore has no remedy under the NLRA. Therefore, in the Board's view, the lack of remedy for the non-genuine applicant under the NLRA supported the idea that these applicants are not protected as § 2(3) employees.

***1259** 3. Disloyal Actions Are Not Protected by the NLRA

The majority also pointed out that disloyal employee conduct is not protected by the NLRA. [100] In the Jefferson Standard case, where employees had distributed handbills disparaging the company product, the Supreme Court ruled that conduct intended to hurt the employer that has no relation to a labor issue is disloyal, and, therefore, is not protected by the NLRA. [101] The Toering majority quoted the Court in Jefferson Standard as saying, "there is no more elemental cause for discharge of an employee than disloyalty to his employer." [102] Similarly in Toering, the Board argued that a salting campaign that has the sole intent of economically hurting an employer is clearly disloyal, and, therefore, the applicants should not receive employee protections. [103]

4. Testers

While there are several reasons for the Board to believe that non-genuine applicants should not receive NLRA protections, a major argument employed by the dissent in favor of granting non-genuine applicants NLRA protection rests in the notion that these applicants serve a legitimate purpose as "testers," similar to testers in civil rights discrimination cases, where an individual who has no intent to accept an employment offer poses as a job applicant in order to gather evidence of discriminatory hiring practices. [104]

The Toering majority addressed any attempt to compare testers in Title VII civil rights cases to non-genuine applicants under the NLRA by saying that Title VII is much broader than the NLRA, and, therefore, provides much greater protections to testers. [105] First, the majority said, Title VII protects all individuals, while the NLRA only protects statutory "employees." [106] Second, while testers in Title VII cases can file civil action in court, the NLRA vests exclusive prosecutorial authority in the office of the General Counsel. [107] Finally, the majority said that while Title VII testers can win compensation for humiliation or ***1260** embarrassment, such injuries do not constitute discrimination to hire under the NLRA. [108] The sum of all of these arguments, in conjunction with the Board's previous arguments about defining "employee," confirmed for the Board's majority that the NLRA was not meant to allow for "testers" in the same way that Title VII is.

5. Policy Concerns of the FES Framework

In addition to all of its arguments for why a non-genuine applicant should not receive NLRA protections, the majority also expressed a broader policy concern about how non-genuine applicants can abuse the FES framework, the NLRB's proof structure that requires General Counsel to show antiunion animus and job-matching to establish a prima facie case for hiring discrimination. [109] The reason for this concern is that there is no requirement that General Counsel prove an applicant's genuine interest in employment; instead, once a case is established under the FES, the employer must prove it reasonably believed that the applicant had no genuine interest in employment, and, furthermore, that it was this reasonable belief that led to the decision not to hire the applicant, and not the employer's antiunion animus. [110] With this burden on the employer, the majority feared that applicants can too easily "abuse" the Board's processes for the purpose of hurting a non-union employer economically through litigation costs.

The majority argued that economic harm is the intent of applicants who engage in inflammatory conduct against an employer clearly intended to provoke a decision not to hire them, such as the type of conduct described at the beginning of this Case Note. [111] Additionally, unions may batch large numbers of applications in the name of its members for the purpose of creating a prima facie case of statistical discrimination. [112] The majority suggested that this was the tactic the union was using against Toering Electric Company, as the union ***1261** president was quoted as saying the campaign's desire was to "drive the non-union element out of business." [113] Additionally, the facts surrounding a similar salting campaign by the union against Toering in 1994--where the Local president boasted about putting an economic "hurt" on the employer--further supported the Board's belief that this was the union's intent. [114]

The Board argued that it is not fair for the employer to bear the burden of proving an applicant's genuine interest because it puts the employer to "the task and expense, at every stage of an unfair labor practice proceeding, of proving the applicant's lack of genuine job interest," [115] making them susceptible to the type of attacks meant to cause economic hardship.

6. Modified FES Framework

In order to protect employers from perceived litigious abuses stemming from non-genuine applicants, the majority in Toering added an element to the FES standard that requires the General Counsel to prove genuine job interest in order to establish a prima facie case if the employer raises evidence bringing the applicant's genuineness into reasonable question. [116] This new element for the General Counsel embraces two components: (1) that there was an application for employment; and (2) the application reflected a genuine interest in becoming employed by the employer. [117]

As to the first component, General Counsel must simply introduce evidence that the individuals applied for employment or that someone authorized by the individuals applied for employment on their behalf. [118]

As for the second component, once the General Counsel has shown that there was an application for employment, its burden is met unless the employer raises "a reasonable question as to the applicant's actual interest in going to work for the employer." [119] An employer may raise ***1262** such a question by introducing evidence that: an applicant recently refused similar employment with the employer; made belligerent or offensive comments on his or her application; engaged in disruptive, insulting, or antagonistic behavior during the application process; or engaged in other conduct inconsistent with a genuine desire to establish an employment relationship. [120] Similarly, evidence that the application is stale or incomplete, along with other considerations, may indicate that the applicant does not genuinely seek employment. [121]

If the employer puts forward such evidence, the General Counsel then bears the burden of proving by a "preponderance of the evidence" that the applicant in question was genuinely interested in employment. [122] General Counsel may be able to prove genuine interest through various ways: credible direct testimony that applicants would have accepted a position; or, evidence that an applicant submitted an application in accordance with the employer's procedures, arrived on time to interviews, made follow-up inquiries regarding the application, had relevant work experience, or was also seeking similar employment with other employers. [123]

Therefore, an employer's motivation for making an alleged discriminatory hiring decision does not become relevant until the General Counsel satisfies its burden of proof regarding the FES standards of "matching" a job with a qualified candidate and showing an employer's antiunion animus, as well as the new element of showing an applicant's genuine interest in employment if an employer brings the applicant's interest into reasonable question. [124]

B. Dissent

The dissent in Toering took issue with many of the majority's arguments. Broadly speaking, the dissent believed the majority was too concerned with protecting employers from non-genuine applicants and not concerned enough with protecting applicants and employees from employers who act on antiunion animus. [125] The majority's decision to ***1263** change the FES framework in order to combat abuses associated with union salting campaigns rested on what the dissent argued are three fundamentally flawed premises: (1) that unfair labor practice charges filed by salts are inherently "meritless;" (2) that non-genuine applicants are engaging in unprotected disloyal behavior; and (3) that the FES framework does not adequately deal with abusive application practices. [126]

First, the dissent argued that the NLRA extends employee status broadly to all applicants, and has never attempted to classify one type of applicant from another, even when the applicants were salts. [127] In recent years, the Board has held that even when a salting campaign is intended in part to provoke an employer to commit unfair labor practices, union organizers have

retained their employee status. [128] The important question, the dissent argued, is whether an employer engaged in antiunion discrimination, which has no necessary connection to the applicant's interest in the job. [129]

Furthermore, the dissent argued that non-genuine applicants serve a critical function under the NLRA by "policing" employers and bringing unlawful discriminatory practices to the Board's attention. [130] Contrary to the majority's assessment, the dissent argued that it is irrelevant as to whether there are private remedies for the applicant under the Act. [131] Citing the Supreme Court in Phelps Dodge, the dissent said that the Board's authority is not "'confined . . . to the correction of private injuries.'" [132] Instead, the Board has authority to further "the central purpose of the Act, directed as that is toward the achievement and maintenance of workers' self-organization." [133]

The dissent next argued that there is nothing "disloyal" about salts who seek to provoke an unfair labor practice by "applying to an employer who is hostile to unionization and willing to discriminate unlawfully against union members . . . ." [134] As the dissent pointed out, the NLRA protects a broad range of concerted activities; activities that might necessarily cause economic harm to employers, such as strikes and boycotts. [135] Such ordinary union organizing activity is specifically ***1264** protected by the NLRA, even if an employer perceives the activities as disloyal. [136] The dissent concluded this argument by scolding the majority for being overly concerned about protecting employers instead of being concerned about discrimination against employees: "[a]lthough salts may generate unfair labor practice litigation . . . it is the employers who are committing the unfair labor practices. One would think that such conduct would be the Board's chief concern." [137]

Finally, the dissent argued that the FES framework was already sufficient for protecting employers from potential abuses of non-genuine applicants. [138] According to the dissent, under the FES framework, an employer only has to prove that it "honestly believed that the applicant was not interested in being hired, and that this was the actual reason he was not hired or considered." [139] Employers are not required to prove that the applicant actually did lack genuine interest. [140] Furthermore, the dissent argued that it is not as if the Board is "somehow compelled" to find a violation "in circumstances where an employer has not, in fact, acted with a discriminatory motive in refusing to hire or consider union applicants." [141]

Generally speaking, the dissent argued that the majority was too concerned with protecting employers with antiunion animus and not concerned enough with applicants. Non-genuine applicants play an important role in uncovering unlawful discriminatory practices. And, if employers are acting appropriately under the NLRA, they will be sufficiently protected under the FES standard.

IV. Discussion

The majority in Toering made clear that its reason for adding a genuineness prong to the FES test was to prevent unions from leveling hiring discrimination charges against nonunion employers for the sole purpose of causing economic injury to the employer. The dissent, on the other hand, argued that non-genuine applicants serve a legitimate purpose in policing against hiring discrimination, and therefore need NLRA protections. Both sides raised legitimate concerns; unfortunately, because they each took hard-line views, neither side presented a solution than can adequately protect both sides' concerns. After analyzing the ***1265** flaws of these hard-line stances, this Case Note proposes an alternative framework that focuses on applicant disloyalty and flagrant misconduct as grounds for losing employee protections instead of focusing on whether or not non-genuine applicants should be considered employees under the NLRA.

A. The Dissent Ignores Abuses

The dissent argued that the NLRA is meant to protect and foster employees' rights to organize, and, therefore, non-genuine applicants serve the purpose of "policing" against employers who discriminate against unions. [142] Regardless of the merits of this argument, the dissent conveniently downplayed the fact that non-genuine applicants may have motives unrelated to "policing" employers. More so, the very facts in front of the dissent showed the intent of the non-genuine applicants was not to "police" the non-union employer, but instead, in the words of the union president, to put an economic "hurt" on the non-union employer for refusing to unionize. [143] The facts in Toering, as well as in some of the more flagrant fact patterns in other cases discussed by the majority, [144] support the idea that unions can and will use non-genuine applicants for ends wholly unrelated

to policing employers; instead, they can use non-genuine applicants as a way of putting economic pressure on employers to unionize or as a way to punish employers for refusing to unionize.

Furthermore, while the dissent correctly argued that protected concerted activities, such as strikes and boycotts, are not disloyal simply because they cause economic harm, this argument stretches too far when trying to analogize strikes and boycotts with the practice of abusing Board procedures in order to cause non-union employers financial harm. In Jefferson Standard, where striking employees passed out handbills disparaging the employer's product, the Supreme Court ruled that employee actions intending to hurt the employer that have no relation to ***1266** a labor dispute are disloyal. [145] In Toering, as well as the other flagrant examples presented by the majority, there was no real labor dispute; instead, the applicants' actions appeared to have the intention of hurting the employer for the sole purpose of hurting the employer. Even if it could be argued that litigation threats are concerted activity because they are meant to pressure an employer into unionizing, the Court in Jefferson Standard said that some means used to attack an employer can go far enough as to deprive the "attackers" of protection under the Act. [146] Furthermore, unlike strikes and boycotts, the union is not exercising its own leverage against employers, but is instead using the Board's processes as leverage against employers.

B. The Majority's Unnecessarily Broad Framework

The issue that the dissent failed to adequately address--that the FES framework fails to control abusive litigation by non-genuine applicants--was the Toering majority's primary concern. The majority decided to solve the problem of potential abuse by essentially adding another prong to the FES framework--a prong that requires the General Counsel to prove an applicant's genuine interest in employment. [147] The Board justified this additional requirement by saying non-genuine applicants do not receive NLRA protections, a conclusion it based on three arguments: (1) that these applicants do not qualify as Section 2(3) employees; (2) that such applicants' lose protections because they are acting disloyally; and (3) that there are no grounds for allowing such applicants to be treated as "testers." [148]

The Board, however, had to stretch to make two of these arguments. First, in order to avoid the Supreme Court's rulings in Phelps Dodge, which held that applicants are employees under the NLRA, [149] and in Town & Country, which held that hiring employers cannot discriminate against paid union organizers, [150] the Board went to great lengths to develop a never-before-used idea that non-genuine applicants are not really the same as genuine applicants in the eyes of the NLRA, and therefore do not receive employee protections. [151] Second, based in part ***1267** on a circular argument, the majority said that non-genuine applicants cannot act as "testers" because the NLRA only protects employees; and, as the Board had already argued and concluded, non-genuine applicants are not employees. [152]

Furthermore, while the majority properly presented the disloyalty argument as a reason why an employee can be stripped of protections, it should have also developed an argument that flagrant misconduct may be grounds for stripping an employee of protections. As the Carleton College court stated, "misconduct that is flagrant or renders the employee unfit for employment is unprotected." [153]

The majority's attempt to carve out a non-genuine exception to the rule that all applicants, including paid union organizers, are employees under the NLRA is overly broad and unnecessary to address its concerns with potential abuse. Instead, the Board should have ignored the issue of whether non-genuine applicants are really applicants, and instead focused on and better developed the issues of disloyalty and flagrant misconduct.

C. Focusing on Disloyalty and Flagrant Misconduct

If a circuit court hears the Toering case or similar case on appeal, or if the Board should hear a similar case in the future, it should adopt an approach that addresses the majority's concerns of abuse, but do so by focusing on applicant disloyalty and flagrant misconduct, which is what the Board should have done in Toering. This is the best approach for two reasons: first, the argument that employees can lose their NLRA protections because of disloyal or flagrant misconduct, unlike the argument that non-genuine applicants are not employees under the NLRA, is grounded in some precedent, making it the stronger of the two arguments; [154] and, second, it does not treat all non-genuine applicants the same, but instead singles out only those applicants whose sole intention is to harm an otherwise law-abiding employer for doing nothing more than refusing to unionize.

By focusing on disloyalty and flagrant misconduct, it is not necessary to struggle through the ambiguous question of whether a non-genuine applicant is an employee under § 2(3). Instead of attempting to carve out an exception to Phelps Dodge and Town & Country, all non-genuine ***1268** applicants should be considered employees, as was the situation before Toering. The issue then becomes one of determining when an applicant can lose NLRA protections. And, they can lose these protections when, among other conduct, they act disloyal or with flagrant misconduct. The Jefferson Standard test for disloyalty says harmful actions toward the employer are disloyal if those actions are unrelated to a labor dispute. [155] Non-genuine applicants whose sole intent is to harm non-union employers by putting them through expensive litigation are not acting in relation to a labor dispute. The conduct is disloyal and is not protected by the NLRA. Similarly, if job applicants make belligerent or offensive comments on their applications or engage in disruptive or antagonistic behavior during the application process, their misconduct is undoubtedly flagrant, and, like the professor in Carleton College, they lose their employee protections. When an applicant does something to lose his or her NLRA protections, employers are allowed to deny them employment. As the Court in Jefferson Standard said, the NLRA is not meant to interfere with an employer's normal exercise of selecting and discharging employees. [156]

Focusing on disloyalty and flagrant misconduct is also the best approach because it does not treat all non-genuine applicants the same. Instead, it only singles out those non-genuine applicants who have ill intentions of harming a non-union employer. As the dissent argued, non-genuine applicants can act as testers in order to "police" employers. [157] Furthermore, there may be other legitimate reasons for applying to a job when there is no actual interest in employment. A worker may simply want to see how he or she "stands" in the job market or may want to use a job offer as leverage with his or her employer. In all of these examples, the non-genuine applicant is not acting disloyally or engaging in flagrant misconduct, and therefore should not lose employee protections under the NLRA. These are not the non-genuine applicants who are abusing the FES framework; they are not the type of applicants the majority was concerned with.

By approaching the concerns of the majority in a way that focuses only on disloyalty and flagrant misconduct, it is not necessary to struggle through the question of whether a non-genuine applicant is an employee under § 2(3). Additionally, and more importantly, such an approach would focus on abusive non-genuine applicants without having to interfere with those who are not abusive.

***1269 D. Modifying FES to Include Disloyalty and Flagrancy Instead of Genuineness**

In order to reflect an approach that ignores the issue of whether a non-genuine applicant is an employee under the NLRA and instead focuses on what conduct strips applicants of employee protections, a circuit court or the Board should adopt a framework that modifies FES in a way that removes the genuineness prong established in Toering and replaces it with a disloyalty/flagrant misconduct prong. This framework would be applied in a way similar to how the genuineness prong is applied now: if an employer raises a reasonable question as to whether the applicant has acted disloyal or flagrant, the burden shifts to the General Counsel to prove that the applicant's actions were not disloyal or, if flagrant, that the applicant's flagrant actions were excusable. [158] Therefore, the ultimate burden of proof on this question would rest with the General Counsel.

Under such a standard, an employer could raise reasonable questions regarding an applicant's loyalty or flagrancy by introducing many, but not all, of the types of evidence it can currently use to raise questions of genuineness under Toering. This would include such evidence as: an applicant making belligerent or offensive comments on his or her application; engaging in disruptive, insulting, or antagonistic behavior during the application process; engaging in other conduct inconsistent with a genuine desire to establish an employment relationship; [159] credible direct testimony that the application was part of a union attempt to economically harm the employer; or evidence that the applicant applied en masse with members of the same union. [160]

Some types of evidence that would bring genuineness into reasonable question under Toering but would not be enough to bring disloyalty or flagrancy into question would include evidence of an applicant's recent refusal of similar employment with the employer or evidence that the application is stale or incomplete. [161]

If the employer brings disloyalty or flagrancy into reasonable question, the General Counsel would then bear the burden of proving by ***1270** a "preponderance of the evidence" that the applicant in question was not acting disloyally or, in the case of flagrant misconduct, that the applicant's actions were somehow excusable. [162] As for disloyalty, General Counsel would be able to overcome this presumption in many of the same ways it can overcome questions of genuineness under Toering, including:

credible direct testimony that applicants would have accepted a position; evidence that an applicant submitted an application in accordance with the employer's procedures, arrived on time to interviews, made follow-up inquiries regarding the application, had relevant work experience, or was also seeking similar employment with other employers; [163] or, evidence that the applicant was not actively participating in union efforts to economically harm the employer. As for flagrant misconduct, General Counsel could overcome this presumption by showing that the applicant's flagrant actions were somehow excusable. This might include evidence that the employer somehow provoked the applicant into acting flagrantly, such as evidence that the employer made antiunion remarks to the applicant.

Therefore, an employer's motivation for making an alleged discriminatory hiring decision would not become relevant until the General Counsel satisfies its burden of proof under the old FES standards of "matching" a job with a qualified candidate and showing an employer's antiunion animus, as well as satisfying this new element of showing that an applicant was not acting disloyally or engaging in flagrant misconduct if an employer brings that issue into reasonable question. [164]

Of course, if the General Counsel is able to establish a prima facie case under this standard, an applicant's genuineness can still come into consideration in later proceedings, just as it could under the original FES framework. So, if an employer can prove that it reasonably believed that an applicant was not genuinely interested in employment, and, furthermore, that it based its decision not to hire the applicant on this reasonable belief, then the employer will not be found guilty of hiring discrimination under the NLRA. [165]

*1271 V. Conclusion

As the facts in Toering and other cases presented by the majority opinion show, there are legitimate reasons to be concerned that an unmodified FES framework makes employers susceptible to expensive and abusive litigation stemming from non-genuine applicants. However, while it failed to fully appreciate the potential of these abuses, the dissent properly raised valid counter-concerns about categorically dismissing non-genuine applicants of NLRA protections. An approach that does not try to answer the question of whether a non-genuine applicant is an employee but instead focuses on applicant disloyalty and flagrancy would reconcile both sides' concerns. Such an approach would single out only those non-genuine applicants who have ill intentions of abusing the NLRB's processes in order to financially hurt non-union employers.

Therefore, the additional genuineness prong that was added to the FES framework in Toering should be replaced with a disloyalty/flagrant misconduct prong, where the General Counsel bears the ultimate burden of proving that an applicant was not acting disloyally or that flagrant misconduct was excusable if an employer brings one of these issues into reasonable question. If a circuit court takes up the Toering case or a similar case in the future, it should implement such a framework; if the Board receives a case similar to Toering in the future, it should do the same. Such a framework would protect employers from those non-genuine applicants who seek to abuse and leverage the NLRB's processes, while continuing to provide NLRA protections to all other non-genuine applicants.

Footnotes

a1 Associate Member, 2007-2008 University of Cincinnati Law Review. The author would like to recognize his dad, whose example continues to have a positive impact on his life. He would also like to thank Professor Rafael Gely for his guidance on this Case Note.

1 See Exterior Sys., Inc., 338 N.L.R.B. 677 (2002).

2 See Smucker Co., 341 N.L.R.B. 35, 38 (2004).

3 See Progressive Elec., Inc., 344 N.L.R.B. 426, 431-32 (2005) (describing how eight union members filed into an employer's office to fill out applications, videotaping the entire proceeding); Tann Elec., 331 N.L.R.B. 1014, 1015-16 (2000).

4 See NLRB v. Town & Country Elec., Inc., 516 U.S. 85 (1995).

5 The term "salting" originates from the concept of salting a mine, where metal or ore is introduced to the mine to create a false impression that the metal or ore is actually present in the mine. James L. Fox, "Salting" the Construction Industry, 24 Wm. Mitchell L. Rev. 681, 682 (1998).

6 Michael C. Harper, Samuel Estreicher & Joan Flynn, Labor Law: Cases, Materials, & Problems 191 (6th ed. 2007).

7 516 U.S. 85 (1995)

8 See 29 U.S.C. §152 (2006).

9 See Town & Country, 516 U.S. 85. The NLRA states: "[t]he term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer...." 29 U.S.C. §152(3) (2006).

10 See Pamela A. Howlett, Note, "Salt" in the Wound? Making a Case and Formulating a Remedy When an Employer Refuses to Hire Union Organizers, 81 Wash. U. L.Q. 201 (2003).

11 See John A. Litwinksi, Regulation of Labor Market Monopsony, 22 Berkeley J. Emp. & Lab. L. 49, 80 (2001).

12 Toering Electric was the target of a previous salting campaign by Local 275 in 1994.Toering Elec. Co., 351 N.L.R.B. No. 18, 2007 WL 2899733, at *2 (Sept. 29, 2007). Its alleged refusal to hire or consider union-affiliated individuals that year generated several unfair labor practice charges. Id. In July and August 1995, to settle these allegations, Toering Electric offered jobs to six Local 275 members but all six failed to show up for work. Other Local 275 members received backpay awards pursuant to the settlement agreement. Id. Local 275 boasted in its March 1995 newsletter that its salting campaign "put a big hurt" on Toering Electric's business. Id.

13 See 351 N.L.R.B. No. 18, 2007 WL 2899733 (Sept. 29, 2007).

14 Id. at *8.

15 See id. at *2.

16 See id. at *1.

17 29 U.S.C. §158 (2006).

18 See 29 U.S.C. §152 (defining the term "employee").

19 See 29 U.S.C. §157.

20 Id. The Act goes on to say that employees have the right to refrain from such activity as well: employees "shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." Id.

21 29 U.S.C. §158(a)(1) (2006).

22 See Harper, Estreicher & Flynn, supra note 6, at 83.

23 See National Labor Relations Board, Fact Sheet, http:// www.nlrb.gov/about_us/overview/fact_sheet.aspx (last visited Mar. 10, 2009) [hereinafter NLRB Fact Sheet]. See also 29 U.S.C.§153 (2006).

24 See id. §153(d). See also NLRB Fact Sheet, supra note 23.

25 See 29 U.S.C. §158(a)(1).

26 §158(a)(3).

27 See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Jones & Laughlin involved a large steel producer who fired ten employees after they attempted to organize a union. Id. at 22. The Board ruled against the employer and ordered it to reinstate the workers with back pay, which the employer refused to do under the argument that Congress had exceeded its powers under the Commerce Clause when it enacted the NLRA. Id. at 22, 25. The case was appealed to the Supreme Court where Chief Justice Charles Evans Hughes wrote the majority opinion, holding that the NLRA was constitutional because it bore a "close and substantial relation to interstate commerce...." See id. at 37.

28 See 29 U.S.C. §152(3).
The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice....
Id.

29 See Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). Phelps Dodge is also well recognized as establishing the remedial goal of §8(3). See id. at 194 (requiring "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination").

30 See id. at 181-82.

31 See id. at 185.

32 Id.

33 See id.

34 See NLRB v. Town & Country Elec., Inc., 516 U.S. 85 (1995).

35 See id. at 92.

36 See id. at 94-95.

37 See id. at 89-90. "We put the question in terms of the Board's lawful authority because this Court's decisions recognize that the Board often possesses a degree of legal leeway when it interprets its governing statute, particularly where Congress likely intended an understanding of labor relations to guide the Act's application." Id.

38 See id. at 91-95.

39 Id. at 94-95 (quoting Restatement (Second) of Agency §226, at 498 (1958)) (emphasis omitted).

40 328 N.L.R.B. 1273 (1999).

41 See id. at 1274. "The ordinarydictionary definition of 'employee' includes any 'person who works for another in return for financial or other compensation.'" Id. (quoting Town & Country Elec., Inc., 516 U.S. 85, 90 (1995)).

42 See id. "The definition of the term 'hire' in either its noun or verb form also includes compensation." Id. (citing Black's Law Dictionary (6th ed. 1990)).

43 Id.

44 See id. at 1275.

45 See id. at 1274.

46 See NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939). The Supreme Court ruled that a sit down strike in violation of a court order was not protected concerted activity. Id. at 261-62.

47 See Elk Lumber Co., 91 N.L.R.B. 333 (1950). The Board ruled that slowing down work speed was not protected concerted activity. Id. at 336.

48 See NLRB v. Local 1229, Intl Bhd. of Elec. Workers (Jefferson Standard), 346 U.S. 464 (1953).

49 See id. at 468.

50 See id.

51 See id.

52 See id. at 472.

53 Id. at 477-78.

54 See id. See also Patterson-Sargent Co., 115 N.L.R.B. 1627 (1956). The Board said that distributing handbills that disparage company product was not protected activity even though the handbills explicitly referenced labor dispute. Id. 1627-28.

55 See Jefferson Standard, 346 U.S. at 474 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937)).

56 See NLRB v. Town & Country Elec., Inc., 516 U.S. 85 (1995).

57 See id. at 94-95.

58 See id. at 96.

59 See Carleton College v. NLRB, 230 F.3d 1075 (8th Cir. 2000).

60 230 F.3d 1075 (8th Cir. 2000).

61 See id. at 1080.

62 See id. at 1077-78.

63 Id. at 1081 (quoting Earle Indus., Inc. v. NLRB, 75 F.3d 400, 406 (8th Cir. 1996)).

64 See id.

65 "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937).

66 See Wright Line, 251 N.L.R.B. 1083 (1980) (reviewing a "dual motive" discharge).

67 See id. at 1083.

68 See Howlett, supra note 10, at 209.

69 See id. at 210.

70 See id. at 211.

71 FES, 331 N.L.R.B. 9, 10 (2000), aff'd 301 F.3d 83 (3d Cir. 2002).

72 Id. at 10.

73 See id. at 12 (internal citations omitted).

74 See Howlett, supra note 10, at 225.

75 See FES, 331 N.L.R.B. at 20.

76 See Toering Elec. Co., 351 N.L.R.B. No. 18, 2007 WL 2899733, at *21, 2006-2007 NLRB Dec. P 17403 (Sept. 29, 2007).

77 See id. at *5.

78 See Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

79 See NLRB v. Town & Country Elec., Inc., 516 U.S. 85 (1995).

80 See Toering Elec. Co., 351 N.L.R.B. No. 18, 2007 WL 2899733, at *5.

81 See id. at *3.

82 See id. at *4 (quoting E & L Transport Co. v. NLRB, 85 F.3d 1258, 1267 (7th Cir. 1996)); see also Pac. Am. Shipowners Ass'n, 98 N.L.R.B. 582, 596 (1952) (holding that nonemployee applicants for supervisory positions are not protected).

83 §2(3) of the NLRA states:
The term "employee" shall...not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. §151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.
29 U.S.C. §152(3) (2006).

84 See Toering Elec. Co., 351 N.L.R.B. No. 18, 2007 WL 2899733, at *4.

85 Id. at *3-*4.

86 Id. at *5.

87 Id.

88 See id. at *5-*7.

89 See Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

90 See NLRB v. Town & Country Elec., Inc., 516 U.S. 85 (1995).

91 See Toering Elec. Co., 351 N.L.R.B. No. 18, 2007 WL 2899733, at *6.

92 See id.

93 Id. at *5 (quoting WBAI Pacifica Found., 328 N.L.R.B. 1273, 1274 (1999)) (emphasis omitted).

94 See id. at *6.

95 Id.

96 See id.

97 See id.

98 See id. (quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941)).

99 See id. at *7; see also Starcon, Inc. v. NLRB, 176 F.3d 948 (7th Cir. 1999) (holding that no affirmative remedy could be ordered for an alleged discriminatee unless General Counsel proved at the hearing of the merits that the discriminatee was available for and willing to accept a job offer from the respondent).

100 See Toering Elec. Co., 351 N.L.R.B. No. 18, 2007 WL 2899733, at *9.

101 See NLRB v. Local 1229, International Brotherhood of Electrical Workers (Jefferson Standard), 346 U.S. 464 (1953).

102 See Toering Elec. Co., 351 N.L.R.B. No. 18, 2007 WL 2899733, at *9 (quoting Jefferson Standard, 346 U.S. at 472).

103 See id.

104 See id. at *10.

105 See id.

106 See id.

107 See id.

108 See id.

109 See id. at *7.

110 See id. at *8.

111 The Toering majority stated:
Such conduct has included mocking a hiring official's Asian accent while soliciting workers to quit their jobs and work for a union contractor; putting an arm around a hiring official's shoulder and threateningly stating that "you're messing with the union now"; entering an employer's office en masse to apply while videotaping the proceedings; and making outrageous and defamatory statements about the employer at a public meeting.
Id. at *7 (internal citations omitted).

112 See id. at *8; see also Oil Capital Elec., 337 N.L.R.B. 947, 947-48 (2002) (noting that 20 of 21 salts who applied en masse had no relevant work experience).

113 Toering Elec. Co., 351 N.L.R.B. No. 18, 2007 WL 2899733, at *8, *11.

114 Id. at *8. Local 275 filed several unfair labor practice charges against Toering Electric during the 1994 salting campaign. Id. Toering settled those charges by offering employment to six of the union members/applicants. Id. Those individuals, however, failed to show up for work. Id. The majority argued that these facts support the conclusion that the applicants in the 1994 campaign were not interested in obtaining employment or in organizing Toering Electric's employees; instead, they were interested in putting "a big hurt" on Toering Electric's business, as Local 275 later boasted in its March 1995 newsletter. Id.

115 See id.

116 See id. at *12.

117 See id.

118 See id.

119 See id.

120 See id.

121 See id.

122 See id.

123 See Ronald Meisburg, Guideline Memorandum Concerning Toering Electric Company, GC 08-04 at 5 (Feb. 15, 2008), available at http:// www.abc.org/Legal/LawLibrary/NLRB_Updates.aspx (enter search term "Guideline Memorandum concerning Toering"; then follow "NLRB Offers Guidance on Important Labor-related Cases" hyperlink; then follow "Toering Electric" hyperlink) (citing Cossentio Contracting Co., 351 N.L.R.B. No. 31, 1 (Sept. 29, 2007)).

124 See Toering Elec. Co., 351 N.L.R.B. No. 18, 2007 WL 2899733, at *12.

125 See id. at *24 (Liebman & Walsh, dissenting).

126 Id. at *23.

127 Id.

128 Id.

129 Id.

130 See id.

131 See id. at *22.

132 Id. (quoting Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 192-93 (1941)).

133 See id. (quoting Phelps Dodge Corp., 313 U.S. at 193) (emphasis added).

134 See id. at *24.

135 See id.

136 See id. (citing NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 95-96 (1995)).

137 See id.

138 See id. at *25.

139 See id. at *21 (emphasis added).

140 See id.

141 See id. at *25.

142 See id. at *22-*23.

143 See id. at *8 (majority opinion).

144 See Progressive Elec., Inc., 344 N.L.R.B. 426, 432 (2005) (noting how eight union members filed into an employer's office to fill out applications, videotaping the entire proceeding); Smucker Co., 341 N.L.R.B. 35, 38 (2004) (noting how applicant put his arm around a hiring official at a would-be employer and threateningly said, "[y]ou're messing with the union now"); Exterior Sys., 338 N.L.R.B. 677 (2002) (describing applicant who made fun of a hiring official's Asian accent, openly urged on-duty workers to leave their jobs to go work for a union contractor, and refused to leave the jobsite despite repeated requests from hiring company officials); Tann Elec., 331 N.L.R.B. 1014, 1015-16 (2000) (describing actions of eighteen union members who filed into an employer's office en masse to fill out job applications while videotaping the proceedings).

145 See NLRB v. Local 1229, Int'l Bhd. of Elec. Workers (Jefferson Standard), 346 U.S. 464 (1953).

146 See id. at 477-78.

147 See Toering Elec. Co., 351 N.L.R.B. No. 18, 2007 WL 2899733, at *12.

148 See id. at *4-*9.

149 See Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177 (1941).

150 See NLRB v. Town & Country Elec., Inc. 516 U.S. 85 (1995).

151 See Toering Elec. Co., 351 N.L.R.B. No. 18, 2007 WL 2899733, at *5-*7.

152 See id. at *10.

153 See Carleton College v. NLRB, 230 F.3d 1075, 1081 (8th Cir. 2000) (quoting Earle Indus., Inc. v. NLRB, 75 F.3d 400, 406 (8th Cir. 1996)).

154 See NLRB v. Local 1229, Int'l Bhd. of Elec. Workers (Jefferson Standard), 346 U.S. 464 (1953).

155 See id.

156 See id. at 474 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937).

157 See Toering Elec. Co., 351 N.L.R.B. No. 18, 2007 WL 2899733, at *23 (Sept. 29, 2007) (Liebman & Walsh, dissenting).

158 This is just like the majority's modified FES framework in Toering, except instead of disloyalty/flagrant misconduct, the majority added a genuineness prong. See id. at *12 (majority opinion).

159 These are the same examples of evidence that can used to raise reasonable questions about an employee's genuineness in the majority's modified FES framework. See id.

160 The last two listed examples of how to bring disloyalty into reasonable question are in addition to what the Toering majority lists for bringing genuineness into question.

161 See id. at *12. Evidence that an applicant refused similar employment or that the application is stale or incomplete does not by itself suggest disloyalty. Id.

162 See id. The "preponderance of the evidence" standard is the same standard used for genuineness under the majority's modified FES framework. Id.

163 These are the same as some of the examples given as to how General Counsel can overcome questions of genuineness. See Meisburg, supra note 123 (citing Cossentio Contracting Co., 351 N.L.R.B. No. 31, 1 (Sept. 29, 2007)).

164 See Toering Elec. Co., 351 N.L.R.B. No. 18, 2007 WL 2899733, at *12.

165 See id. at *21.

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