United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

t DATE: April 30, 2003

TO : Richard L. Ahearn, Regional Director
Earl Ledford, Regional Attorney
Laura E. Atkinson, Assistant to Regional Director

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Steel Erectors International
Case 9-CA-39765 512-0125-9800
524-0133-7500
524-5012-7000
524-6740-5000

This case was submitted for advice on whether the Employer unlawfully refused to consider for hire and refused to hire Union members whose resumes were sent to the Employer by the Union acting in the guise of an employment agency. We conclude that the Employer unlawfully refused to consider and to hire the Union members because it failed to demonstrate that they were not bona fide job applicants.

FACTS

Steel Erectors International (Employer) is a nonunion steel erection company that performs a wide variety of iron-related construction services. On June 18, 2002,[1] the Employer ran an advertisement for ironworkers stating: "Construction IRWS Needed. Minimum 5 years exp. Must have transportation. Drug free environment. Call [Employer telephone number]." That day, Iron Workers Local 290 (Union) organizer Clark called the Employer in response to the advertisement. Clark told Employer Vice President Stacey Cordi that he was seeking employment for his son. Cordi told Clark that if his son was a union member, he would not hire him.

Clark again called the Employer on July 12, posing as Rick Allen, the owner of a struggling steel erecting company and the prospective proprietor of a steel erector employee referral agency. Clark, as Allen, told Kacona that he was interested in referring steel erection workers to the Employer; Kacona said that the Employer was hiring and instructed Clark to fax him resumes. Kacona also

---

[1] All dates are in year 2002.

stated that if the workers were union members, the Employer would not hire them. Clark, as Allen, then sent the Employer resumes of ten individuals, all identified as Union members. The resumes were attached to a cover letter bearing letterhead "Merit Employment Service Systems." The cover letter stated, in part:

> "Regarding our phone conversation this morning concerning Steel Erectors Inc's help wanted ad in the Columbus newspaper.
>
> As requested by you I have compiled ten (10) resumes of highly qualified Iron Workers that are skilled in the performance requirements that you desire. I am sure that you will be more than satisfied with any and all of these applicants. Also, these resumes are being provided to you as a courtesy and no fee will be charged."

The Employer did not contact Clark or any of the ten Union applicants. On both August 30 and September 5, a Union applicant left a message with the Employer checking on his resume status. Later on September 5, Clark called the Employer and told General Foreman Proffit that he was checking on the status of the resumes mailed by Rick Allen. Proffit was not aware of any applications sent by Allen, but informed Clark that the Employer was still hiring, and that Clark should fill out and send an application.

The Employer hired six nonunion applicants between July 29 and November 7, i.e., after Clark had delivered the Union members' resumes.

ACTION

We conclude that the Employer violated Section 8(a)(1) and (3) by refusing to consider for hire and refusing to hire the ten Union applicants because the Employer failed to demonstrate that they were not bona fide job applicants for permanent positions.

Under FES (A Division of Thermo Power),[2] the General Counsel establishes prima facie evidence of a discriminatory refusal to consider for employment by showing that: (1) the respondent excluded applicants from the hiring process; and (2) antiunion animus contributed to this decision. Once this is established, the burden shifts to the respondent to show that it would not have considered

---

[2] 331 NLRB 9 (2000).

the applicants even in the absence of their union activity or affiliation.

To establish a prima facie refusal-to-hire case under FES, the General Counsel must show:

> (1) that the respondent 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 for the positions for hire, or in the alternative, that the employer had 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.[3]

The burden then shifts to the respondent to show that, absent union activity or affiliation, it still would not have hired the applicants.[4]

The Region has concluded that if the ten Union applicants are bona fide applicants, the Region can establish a prima facie case. A bona fide applicant is generally understood to be one who is available for employment at the time of application; has the ability and experience; and would accept the work if offered.[5] The burden is on the employer to show that the applicant is not seeking employment in a bona fide fashion.[6]

---

[3] Id. at 4.

[4] Ibid.

[5] See, e.g., Pan American Electric, 328 NLRB 54, 57 n.26 (1999) (applicant bona fide because he was prepared to go to work if offered a position); Mathis Electric Co., 314 NLRB 258, 265 (1994) (applicant bona fide because he was qualified and agreed to perform work assigned to him).

[6] See Merit Electric Co., 328 NLRB 212, 214 n.6 (1999); Arrow Flint Electric Co., 321 NLRB 1208, 1209 & n.9 (1996) (once General Counsel establishes employer animus, Board will not substitute speculation as to whether the employee would have continued working for evidence that the employee refused or failed to work).

The Employer does not contend that the applicants were not available for employment when they applied, or that they did not have the ability or experience for the positions.[7] Instead, the Employer contends that the Union applicants were not bona fide because they did not genuinely seek employment and merely sought to file an unfair labor practice. Under the above bona fide applicant standards, the Employer apparently is arguing that the applicants would not have accepted the full time positions if offered.

The Employer supports its argument by pointing to the Union applicants' failure to apply and interview for the positions in person; the Union's lack of proximity to the Employer; the delay of four months in filing the instant unfair labor practice charge; the Employer's assertion that because the Union submitted the Union applicants' resumes under the guise of an employment agency, it believed the applicants were from a temporary employee agency seeking temporary employment. We conclude that none of these factors establish that the applicants would not have accepted the positions if offered, or were not willing to perform the work.[8]

The Employer's reliance on the fact that the applicants did not apply and interview in person is undermined by the evidence that the Employer first told Clark to fax the resumes, and later told Clark to send in an application. The Employer also has not shown that it maintains a policy of only considering applicants who fill out an application and interview in person. The Union's distance from the Employer does not indicate where the applicants lived nor whether they would have rejected an offer because of a commute. The Union's delay in filing this charge is statutorily protected and wholly irrelevant to whether the applicants would have accepted job offers. The Union's employment agency misrepresentation arguably supports rather than undermines the applicants' bona fide status. In light of Employer Vice President Cordi's statement on June 12 that the Employer would not hire union members, Clark's concealment of his Union affiliation evinced a genuine desire to obtain employment for the Union applicants. Finally, the Employer's contention that it

---

[7] It appears that the Region has found that all Union applicants had the ability and experience for the positions.

[8] See Pan American Electric and Mathis Electric Co., supra, note 5.

believed the applicants were seeking only temporary employment is undermined by the fact that the Employer consistently showed interest in the applicants, i.e., it told Clark to first fax the resumes and later to send in an application.

We note the evidence affirmatively showing that at least two Union applicants would have accepted the positions if offered, i.e., two applicants called the Employer to check on the status of their applications.[9]

We also reject the possible Employer defense that it did not refuse to consider or hire the Union applicants, but rather did not want to enter into a business relationship with the Union's purported employment agency.[10] Kacona's invitation to Clark to send resumes indicates that the Employer was interested in the Union applicants even though they came from an agency. The cover letter from the purported agency also clearly stated that the resumes were provided as a courtesy, free of charge. Thus, both the conversation leading to the resumes and the letter accompanying them belie any argument that the Employer was refusing to enter into a business relationship rather than refusing to consider the applicants. In addition, the Employer rejected the Region's request for evidence concerning its relationships with other employment agencies. Thus the Employer also failed to establish any affirmative defense that it could not consider the

---

[9] See Sommer Awning Co., 332 NLRB No. 136., slip. op. at 9 (2000) (in response to employer's argument that union applicants were not bona fide, ALJ held that the evidence supported a reasonable inference that these applicants were serious about obtaining a job because, in part, they diligently pursued employment by contacting the employer several times to arrange interviews or to ascertain the status of their applications).

If further investigation reveals that the other applicants were unaware of or had not authorized Clark's conduct on their behalf, or otherwise would not have accepted the positions, the Region should resubmit this case for advice.

[10] See Plumbers Local 447 (Malbaff Landscape Construction), 172 NLRB 128 (1968) (an employer does not violate Section 8(a)(3) by ceasing or refusing to do business with another employer because of the union or nonunion activity of the employees of that employer).

applicants from the purported employment agency because the Employer had conflicting obligations with other agencies.[11]

Finally, the Employer may be asserting the Union's employment agency misrepresentation as an affirmative defense rather than as grounds for rejecting their bona fide applicant status. We first note that the Union's employment agency misrepresentation was not material, i.e., it concerned only how the Employer received the applications, not the applicants themselves. In addition, the Employer has not established that it would have refused to consider or hire the applicants due to this misrepresentation. For example, the Employer has not furnished evidence that it has refused to consider or hire other applicants because of similar misrepresentations.[12]

Based on the foregoing, we conclude that the Region should issue a Section 8(a)(1) and (3) complaint, absent settlement, alleging that the Employer unlawfully refused to consider for hire and refused to hire the Union applicants.

B.J.K.

---

[11] Cf. Abbott Northwestern Hospital, JD(MN)82-02 (Aug. 2, 2002), 2002 WL 1821527, exceptions not filed on relevant conclusion (employer did not unlawfully refuse to consider for hire or refuse to hire two nurses because the referral agency from which the applicants were purportedly referred had no contract with the employer, and the evidence showed that such contracts were an integral component of other staffing agencies' referral arrangements with the employer).

[12] Accord: Arrow Flint Electric Co., 321 NLRB 1208, 1209 (1996) (employee's deceptions regarding job history and references did not evince an intent not to work for the employer or affect his bona fide status; real reason for his discharge was his stated intent to organize).