Oasis Mechanical, Inc. ***and*** **Plumbers & Pipefitters Local 344.** Case 17–CA–23050

April 27, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 14, 2005, Administrative Law Judge Thomas M. Patton issued the attached decision. The Respondent and the General Counsel each filed exceptions and a brief in support of their exceptions. The Respondent and the General Counsel also filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as modified,[1] and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The Respondent, Oasis Mechanical, Inc., Princeton, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire applicants for employment because of their activities on behalf of Plumbers & Pipefitters Local 344 or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees or applicants in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer employment, if it has not already done so, to two of the following named applicants, whose identities are to be determined in the compliance stage of this proceeding consistent with the remedy section of the judge's decision, in the positions for which they applied on February 11, 2005, or if such positions no longer exist, employment in substantially equivalent positions: Tommy O'Donnell, Mike Franklin, and Larry Mason.

(b) Consider the remaining applicant for future job openings that arise in accord with nondiscriminatory criteria, and notify the applicant, the Charging Party, and the Regional Director for Region 17 of such openings in positions for which the applicant applied, or substantially equivalent positions.

(c) Make the selected applicants whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to hire and to consider for hire the three named applicants, and within 3 days thereafter notify the named applicants in writing that this has been done and that the refusals to hire and to consider for hire will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its jobsites in the State of Oklahoma, copies of the at-

[1] In adopting the judge's make-whole remedy, we do not rely on the judge's assumption that Patrick Murray was hired before Jones, O'Donnell, Franklin, and Mason applied. Instead, we note that, because Murray was hired for an HVAC position, and the General Counsel has not established that any of the discriminatees were qualified to perform HVAC work, Murray did not fill a position that would have been available for the discriminatees, but for the Respondent's discriminatory conduct.

[2] We note that the Respondent is free to argue at compliance that instatement is not appropriate in this case because it allegedly made the discriminatees unconditional offers of employment in March 2005. The Respondent may also argue, at compliance, that the backpay period was tolled at the time of those offers of employment. In light of the foregoing, we shall modify the judge's Order. See *Solvay Iron Works*, 341 NLRB 208, 208–209 (2004); *Desert Aggregates*, 340 NLRB 1389 (2003). We also modify the judge's Order to reflect that, under *FES*, 331 NLRB 9, 14 (2000), the Respondent's conduct constitutes not only a refusal to hire the two applicants who would have been hired (as determined at compliance), but also a refusal to consider the remaining applicant, for whom no position would have been available. We further modify the judge's Order to include the standard provision ordering the Respondent to remove from its files any reference to its unlawful conduct and to notify the applicants that this has been done. Further, because we acknowledge that the Respondent cannot meet an obligation to offer instatement within 14 days of this Decision and Order to applicants whose identities are yet to be determined, we modify the judge's order to remove the 14-day time limit in that provision. See *Tri-County Paving*, 342 NRLB 1213 (2004). We emphasize, however, that this variance from our usual time limits does not give the Respondent carte blanche to delay its offers of instatement after a compliance determination regarding applicants' eligibility for such offers.

We recognize that the complaint did not allege, and thus the Board does not find, a "refusal to consider" violation. Thus, the cease-and-desist order does not contain this phrase. However, the absence of this violation does not preclude the Board from entering a complete remedy for the "refusal to hire" violation as to all three discriminatees. This includes an order that the Respondent consider for hire the applicant for whom no position existed at the relevant time.

tached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted and in locations where they may be observed by applicants for employment. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time in the State of Oklahoma since February 11, 2005.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire applicants for employment because of their activities on behalf of Plumbers & Pipefitters Local 344 or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL offer employment, if we have not already done so, to two of the following named applicants, whose identities are to be determined in the compliance stage of this proceeding consistent with the remedy section of the judge's decision in this case, in the positions for which they applied on February 11, 2005, or if such positions no longer exist, employment in substantially equivalent positions: Tommy O'Donnell, Mike Franklin, and Larry Mason.

WE WILL consider the remaining applicant for future job openings that arise in accord with nondiscriminatory criteria, and WE WILL notify the applicant, the Charging Party, and the Regional Director for Region 17 of such openings in positions for which the applicant applied, or substantially equivalent positions.

WE WILL make the selected applicants whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful refusals to hire the named applicants and to consider them for hire, and WE WILL, within 3 days thereafter notify the named applicants in writing that this has been done and that the refusals to hire them and to consider them for hire will not be used against them in any way.

OASIS MECHANICAL, INC.

Charles T. Hoskin, Esq., for the General Counsel.
John D. Meyer, Esq. (*Blankenship & Associates LLC*), of Greenwood, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS M. PATTON, Administrative Law Judge. This case was tried in Oklahoma City, Oklahoma, on July 7 and 8, 2005.[1] The charge was filed by Plumbers & Pipefitters Local 344 (referred to as Local 344 and the Union). Local 344 is an affiliate or constituent member of United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. The initial charge was filed on February 28. An amended charge was filed on May 20. The complaint issued on May 26. The complaint alleges that Oasis Mechanical (referred to as Oasis, the Respondent, and the Employer) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by refusing to consider for employment or to employ four named employees. The complaint also alleges that the Respondent violated Section 8(a)(1) of the Act by a supervisor interrogating employees about their union af-

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] All dates are 2005, unless otherwise stated.

filiation and by giving employees the impression that it would be futile for them to select a union as their collective-bargaining representative. The Respondent denies any violation of the Act.

On the entire record, including my observation of the demeanor of the witnesses and the inherent probability of the testimony and after considering the briefs that were filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the supply and installation of plumbing, heating, ventilation, and air-conditioning (HVAC) equipment as a subcontractor in the construction industry and maintains its business office in Princeton, Texas. The answer admits facts showing that Respondent meets the Board's jurisdiction standards and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all material times the Union has been a labor organization as defined in Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

The alleged unfair labor practices occurred during the course of an asserted unsuccessful attempt by Darren Jones, Tommy O'Donnell, Mike Franklin, and Larry Mason to become employees of the Respondent for the purpose of organizing for Local 344, a practice known as salting.

The thrust of the complaint and the evidence presented by the Government is that Jones, O'Donnell, Franklin, and Mason (the applicants) are employees who had the relevant training and experience for jobs that the Respondent was seeking to fill, that each applied for a job, that none were considered for hire or hired and that antiunion animus was a motivating reason for the Respondent's action. See *FES,* 331 NLRB 9 (2000). The alleged statements in violation of Section 8(a)(1) were made while the applicants were at one of the Employer's jobsites.

The Respondent's position is that the evidence does not establish that the Employer was motivated by antiunion considerations. The Respondent argues that the applicants were not hired based upon valid business considerations. The Respondent also argues that the evidence does not show that the applicants were bona fide applicants for employment and that it would accordingly not be a violation to decline to hire them. Regarding the alleged unlawful statements, the Respondent contends that the evidence does not show that the statements were made by a supervisor or agent and that the statements, considered in context, would not be unlawful if made by a supervisor or agent.

Much of the relevant evidence is not in dispute. My findings of fact are based on the entire record, including my observation of the demeanor of the witnesses, consideration of the exhibits, and assessing the probabilities. Testimony inconsistent with my findings has not been credited because it is in conflict with more credible evidence or because it is not credible and unworthy of belief.

B. Detailed Facts

1. The salting attempt

At the time of the alleged violations, the Respondent had subcontracts for plumbing and HVAC work at construction projects in Texas, Oklahoma, and Arkansas, including two jobsites in Norman, Oklahoma. One of the Norman projects was identified as the Crimson Park Apartments (the Crimson jobsite). The asserted salting attempt occurred at the Crimson jobsite. The other job in Norman was Oklahoma University student housing (the OU jobsite). Other Oklahoma jobs in progress at relevant times were in Oklahoma City, Sapulpa, Stillwater, and Edmond.

Bobby Cox is Respondent's president and chief operating officer. Scott Mitchell is a superintendent for the Employer. Mitchell had management responsibility for all of Respondent's several projects in Oklahoma. At the time of the alleged unfair labor practices Mitchell was principally engaged in managing work the Respondent was performing at the Crimson jobsite. Buddy Potter had the title of foreman for Respondent and worked at the Crimson jobsite. The complaint alleges that Cox, Mitchell, and Potter acted as supervisors and agents of the Respondent within the meaning of Section 2(11) and (13) of the Act. The Employer admits these complaint allegations with respect to Cox and Mitchell, but denies that Potter was a statutory supervisor or an agent. The employees of the Employer are not represented by a labor organization and there is no relevant collective bargaining history.

Bailey Williams was employed by the Employer in Oklahoma until sometime in January. On February 11, Williams visited the union hall in Oklahoma City to discuss working on union jobs. He met with Local 344 Business Agents Darren Jones and Tommy O'Donnell. In the course of the meeting Williams told Jones and O'Donnell that the Employer was hiring. Jones and O'Donnell had recently received training in salting the jobsites of nonunion employers. After their meeting with Williams, Jones and O'Donnell decided to attempt to salt the Employer at the Crimson jobsite, about 16 miles from Oklahoma City.[2]

Jones called Bobby Cox and discussed employment, without disclosing his union affiliation. Cox said that the Employer was hiring licensed plumbing and HVAC journeymen and that he would have his superintendent in Oklahoma call Jones. Shortly thereafter Scott Mitchell called Jones. Their conversation was recorded.[3] The conversation included the following:

> SCOTT MITCHELL: . . . but its all plumbers work. You've got any plumbers experience?
>
> DARREN JONES: Uh, yeah. We've got plumbing licenses and everything.
>
> MITCHELL: Have you ever done apartments before?

[2] In this decision, distances between cities are as reported by *Mapquest.com.*, 2005.

[3] Jones' account of his conversation with Cox and his testimony that Mitchell called him is credited. A transcript of the recorded conversation with Mitchell was received without objection.

JONES: Apartments? Oh, yeah, yeah.

MITCHELL: OK, OK. Well, you might want to hook up today and talk or something?

. . . .

JONES: Well, I've got a couple of buddies that are looking for a job, too.

MITCHELL: eally? Well, I've got, uh, 41 buildings and I've got another one in Stillwater just like it. [Stillwater, Oklahoma is about 67 miles from Oklahoma City.]

. . . .

MITCHELL: These down here in Norman, these are pretty good size jobs, too. There, you know, it takes a lot of people to build an apartment complex.

JONES: Yeah, uh, how much do you pay?

MITCHELL: It really just depends on the person's personal experience. What kind of experience do the guys you got now?

JONES: Oh, we're all licensed journeymen. You know, we've got plenty of ten years experience, and

. . . .

MITCHELL: Yeah, why don't you guys come out here, one of you or all of you, come out here and talk to me and I'll be glad to talk to you, I'd love to put you guys on.

JONES: OK, where you gonna be at, Norman?

MITCHELL: I'll be at Norman all day, I've got inspections all over the place down there.

JONES: OK, well I'll just give you a call when we get close, then.

MITCHELL: You got caller ID this is my cell phone.

JONES: Yeah, I got caller ID.[4]

Local 344 members Mike Franklin and Larry Mason were not working and agreed to join the salting attempt. Jones, O'Donnell, Franklin, and Mason traveled together to the Crimson jobsite on the afternoon of February 11. At Jones' direction all four were dressed in uuion shirts and hats.

Jones made a surreptitious tape recording of what was said during the visit to the Crimson jobsite. The actual tape recording was received as an exhibit as was a transcript prepared by the Government, as annotated by Jones. The Respondent objected to admission of the transcript, contending that it was not accurate. The transcript was not received as a true copy, but as a convenience, to the extent that it proved to be accurate. On brief, the Respondent submitted an alternative transcript marked appendix A to the brief that has been marked Exhibit R-6 and made a part of the record, on the same basis as the Government prepared transcript. My comparison of the tape cassette with the two transcripts discloses inaccuracies and omissions in both transcripts.[5] My findings regarding the relevant portions of what was said at the Crimson jobsite on February 11 are based upon my listening to the tape and upon the portions of the two transcripts that the General Counsel and Respondent agree are accurate. The tape lasts for about 75 minutes and is recorded on both sides of a single cassette. The tape begins at the point when the applicants are on the Crimson jobsite and Jones makes initial contact with the Employer by speaking to Buddy Potter. Because the issues include whether alleged statements violated Section 8(a)(1) of the Act when considered in context, and in view of the disagreements regarding the accuracy of the transcript of the tape introduced by the Government, relevant portions of the recorded conversations are set forth below. The roles of Franklin and Mason were largely passive and they remained in Jones' vehicle for much of the time. The tone of the remarks made by the participants was affable. The tape includes the following:

. . . .

JONES: You Scott?

POTTER: No, I'm Buddy. . . . I'm the super on this job. All you all are licensed?

O'DONNELL, JONES, LARRY MASON AND MICHAEL FRANKLIN: Yeah

POTTER: All four of you?

JONES: Yeah, all four of us.

POTTER: Ah, fuckin'-A. Can you wait just a minute.

. . . .

SCOTT MITCHELL: (unintelligible). . . you guys been out here?

JONES: We've been out here a while. How you doing? Scott?

MITCHELL: Scott. Good to meet you.

JONES: Darren Jones

O'DONNELL: I'm Tommy O'Donnell. Ya'll needin' some hands?

MITCHELL: Yep. Well, tell me something, have you all ever worked in the City of Norman?

O'DONNELL: yeah

. . . [extended technical discussion of plumbing issues on the job]

O'DONNELL: How many hands ya'll needin'?

POTTER: A bunch.

. . . .

MITCHELL: What kind of money you guys looking at to start?

JONES: Uhh

MITCHELL: Are all you all journeymen?

JONES: Yeah. Actually I've got my mechanical license and I'll have my apprenticeship plumbing license, but I've got my mechanical license. I'm mechanical.

MITCHELL: So you're Mechanical?

JONES: Yeah.

JONES: God Damn, boy, you're out.

O'DONNELL: When you're talking money, what are you paying top end out here?

MITCHELL: Well, first of all, hiring somebody off the street. I've got a clown up there, working up there Edmond, hired him and paid him $18 per hour and that guy's worth about six. He don't know anything, he don't work.

O'DONNELL: Are you just going off experience?

MITCHELL: I hate to, just hire someone in, to say I'm just going to pay someone a set amount of money. How much experience you guys got?

[4] The discussion of caller ID is consistent with Mitchell having placed the call. Inferentially, Jones called Mitchell later and was given the address of the Crimson jobsite.

[5] The inaccuracies and omissions do not appear to be intentional.

O'DONNELL: We'll, I've got 5 years of plumbers and pipefitters experience in the local union in Oklahoma City.

MITCHELL: What's the Union pay?

O'DONNELL: They're paying, $22.50.

MITCHELL: Well, hell, I can't get you [background coughing] and benefits.

O'DONNELL: Well, we're not asking for $22.50. What I'm saying is, though, I've got 5 year of apprenticeship, BAT training.

JONES: All four of us do.

O'DONNELL: We all do and I've got my journeyman's plumbers license since '91. You know, I graduated from plumbers apprenticeship school in '92. got my plumbing license in '91. I've been working out of Plumbers and Pipefitters in Oklahoma City since 1986.

MITCHELL: OK.

JONES: Everyone of us has been through the apprenticeship school. Like I said, I'm the only one without a plumbing license, I got my apprenticeship plumbing license. I got my mechanical license. So I work on mechanical mostly.

MITCHELL: Well, we've also got mechanical here too. We've got mechanical here and, uh, lets see, 7 plumbing jobs in Oklahoma. They are all apartment complexes, that's about all we do. And, three heat and air jobs.

POTTER: You all still union?

O'DONNELL: Uh huh.

POTTER: What, uh, are you gonna quit?

JONES: No. Would we have to?

POTTER: Well, I don't know.

POTTER: I've always understood that if you were union you couldn't work on non-union jobs.

JONES: No, it's the other way around.

POTTER: It ain't now?

JONES: No.

POTTER: You've got to buy into the union. He said (unintelligible). It costs about a thousand bucks to get in.

MITCHELL: Is it?

JONES: Naw, it ain't that much.

POTTER: How much is it?

JONES: It ain't that. Its just according to the circumstances.

POTTER: They wouldn't say nothing about you working a non-union job.

JONES: We are the Union. We're here representing the Union.

POTTER: You trying to bring the Union here?

JONES: Yeah.

POTTER: That's probably won't happen.

JONES: What?

POTTER: That's probably not going to happen.

JONES: It's not going to happen?

O'DONNELL: Why not?

POTTER: The big man's walking around. He's probably not going to buy the union.

O'DONNELL: Why not. Bring more quality and better work. Better conditions for everyone.

O'DONNELL: Well, they may not be union now, but everyone ought to have a chance to organize and be union if they want to.

POTTER: Yeah, that would be nice. You ain't gonna hurt my feelings.

O'DONNELL: You out of Texas?

. . . .

JONES: You ever thought about being union?

POTTER: Yeah, I've thought about it. My brother's union.

. . . .

O'DONNELL: Where's big boss at?

O'DONNELL: If He's ready to hire some guys—we're ready to take off.

POTTER: We don't have a problem with you guys at all.

POTTER: What do you got to have?

O'Donnell: Whatever ya'll think. What's top journeyman get?

POTTER: $18

POTTER: Usually a journeyman get his own job.

JONES: How many journeyman you all got out here.

POTTER: There's four on this one.

JONES: How many apprentices.

POTTER: There's seven.

JONES: Damn, you do need a lot of help, don't you?

POTTER: Yeah.

JONES: You've got a lot of plumbing here, don't you?

MITCHELL: Yeah in just this part.

MITCHELL: There's 34 unit per boiler.

JONES: Hard to get hands?

MITCHELL: Especially here in Norman. These inspectors know there stuff, now.

JONES: Well, they can be hard on you or they can be easy on you. Most of the time they are hard on you.

MITCHELL: We've got one going in Edmond.

JONES: How's that inspector?

MITCHELL: . . . You know where the old man is?

POTTER: Yeah, he's in the red pickup.

MITCHELL: Yeah, I'd like for him to talk to these guys here.

MITCHELL: You are some Before I go hire a bunch of high dollar people.

. . . .

JONES: You all both supervision?

MITCHELL: Yeah. He's the foreman of this job and I handle everything in Oklahoma.

FRANKLIN: You live in Oklahoma City?

MITCHELL: I live in Edmond. We've got another job about 2 or 3 minutes away from here on campus.

FRANKLIN: How many journeyman ya'll have working all together?

MITCHELL: I don't know. It fluctuates, hell, pick up two or three here and lose another one there. See, like right now, we don't have anyone at all working in Sapulpa.

JONES: It's hard to find qualified people, isn't it?

MITCHELL: It's hard to find qualified people. Probably one out of one journeyman are either drunk or druggies or both. [laughter]

. . . .

JONES: . . . What hours you all workin'?

MITCHELL and POTTER: 8 to 4:30. About 8 to 4:30

. . . .

O'DONNELL: You think they'll hire us?

JONES: Not when we tell'um we want to organize them.

. . . .

O'DONNELL: Are you doing that job out north of Stillwater? Out there on that golf course?

MITCHELL: Yep. That thing is 41 buildings, and uh, hey Johnnie, before you run out [trials off, unintelligible period of 10–15 seconds]

O'DONNELL: I think their gonna hire us.

JONES: Yeah, its gonna work out. Its gonna work out.

. . . .

FRANKLIN: How many hours you working?

JONES and MITCHELL: Eight

FRANKLIN: Days, five days a week?

MITCHELL: But, like, the other day, we worked until about midnight, cause we were really, really hurtin'. So, it won't hurt you guys on the union side come to work for a non-union job?

JONES: No.

MITCHELL: Really?

JONES: Get approval from the hall and we can work it.

MITCHELL: The Union don't keep you guys busy?

JONES: Oh, they keep us pretty busy. Got any welding going on out here?

MITCHELL: No, not really.

JONES: Boilers going in here.

MITCHELL: No, got boilers going in over there at the OU campus. Got two boilers over there and they're going to tear down those other houses and build more apartments on the other side of the road. Up off of Imhoff and Chautauqua.

O'DONNELL: Who does the hiring? You do the hiring?

MITCHELL: Pretty much, pretty much. I don't normally hire but with his approval but, at this point in time I'm to the point where if I don't get the job done it ain't gonna happen. We're hurtin', I mean we're hurtin'. Heatin' and air is what's killing us.

O'DONNELL: Have you all ever thought about signing an agreement?

MITCHELL: What agreement?

O'DONNELL: With the local. Union agreement.

MITCHELL: There ain't enough money for they many plumber, if the union comes on the job it will cost too much.

O'Donnell: Yeah, but you can do it with half. You could do it with half of what you got out here.

MITCHELL: I've got six or seven people today doing nothing but picking up trash. I can't afford union wages picking up trash.

O'DONNELL: Who's doing the plumbing? They're not union plumbers.

MITCHELL: The only time I've worked union, I've only worked union one time, a job over in Muskogee and I had a small union contractor who was just starting out and me and him got together he helped me out do heat and air for me. And they did a good job I ain't lyin' they did a beautiful piece of work. But, my god those guys took all day to do it.

. . . .

JONES: Who we waiting on?

MITCHELL: My boss.

. . . .

JONES: [Another contractor] needing hands too, huh?

MITCHELL: Yeah, everyone does. If you had 50 people out here, you'd have enough, but we don't have that kind of money.

. . . .

MITCHELL: . . . You don't have to sign any kind of an agreement with the Union to go to work over here. How does that work? You go wherever you want to go an if the Union calls, you say. "sorry I'm busy today"?

O'DONNELL: We can come over here and work, all we've got to do is get approval from the Business Manager and go to work.

MITCHELL: Really

O'DONNELL: Yeah. Everybody has the opportunity to work.

. . . .

JONES: Well, I mean, what are you paying?

MITCHELL: Well, I can't get anywhere near that. I can't get near $22 per hour.

O'DONNELL: We never said that. We just said that's our scale is, $22.50 and benefits.

MITCHELL: What do you think is fair for you guys.

JONES: That's up to you all.

JONES: Ya'll are doing the hiring.

MITCHELL: Anywhere from $15 per hour to $18 per hour and the foreman will make higher than that. But I don't have anyone glueing pipe making more than $18 per hour and I don't think a foreman should be doing pipe.

JONES: Yeah.

MITCHELL: Have you all got phone numbers where I can get in touch with you?

JONES: Are you all not going to hire today?

MITCHELL: Well, [Bobby Cox] wants us to run over there. Apparently, we've got some problems over at OU that we may have to go look at this evening. He's gonna be in a hurry for us to go with him over there, Oklahoma University job.

O'DONNELL: Have you all got applications? How do you all do your hiring procedure?

. . . [Mitchell provides four applications.]

O'DONNELL: When do you think you'll hire?

MITCHELL: I don't know, I might call you guys this evening. But, I don't want to keep you guys, you guys have already been hanging out here. I don't want to keep you here after dark, but that's the way the old man runs.

JONES: [cell phone tone] You gonna be around long enough for us to fill these out?

MITCHELL: Uh, maybe. If I'm not here I can get Buddy to stay.

. . . [Mitchell leaves and employees talk amoung themselves while completing the job the applications. Jones instructs the other Applicants on how to fill out the applications.]

JONES: [In answer to a question regarding comleting the application] Just put plumber and the date you start. That's what he said wasn't it?

. . . .

JONES: what they are looking for is plumbers. Employment desired.

. . . .

POTTER: [approaching the applicants] you get it [the applications] done?

JONES: Yeah

O'DONNELL: you think there's any chance you'll hire us?

POTTER: Yeah.

. . . .

POTTER: You got the OSHA training course?

JONES: Yeah, I do.

. . . .

POTTER: That's a requirement for this job. For every six people we have, we have to have a member on the team that has OSHA card. That's real good.

. . . .

POTTER: When can you all start work?

O'DONNELL: Monday

FRANKLIN: They said they might call us this weekend.

POTTER: Probably so.

. . . .

POTTER: Good, good, good, good. You live in Mustang? You do

JONES: You've got something out in Yukon too?

POTTER: Yeah, we've got a big job.

JONES: You all got a bunch of work, a ton of work.

POTTER: We've got a guaranteed four years solid work if we don't get another job in Oklahoma. Guaranteed four years.

JONES: You think we can organize ya'll?

POTTER: I don't know. [laughter] You can try. I won't mind.

JONES: You think we can organize ya'll.

POTTER: I don't know. [laughter] You can try. I won't mind

JONES: You get any benefits or anything?

POTTER: No, we buy our own insurance.

JONES: Man, you need that, don't ya.

O'DONNELL: You thought about being a union member?

POTTER: I've talked to him a couple of times.

JONES: You a plumber?

POTTER: Yeah. What he says he likes the most about it, he likes the benefits, but what he likes most is that if you don't like someone's bullshit, you say fuck you I'm out of here and go to the hall. And go to work somewhere else.

JONES: Do you think they'll give us any trouble cause we're union on hiring us?

POTTER: I don't think so. That's on you guys. They aren't gonna come get us or nothing. We can hire whoever the fuck we want.

O'DONNELL: We want to get hired on and we want to organize the company.

JONES: That's what we're here for.

POTTER: I tell you what, it will be a big job. It will be a big job with Bobby Cox, he's the owner of this company.

JONES: We want to organize this company and make it move up for everyone. Help you guys out too.

POTTER: What will make it better is if we have qualified help the.

JONES: Thanks, we appreciate it.

POTTER: Good to meet you all.

JONES: Hey, let me give you my card.

POTTER: Alright

JONES: Call me.

POTTER: Alright, I will man.

. . . .

The applicants gave their written applications to Potter when they were completed and they left the jobsite. It was about quitting time at the jobsite.

From time to time Mitchell was not a participant because of unrelated cell phone interruptions and his speaking with other persons on the jobsite regarding the work. During a substantial period of time when the applicants were at the jobsite, Mitchell was not available because he was accompanying a building inspector who was making a scheduled inspection. Mitchell had mentioned the building inspection when he called Jones earlier that day, before he learned of Jones' union affiliation. Potter remained in the area while the Applicants were on the jobsite, and did not work with the tools, but he was not within hearing distance while the applicants were completing the application forms.

The Employer typically recruits new HVAC and plumbing employees by using classified help wanted newspaper ads and by giving recruiting bonuses to current employees who refer prospective employees who are hired. On February 11, the date of the asserted salting effort, the Employer was offering recruiting bonuses for journeyman plumbing applicants. On February 17–23, the Employer placed the following ad in the Norman Transcript, a Norman, Oklahoma newspaper.

> LICENSED HVAC & plumbing journeymen needed to work on multi-family construction projects in OK. Call Bobby Cox at . . . [two telephone numbers].

On February 17, the Employer placed an identical ad in the Stillwater News Press, a newspaper in Stillwater, Oklahoma, located about 66 miles from Oklahoma City. The Employer place the same ad in the Oklahoman, an Oklahoma City newspaper March 2–9.

At the time of the salting effort Cox was recovering from serious health problems and his wife's active role in operating the

company had been curtailed by her own serious health problems. Mitchell testified that Cox had lapses of memory because of his medical issues, which included brain surgery. Because of these problems, a clerical employee had been hired to assist in performing office work at the Employer's office in Princeton and Cox had delegated additional management authority to Mitchell. In particular, Cox relied more heavily than in the past on Mitchell's recommendations regarding hiring employees and the staffing level of projects in Oklahoma. Cox testified, "I ask they all come through me, but, like I said, if Scott says, I want to hire this guy that is good, he would have got hired." I conclude that Cox reserved the right to make the final decision to hire job applicants, but on February 11, his review of the qualifications of applicants recommended by Mitchell was merely procedural, and he did not independently review those applicants' qualifications.

Following his final conversation with the applicants, Potter gave their job applications to Cox, who was in his pickup truck at the jobsite, having driven to Norman from Princeton, Texas, that day, a distance of about 188 miles. I credit Mitchell's testimony that Cox arrived at the jobsite on the afternoon of February 11, rather than in the morning as recalled by Cox in his testimony. Cox routinely visited the jobsites and I find, based on credited testimony by Cox and Mitchell, that Cox's visit to the Norman jobsite at the same time that the applicants were present was coincidental.

Cox testified that he looked briefly at one of the applications and put the applications on the dashboard of his truck. The applications were subpoenaed by the Government, but were not produced. Cox claimed that he had no recall of what happened to the applications after he put them on the dashboard. That testimony was not credibly offered and is highly improbable. The Employer was attempting to hire licensed plumbing journeymen and was giving recruiting bonuses to current employees. Cox did recall that on February 11, Potter had told him that he had called Potter's brother (apparently a union plumber) and had been advised, "this is a setup." In addition, Mitchell testified that Potter had told him that Potter's brother said that it was a "trap." In these circumstances it is unbelievable that Cox would be unable to account for the applications after they were given to him. In reaching this conclusion I have considered Mitchell's testimony that Cox was experiencing short-term memory problems and find that Mitchell's testimony on this issue is insufficient to warrant a different conclusion.

Mitchell and Cox communicated with both cell phones and two-way radio. Mitchell testified that he was sure that he advised Cox that the Applicants were union, most likely by radio, but claimed to not recall Cox's reaction. Cox testified that he must have spoken with Mitchell about the applicants on February 11, but claimed that he had no actual recall of such a discussion. Mitchell and Cox's claimed lack of memory was unconvincing and improbable. It is inconceivable that Mitchell would not have informed Cox of the salting attempt as soon as the Applicants' agenda became apparent. I infer that at the time Cox was given the applications he had been informed of the substance of the conversations the applicants had with Potter and Mitchell.

Cox testified that he could remember that the application that he looked at stated that the position applied for was "organizer" and that he needed plumbers and HVAC workers, not organizers. This testimony regarding the position applied for is not credited because it was not credibly offered and is inconsistent with the testimony of the applicants and the tape recording of Jones instructing the applicants to write "plumber" on their applications as the employment desired. Moreover, Cox's testimony concerning this fact issue is improbable, in part because it would be inconsistent with the Union's interests to apply to work as an organizer, since it would undermine the Union's position in the salting case if, as happened, the applicants were not hired. The Union, of course, had no reason to anticipate that the Employer would contend that the applications had inexplicably disappeared.

Based on credible testimony of the applicants, the tape recording of the applicants discussing the completion of their job applications, and reasonable inferences based thereon, I conclude that on February 11, each of the applicants completed an application for employment with the Respondent as a plumber; each application indicated that the applicant would accept any wage rate; each application indicated that the applicant was prepared to begin work on February 14, the next workday; each application was on a form like those in evidence, e.g., General Counsel's Exhibit 6; and that each application provided the information requested on the form. I further conclude that each applicant noted on his application that he was a union organizer. In this regard, assuming, without deciding, that one or more of the applications bore the notation "organizer," without the word "union," I do not credit Cox's claim that he did not associate the word "organizer" with unions. Cox was a former union member and he conceded that he knew what a union organizer was. Moreover, it is inconceivable that neither Mitchell nor Potter mentioned to Cox that the applicants were union organizers. I impute the knowledge of Mitchell and Potter to Cox. (Potter's disputed status as a supervisor and agent is addressed infra.) Although not necessary to reach the foregoing conclusions regarding the applications, those conclusions are supported by an adverse inference I draw from the failure of the Respondent to produce the subpoenaed applications or to satisfactorily explain their nonproduction.

I conclude that O'Donnell, Franklin, and Mason each have an Oklahoma journeymen plumbing license. Jones was not a licensed journeyman plumber, a fact he repeatedly misrepresented to the Employer. Thus, in their initial telephone conversation, Mitchell stated at that time he was hiring for plumber's work and inquired, "You've got any plumbers experience?" Jones replied, "Uh, yeah. We've got plumbing licenses." Later in the same conversation, after Jones mentioned that he had a couple of buddies who were looking for work, Mitchell asked again about experience and Jones stated, "Oh, we're all licensed journeymen." When the four salts arrived at the jobsite to apply for the plumbing jobs that Jones had discussed with Mitchell, Potter immediately asked, "Are you all licensed?" and the four all said "Yeah." Potter followed up by asking, "All four of you?" and Jones reiterated, "Yeah, all four of us."

Later, after Mitchell and Potter told the applicants that the Employer would be needing hands and it appeared that job

offers might be made, Mitchell again asked if all four were journeymen. Jones initially said, "Yeah." Probably realizing the possibility that his misrepresentation regarding his qualifications might be found out, Jones added, "Actually I've got my mechanical license and I'll have my apprenticeship plumbing license, but I've got my mechanical license." Later Jones told Mitchell that he was the only one without a plumbing license, stating, "I got my apprenticeship plumbing license." Jones testified that he was a pipefitter and welder. He described his credentials as an Oklahoma mechanical license, Oklahoma welder certification, an Oklahoma boiler installation license, and an OSHA safety course.

Jones did not testify that he ever actually had the "apprenticeship plumbing license" he mentioned to Mitchell and there is no evidence that he had taken any steps to qualify himself to work as a plumbing apprentice in Oklahoma. The Employer sometimes referred to apprentices as helpers. The record does not establish what occupation or trade Jones' mechanical license was issued for. Potter and Mitchell may have assumed that Jones mechanical license covered HVAC work, but the evidence does not show that Jones was a licensed HVAC journeyman. None of the applicants were shown to have relevant HVAC skills. The record shows that the Employer's Oklahoma jobsites had some boiler work, but there is no evidence that the Employer was hiring, or had plans to hire employees to perform boiler work or pipefitting work. I note that the Employer subcontracted some of their work.

Cox testified that he told Potter to have the applicants call back regarding their applications. I do not credit this testimony because it was not credibly offered and is inconsistent with other credible testimony. Potter did not tell the applicants to call back, as Cox claimed he had instructed Potter. Rather, the tape recording discloses that Potter asked the applicants when they could start work and O'Donnell replied, "Monday." Franklin said to Potter, "They said they might call us this weekend," to which Potter replied, "Probably." In this regard, I note that the tape recording shows that Mitchell, in response to O'Donnell's inquiry as to when the Employer would be hiring, replied, "I don't know, I might call you guys this evening." Potter confirmed in his final discussion with the applicants that he had phone numbers to reach them. The applicants were never contacted by the Employer before the charge was filed on February 28. Mitchell's testimony, "I never had their phone number" was not credibly offered and is inconsistent with other creditable evidence. As noted above, Mitchell had Jones' phone number, since had called Jones earlier that day. Moreover, Potter had a phone number for each of the applicants. Both Cox and Potter acknowledged by their testimony that Potter had been assigned to meet with the applicants and receive their job applications. Mitchell testified that in his discussions with the applicants he asked, "Have you all got phone numbers where I can get in touch with you?"

The applicants did not attempt to call the Respondent after they left the jobsite on February 11. Jones and O'Donnell testified that in March, after the charge was filed, the Employer offered to hire them, but that the offers were declined.

2. The status of Buddy Potter

Bailey Williams' testified that he and Potter had worked for the Respondent at the Crimson jobsite August–November 2004 and for 1 day in January. Bailey testified that he was a supervisor and that he had the same authority as Potter when they were working together. At the time he testified he was not working for the Employer and he had approached the Union looking for work.

Williams testified that two persons he had recommended had been hired to work at a jobsite in Stillwater, about 82 miles from Norman. Williams stated that the employees were hired a few days later. Williams testified:

> Q. Okay. And to the best of your knowledge, did they actually get interviewed by Mr. Mitchell?
>
> A. To the best of my knowledge, no.
>
> Q. Did they complete a job application when they were hired?
>
> A. It was after they were—they were verbally hired.
>
> Q. Did you communicate to them that they were hired?
>
> A. Yes.

This testimony, elicited with leading questions, has been accorded little weight because the record does not show that Williams had any actual knowledge of what occurred between the time of his recommendations and the hiring of the employees several days later. Williams' conclusory testimony agreeing that he did "communicate" to the employees that they were hired lacks any foundation. Significantly, Williams acknowledged that there was a $100-recruiting bonus for referring each new employee who was hired. The recruiting bonus was available to all employees.

Mitchell testified that before he assumed greater responsibility for the work at the Crimson jobsite, Potter had been his "right hand man." Mitchell testified that Potter's duties had been diminished and that he had been effectively demoted prior to February 11, but Potter had not been informed of his demotion. I found this testimony to be unconvincing, however, this is not affirmative evidence sufficient to establish what authority Potter possessed.

As noted above, Jones had asked Potter and Mitchell, "You all both supervision?" and Mitchell replied, "Yeah. He's the foreman of this job and I handle everything in Oklahoma." Mitchell stated that he answered in this fashion to avoid embarrassing Potter. Mitchell that Potter was aware of his diminished authority, but not how Potter gained such knowledge. Potter was present and participated while Mitchell spoke with the Applicants.

Potter was salaried, while the other employees were hourly. When the applicants were present, Potter did not work with the tools. Mitchell told the Applicants to give their completed job applications to Potter and Potter gave the applications to Cox.

The General Counsel contends that the evidence establishes that Buddy Potter was a statutory supervisor. Section 2(11) of the Act states:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline

> other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It was the General Counsel's burden to prove affirmatively that Potter was a statutory supervisor. See *NLRB v. Kentucky River Community Care,* 532 U.S. 706 (2001). The burden was not satisfied. There are substantial secondary indicia that Potter was a statutory supervisor. Indeed, it appears very likely that he was a supervisor. However, secondary indicia alone are insufficient to prove that Potter was a supervisor. The evidence must affirmatively establish that Potter possessed one of the several primary indicia of statutory supervisory status enumerated in Section 2(11) of the Act. *Wilshire at Lakewood,* 343 NLRB 141 (2004); *Ken-Crest Services*, 335 NLRB 777, (2001).

Bailey Williams' testimony regarding his own authority is insufficient to prove that Potter possessed any of the primary indicia while he worked with Potter. His testimony is inadequate to prove that he effectively recommended the hire of the employees in Stillwater. Thus, while he recommended two unidentified employees be hired, the record is insufficient to permit a determination that they were hired based on his recommendation, rather than an independent evaluation at a higher level. In this regard, the record does not disclose the process that was followed following Williams' recommendation. Even assuming that the evidence establishes that Williams was a supervisor, his conclusory testimony regarding Potter's authority is insufficient to prove that Potter was a supervisor.

The General Counsel contends that Potter was acting as an agent of the Respondent when he spoke with the applicants. The evidence does not establish that Potter's exchanges with the Applicants at the Crimson jobsite were within the scope of his authority or were actually authorized or subsequently ratified. The remaining issue is whether Potter was clothed with apparent authority. In *Saia Motor Freight, Inc*., 334 NLRB 979 (2001), the Board states:

> It is a long-established policy and practice of the Board to apply the common law principles of the Agency. *Allegany Aggregates, Inc.,* 311 NLRB 1165 (1993). Under the doctrine of apparent authority, an agency relationship is established where a principal's manifestations to a third party supply a reasonable basis for the third party to believe that the principal has authorized the alleged agent to perform the acts in question. Id.; see generally *Dentech Corp.,* 294 NLRB 924, 925 (1989). Thus, in determining whether the actions by individuals towards employees are attributable to an employer, the test is whether "under all the circumstances, 'the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management.'" *Waterbed World*, 286 NLRB 425, 426–427 (1987), supplemented by 289 NLRB 808 (1988), supplemented by 301 NLRB 589 (1991), enfd. 974 F.2d 1329 (1st Cir. 1992) (quoting *Einhorn Enterprises*, 279 NLRB 576 (1986), enfd. 843 F.2d 1507 (2d Cir. 1988), cert. denied sub nom. *Star Color Plate Service*, 488 U.S. 828 (1988)); see also *Victor's Cafe* 52, 321 NLRB 504, 513 (1996).

The General Counsel has convincingly demonstrated that the evidence of Potter's apparent authority satisfies the standards articulated in *Saia Motor Freight.* This conclusion is based upon Mitchell having told the Applicants that Potter was the "foreman of the job," Potter's participation in Mitchell's job interview of the applicants; Mitchell telling Jones that he could have Potter remain while the job applications were completed and accept the completed applications; and the extent of Potter's involvement in the application process.

3. Hiring after February 11

Mitchell acknowledged that the Employer needed additional help. Thus, he testified:

> Q. When you run a job where you have plumbers, do you have to keep a particular ratio with respect to licensed journeymen versus helpers? And does it happen that you occasionally get out of ratio and need to hire people?
>
> A. It happens. It does happen.
>
> Q. Was that happening at the Crimson Apartment complex on February 11th, 2005? Is that the reason you needed additional licensed?
>
> A. I believe that the—we definitely could have used more help. There is no question about that. I believe at that point in time I knew that we had—The Links of Stillwater was about to start and Mustang Creek was about to start and I knew that if we didn't get a licensed plumber we would be in trouble in the future so what we were banking on was getting people now and getting them used to the was we operate in order to put those people on those jobs. But we definitely could have used them, some hands, at Crimson Apartments at that time.

The following chart shows the job application date and the hire date of employees the Employer hired to work at jobsites in Oklahoma during the month of February. The dates are, in some cases, partially based on inferences drawn from documents in the record. The record unequivocally establishes, however, that all these employees, other than Patrick Shawn Murray, applied and were hired after February 11. It is probable that Murray filled out his IRS Form W-4 and was hired before the applicants, because the Applicants turned in their applications at the end of the workday on February 11.

Name	*Applied*	*Position*	*Hired*
Patrick Shawn Murray	2/11	HVAC	2/11
Burt Joslin	2/17	HVAC	2/17
William Sidney Cobb	2/16	Plumber's Helper	2/16
Travis Nicholas	2/21	Plumber	2/21
Steve Rosales		Plumber's Helper	2/22
Randall "Scott" Fletcher	2/22	HVAC	2/22
Andrew Dietrich	2/23	Plumber/ Operator	2/23
Jason Taylor		Plumber's Helper	2/23
Jose G. Escamilla	2/23	Plumber's Helper	2/28
David Black	2/28	HVAC Helper	2/28
Jeremy Hamm	2/28	HVAC Helper	2/28
David Joyner	2/28	HVAC Helper	2/28
Wayne Lunsford	2/28	Plumber Helper	2/28
Shannon Payne	2/28	Plumber Helper	2/28
David Trimble	2/28	HVAC Helper	2/28

Mitchell testified that Travis Nicholas was formerly a plumbing contractor and had a contracting license. According to Mitchell, having a contracting license indicated a higher level of knowledge than a journeyman plumber. The record does not establish, however, that the knowledge required to obtain a contracting license was relevant to the work Nicholas was hired to perform. Dietrich possessed an operator license, but the evidence does not show that the Employer was seeking an operator or that his operator license was a factor in the decision to hire Dietrich.

Cox credibly testified that he would not hire a licensed plumber for a helper position. The record does not establish whether he was testifying that would not pay journeyman wages for helper work or that he would not hire an overqualified journeyman to work at helper wages. Cf. *Kelly Construction of Indiana*, 333 NLRB 1272 (2002). The weight of the evidence is that the Applicants were seeking only journeyman positions. When Potter asked what wages the Applicants had to have, O'Donnell answered, "Whatever ya'll think. What's top journeyman get?" The applicants repeatedly stressed that they were journeymen. Mitchell's remarks about wages gave the applicants repeated opportunities to express their interest in working as apprentices, but they did not, nor did they indicate on their applications that they sought apprentice positions. There is an absence of substantial probative evidence that the applicants expressly or implicitly sought jobs as apprentices.

4. Analysis and preliminary conclusions

a. Interrogation

The complaint states that on February 11, Potter interrogated employees about their union affiliation. The Respondent is responsible for any interrogation of the applicants by Potter because of the apparent authority he possessed. On brief, the General Counsel identifies the alleged unlawful interrogation as the following exchange between Potter and the applicants:

> POTTER: You all still union?
> O'DONNELL: Uh huh
> POTTER: What, uh, are you gonna quit?
> JONES: No. Would we have to?
> POTTER: Well, I don't know.
> POTTER: I've always understood that if you were union you couldn't work on non-union jobs.
> JONES: No, it's the other way around.
> POTTER: It ain't now?
> JONES: No

Paid union organizers who seek employment to both obtain work and to organize unrepresented employees are employees protected by the Act. *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995).

The General Counsel argues that an employer violates Section 8(a)(1) of the act when one of its supervisors or agents questions a job applicant about his or her union activities or sympathies and contends that the circumstances are similar to those *in M. J. Mechanical Services,* 324 NLRB 812 (1997).

The Respondent contends that *M. J. Mechanical* is factually distinguishable because Potter did not ask the Applicants how they felt about the union. The Respondent next argues that if *M. J. Mechanical* holds that that an employer commits a per se violation if questions are asked about an applicant's union affiliation during a job interview, it would be inconsistent with the holdings in *Rossmore House*, 269 NLRB 1176 (1984); *Boydston Electric Inc.*, 331 NLRB 1450 fn. 5 (2000); and *Facchina Construction Co.,* 343 NLRB 886 (2004).

The Respondent argues that under *Rossmore House*, not every question about an applicant's or employee's union status or affiliation is a per se violation of the Act and that the question must be coercive under all the circumstances. The Respondent largely adopts the analysis Board Member Higgins in his dissent in *M. J. Mechanical,* which states:

> As to Colon and Derleth, I do not agree that the questions directed to them were coercive. Board law is clear that a question is not coercive simply because it delves into a Section 7 area. The Board looks at the particular circumstances of each case. *Rossmore House,* 269 NLRB 1176 (1984). Further, as Rossmore House makes clear, one such circumstance is whether the employees are known adherents of the union. In the instant case, Colon and Derleth were known adherents of the Union. In addition, based on the questions directed to them, there is nothing to suggest that they reasonably would be coerced. The questions, as reasonably perceived, were aimed at ascertaining how Colon and Derleth, as union members, would protect themselves from union discipline, not whether they were, in fact, union members.

The Board decisions decided since *M. J. Mechanical* clearly show that the Board does not view questions asked of job applicants to be per se violations, at least where the applicants are known union adherents. In *Boydston Electric* the Board states at fn. 5:

> In the circumstances of this case, we adopt the judge's finding that the Respondent did not unlawfully interrogate employee Donald Martin. We note that the Board normally finds the interrogation of an applicant during an interview to be inherently coercive. See, e.g., *Culley Mechanical Co.,* 316 NLRB 26, 27 fn. 8 (1995). However, in this case, Martin, in his own words, "tried to be as obvious as possible" in showing his support for the Union when applying for the job by wearing a union shirt, hat, and pencil clip and the Respondent's representative simply asked him how long he had been in the Union. Thus, noting the open advocacy of the applicant and the nature of the question asked, we do not find this a coercive interrogation under Sec. 8(a)(1).

In *Oil Capital Electric*, 331 NLRB 1450 (2002), the Board acknowledged, but did not find it necessary in that case to address, the apparent tension between *M. J. Mechanical* and *Rossmore House.* In a subsequent case, however, the Board concluded, citing *Boydston Electric*, that where an applicant went to an employer's jobsite wearing a union organizer hat and a jacket with union insignia, the employer did not violate the Act by asking questions about the union. *Facchina Construction*, 343 NLRB at 887. The Board emphasized the open advocacy of the employee and the nature of the questions. Considering all the circumstances of the present case, including the seemingly genuine interest of Potter in union representation and the context in which the questions were asked, the questions were not coercive and did not violate the Act.

b. Impression of futility

The complaint states that on February 11, Potter gave employees the impression that it would be futile for them to select a union as their collective-bargaining representative. On brief, the General Counsel identifies the questioning at issue as the following exchange between Potter and the Applicants:

> JONES: We are the Union. We're here representing the Union.
> POTTER: You trying to bring the Union here?
> JONES: Yeah
> POTTER: That's probably won't happen.
> JONES: What?
> POTTER: That's probably not going to happen.
> JONES: It's not going to happen?
> O'DONNELL: Why not?
> POTTER: The big man's walking around. He's probably not going to buy the union.
> O'DONNELL: Why not. Bring more quality and better work. Better conditions for everyone.
> O'DONNELL: Well, they may not be union now, but everyone ought to have a chance to organize and be union if they want to.
> POTTER: Yeah, that would be nice. You ain't gonna hurt my feelings.

The reference to the "big man" was an obvious reference to Cox. The foregoing exchange took place shortly after Jones asked Potter, "Do you think they'll give us any trouble cause we're union on hiring us?" and Potter replied, "I don't think so." Later, the following exchange took place:

> O'DONNELL: We want to get hired on and we want to organize the company.
> JONES: That's what we're here for.
> POTTER: I tell you what, it will be a big job. It will be a big job with Bobby Cox, he's the owner of this company.
> JONES: We want to organize this company and make it move up for everyone. Help you guys out too.
> POTTER: What will make it better is if we have qualified help the.
> JONES: Thanks, we appreciate it.
> POTTER: Good to meet you all.

The General Counsel argues that Potter's statements sent the message to the alleged discriminatees that union activities would not likely succeed. The General Counsel argues that the circumstances are similar in many respects to those found in *Commercial Erectors, Inc*., 342 NLRB 940 (2004), a salting case, where the Board stated at fn. 4, "Moreover, we find that Tunnell's statement to "forget" about organizing and his prediction that the company "will not go union" were unlawful threats that attempts to unionize the Respondent would be futile." The Employer in *Commercial Erectors* was engaged in erecting a commercial building. Tunnell was the project supervisor and was in charge of hiring at the site.

The Respondent argues that Potter's statements to the applicants are vague and do not indicate that it would be futile for the union members to pursue organizing the Company. The Respondent contends that Potter's expressed interest in the Union and his expressed interest in the applicants being hired are inconsistent with threatening the employees with the futility of attempting to organize the Employer and do not convey futility, even if isolated from the broader context.

Employers who threaten employees with the futility of selecting a bargaining representative violate Section 8(a)(1) of the Act. *Wellstream Corp.,* 313 NLRB 698 (1994). The Respondent is responsible for Potter's remarks on the likelihood of the Union's success in getting the Respondent to recognize the Union.

Potter's statements must be evaluated in the context, not in isolation, and using the standards established by the Supreme Court in *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969). See *Frontier Telephone of Rochester, Inc.,* 344 NLRB 1270 (2005); *Madison Kipp Co.,* 240 NLRB 879 (1979). See also *Rossmore House*, 269 NLRB 1176 (1984). It was obvious that Potter would have no influence regarding union recognition, Potter expressed his own support for union recognition and he was only sharing his personal view that the Union would have a difficult time convincing Cox to recognize the Union. Viewed in context, Potter's remarks were not a threat and did not violate the Act.

c. Refusal to hire

To establish a discriminatory refusal to hire, the General Counsel must first 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 of the positions for hire; and (3) that antiunion animus contributed to the decision not to hire the applicants. The General Counsel must show that was at least one available opening for the applicant. If this is established, the burden shifts to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d. (2002).

The evidence shows that the Employer had concrete plans to hire in the future. That evidence includes the initial telephone conversation between Mitchell and Jones when Mitchell voiced the Employer's need for licensed plumbers, the newspaper advertising, and Mitchell's statements to the applicants at the jobsite regarding the need for licensed plumbers. The hiring records show that the Employer hired two plumbers later in February.

O'Donnell, Franklin, and Mason were experienced journeymen plumbers and clearly had experience and training relevant to the announced or generally known requirements for licensed plumber positions. Assuming, without finding, that a licensed plumber can be employed as an apprentice plumber in Oklahoma, I find that they did not apply for apprentice positions. As noted earlier, they were not shown to be qualified for or to have applied for HVAC positions. Jones was not shown to be qualified as a licensed HVAC journeyman or as a journeyman plumber. He did not apply for a plumber apprentice position and was not shown to have qualified himself under Oklahoma law to work as an apprentice. The evidence does not show that the Employer handled apprentice qualification for its employees. In view of the foregoing, I find that the General Counsel has introduced evidence that satisfies the second FES initial showing requirement regarding O'Donnell, Franklin, and Mason, but not as to Jones.

The General Counsel has satisfied the third initial FES requirement with the testimony of Cox, who testified, in substance, that he did not hire the applicants because they were union organizers.

The burden of going forward accordingly shifts to the Employer to show that it would not have hired O'Donnell, Franklin, and Mason even in the absence of their union activity or affiliation.

At the hearing the Employer contended that the evidence presented by the government does not show that the Applicants were bona fide applicants for employment and that the evidence affirmatively shows that they were not bona fide applicants. These contentions are addressed in detail on brief, including a review of the facts and law that the Employer contends supports its position. The position of the employer is consistent with the concurring opinion of Board Member Cowan in *Exterior Systems, Inc*., 338 NLRB 677 (2002). It is clear that the Employer's position is not the current position of the Board and I am bound to apply Board law, unless it has been overruled by the Supreme Court. Accordingly, I do not undertake an analysis of this contention.

Because the Employer has not met its *FES* burden, I conclude that the Respondent has engaged in a discriminatory refusal to hire O'Donnell, Franklin, or Mason.

d. Refusal to consider

In *FES*, supra, the Board announced that to establish a discriminatory refusal to consider the General Counsel must show that the employer excluded applicants from a hiring process and that antiunion animus contributed to the decision not to consider the applicants for employment. If the General Counsel makes this showing, the burden shifts to the employer to prove that it would not have considered the applicants even absent their union activity or affiliation.

The General Counsel has failed to prove that the Respondent excluded the union applicants from its hiring process. There is no evidence that the applicants were denied the opportunity to apply and to be considered along with nonunion applicants for positions with the Respondent. The fact that Cox, the final decision maker may have summarily rejected the applicants when he read on the applications that the employees were union organizers does not establish a refusal to consider. See *Zurn/N.E.P.C.O*., 345 NLRB 1 (2005).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act by refusing to hire Tommy O'Donnell, Mike Franklin, and Larry Mason.
4. Respondent has not otherwise violated the Act.
5. The unfair labor practice of Respondent affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent must offer employment to the union applicants whom it would have hired but for its unlawful discriminatory practices. There were more qualified journeyman plumbers who applied than positions that were available. As the Board held in *FES,* where the number of applicants exceeds the number of available jobs, the compliance proceeding may be used to determine which of the applicants would have been hired for the openings. See *Zurn/N.E.P.C.O*., above. Accordingly, the determination of which discriminatees would have been hired for the relevant openings will be left to compliance. It is noted that there is no evidence of journeyman plumbers being hired at any of the Respondent's Oklahoma jobsites after February. Based upon position statements filed in connection with subpoena issues before the hearing opened, it appears that the Respondent made unconditional offers of instatement to the discriminatees before other journeyman plumbers were hired and there has been no contention that applicants should have been hired for job openings that were

filled after February. Accordingly, the remedy will be limited to the two journeyman plumber jobs filled in February. The Respondent must make the discriminatees whole for any lost earnings as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]