

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

Advice Memorandum

DATE: April 11, 2005

TO: Robert H. Miller, Regional Director
Region 20

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

SUBJECT: Gary Krezman Electric Inc., d/b/a G&S Electric
Case 20-CA-32108

524-0133-7500
524-8338-0000

In this 8(a)(1) and (3) case, a union salt, who lied on his application about the identity of his previous employers in order to conceal that he was employed by union contractors, was discharged -- ostensibly for falsification of his application. The Region seeks advice on whether the evidence supports the charge that the Union salt was actually fired for his union activity, and, in particular, whether it should argue that the salt's lie was protected as it did not go to his qualifications for the job.

We conclude that the Employer's assertion that it discharged a union salt for falsifying his application is pretextual and that the salt was discharged in violation of 8(a)(1) and (3) due to his union affiliation and activities. [FOIA Exemption 5

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FACTS

Gary Krezman is the owner of Gary Krezman Electric Inc., d/b/a G&S Electric (the Employer), a non-union electrical contractor operating in Northern California with a work force of at least 5 employees. In 2004 the IBEW, Local 340 (the Union), targeted the Employer for a salting campaign. This was not the Union's first attempt at organizing the Employer. In 1999, a Union representative escorted 20 journeymen wearing Union paraphernalia to the Employer's office to apply for work in response to a newspaper advertisement soliciting electricians. The Union representative states that Krezman was present in the office while the Union applicants were filling out applications. After completing the applications, the applicants were told the Employer was only hiring apprentices. The next day, the Union representative took 20 Union apprentice electricians to apply for work. The Employer locked its doors and would not let them in. No

charges were ever filed. The Employer's office manager confirmed the Union representative's account of these events.

Gino DeRobertis is a journeyman wireman who recently became a paid organizer under the employ of the Union. On March 26, 2004,¹ DeRobertis submitted an application for employment as a journeyman in response to a newspaper advertisement placed by the Employer. In conjunction with the application DeRobertis also tendered a resume detailing his employment history. Both the application and resume contained false information because DeRobertis felt if he did not submit a covert resume he might not have been hired. DeRobertis fabricated his employment history by using the names of non-union, out of business, or non-existent electrical contractors for which he never worked. Although DeRobertis falsified his past employers, he did not exaggerate or falsify his skill set. DeRobertis had 5 years experience as an apprentice and 5 years experience as an inside journeyman wireman working for union electrical contractors.

After filling out the employment application, DeRobertis was interviewed by Krezman. Krezman was a former union member and he recognized DeRobertis' last name as he had worked with DeRobertis' father and grandfather on union jobs 26 years earlier. Krezman asked DeRobertis if he and the two men he knew were related. DeRobertis answered affirmatively. Krezman asked DeRobertis why he was not working union like his father. DeRobertis lied that he had tried to get into the union, but it didn't work out. Krezman asked how DeRobertis' father felt about his son not working union jobs. DeRobertis stated that he and his father didn't have a strong relationship and didn't speak much anymore.

Krezman then steered the interview towards DeRobertis' work experience and pay requirements. DeRobertis explained that he had worked mainly smaller jobs, mostly commercial and some industrial, but not residential. Krezman related that his work experience was acceptable because the Employer performs light commercial work. Krezman inquired into DeRobertis' desired wage rate and DeRobertis asked for \$22.00 per hour. According to DeRobertis, he and Krezman agreed to a starting wage of \$18.00 per hour with the possibility that they would negotiate a raise in the near future. According to the Employer, DeRobertis did not ask for more than \$18.00 to start even though the going wage

¹ All dates are in 2004, unless otherwise noted.

for a journeyman electrician with 5 to 10 years experience was \$23.00 to \$25.00 per hour.

After the wage discussion, DeRobertis went with Krezman to a back room to fill out payroll paper work. While filling out paper work, Krezman again asked why DeRobertis was not a union member like his father. Krezman also inquired if DeRobertis knew how much market share the union had. DeRobertis again lied, indicating that he did not know what a market share was. Krezman stated he thought DeRobertis would know from talking to his father. DeRobertis then met with the project manager for the Rocklin Church of Latter Day Saints jobsite and was told to report for work the following Monday morning.

It is undisputed that the Employer did not check DeRobertis' references at the time he was hired. The Employer asserts that Krezman failed to do the reference check because the project manager needed a worker at the jobsite right away. It further asserts that Krezman does not always check an applicant's references, but will do so about 70% of the time, usually if the job is for an important customer, like Costco or Macy's. Neither the office manager nor Krezman's daughter, who works in the office, has ever checked employee's job references in the past.

On Monday, March 29, DeRobertis began work on the Rocklin church site. On Friday, DeRobertis received his pay check in the mail. Because the amount was larger than he expected, DeRobertis called to inquire whether it was a mistake or whether he had been laid off. Krezman said they would look into it, but that DeRobertis was not laid off. Krezman told him that they loved his work and that he was doing a good job out there. The office manager later called DeRobertis and said the check amount was correct.

On Monday, April 5, at about 6:30 a.m., DeRobertis called Krezman and asked for a raise. DeRobertis claims that he asked for \$22.00 per hour, but that Krezman said he could not afford that and they settled at \$20.00 per hour, effective immediately.

The Employer proffered two differing versions of DeRobertis' request for a raise. Krezman first claimed in a position statement that DeRobertis asked for a \$2.00 raise and Krezman said he would consider the request and get back to him later in the day. He then checked the job reports, job costs, and bid costs for the Rocklin church project and determined it was not economically feasible to grant DeRobertis a raise at that time. Krezman claimed that if DeRobertis had proved to be a good employee he

would have considered giving him a raise in the future; therefore Krezman began investigating DeRobertis' work history. Other evidence shows that decisions about raises are not dependent on the amount of money in a project; rather the decision depends on the employee's ability.

Krezman subsequently asserted that he promised to get back to DeRobertis later in the day only because he needed to talk to the project manager to check on DeRobertis' performance because the project manager is in contact with the foreman on the job. Other evidence shows that Krezman never contacted the project manager or the job foreman for information about DeRobertis' job performance, and that the project manager had no involvement in the decision to give or withhold a raise from DeRobertis.

After speaking with Krezman early Monday morning, DeRobertis called the Union representative and reported that the Employer was very happy with his work and he had just received a raise. DeRobertis also told the Union representative that he had spoken with several of the Employer's employees who either had been members of the Union or seemed to be interested in obtaining Union representation, and suggested it was time for the Union representative to visit the jobsite.

The Union representative visited the Rocklin jobsite at lunchtime on Monday, April 5. The Union representative briefly spoke with DeRobertis, two other employees, and the job foreman while distributing Union leaflets. After the Union representative left the jobsite DeRobertis began to speak favorably to the workers about joining a Union due to the good benefits. The foreman stated that the Employer also provided benefits to the workers. DeRobertis asserted that the foreman watched him more closely after the Union representative's visit and questioned him about his father's union affiliation and why he wasn't working union like his father. According to the Employer, sometime on Monday the foreman informed Krezman by phone that a Union representative had been to the jobsite and the foreman showed him the Union leaflet.²

On Monday afternoon at the behest of her father, Krezman's daughter began checking DeRobertis' references. Krezman claims that he instructed his daughter to begin checking DeRobertis' references because he wanted to know if DeRobertis could run work on his own to warrant the wage

² The record does not indicate what time on Monday the foreman informed Krezman of the Union's visit.

increase to \$20.00.³ Krezman's daughter asserts that her father did not ask her to inquire if DeRobertis ever ran jobs or could read plans, but to inquire if DeRobertis had been employed at the places stated for the dates listed. Neither Krezman's daughter nor the office manager had ever been asked to check an employee's references before.

Krezman's daughter first called Don's Electric, DeRobertis' first listed employment reference, and found the number was out of service. She then attempted to call Wright Electric, DeRobertis' second employment reference at 1:35 p.m., but was unable to connect to a working telephone number. Unable to contact them by phone she then used the internet to search for Wright Electric's contact information and ascertained that their electrical contracting license expired in 2000.⁴ She reported this information to her father since DeRobertis' application indicated he worked for Wright Electric from 2000-2002.

Later that afternoon at 4:15 p.m., Gary Krezman personally called DeRobertis' third listed employment reference, Pede Electric. Krezman and Herman Pede have known each other for over 25 years, although they had not spoken for over 20 years. Krezman and Pede used to work together on IBEW Local 340 jobs. Krezman inquired if DeRobertis had ever worked for Pede. Pede stated that while he knew DeRobertis from working together at Placer Electric,⁵ he had never employed DeRobertis. Pede explained that he has an electrical contractor's license, but it has never been active. Krezman asked Pede if DeRobertis was a good worker, Pede replied he was. According to Pede, Krezman then asked, "Do you suppose he is salting me?" Pede responded, "That would be an astute evaluation." Krezman thanked Pede for his honesty and ended the conversation.

After his telephone conversation with Pede, Krezman states that he decided to terminate DeRobertis for lying on his application. He instructed the office manager at 4:30

³ DeRobertis' wage at \$20 per hour would still have him well below the \$23.00 to \$25.00 per hour wage of other journeymen with 5-10 years experience.

⁴ Although Krezman's daughter was unsure whether she checked the internet that afternoon or the next, other evidence indicates that she checked the internet that afternoon, Monday, April 5.

⁵ Placer Electric is a Union contractor.

p.m. on Monday, April 5, to issue DeRobertis' final paycheck first thing the next morning.

Krezman called DeRobertis around 4:30 p.m. and told him that he could not give him a raise.⁶ DeRobertis states that he asked why his raise was being taken away and Krezman replied it was because the funding wasn't in the job.⁷ He asked if Krezman was aware that the Union visited the jobsite that day. Krezman said he was. DeRobertis then inquired if the Union's leaflet was true in stating that unions have higher wages. According to DeRobertis, Krezman replied that DeRobertis should know because his dad was Union. Krezman says he did not terminate DeRobertis during their phone conversation because he did not have a final paycheck prepared to give DeRobertis as required by California State law.

DeRobertis called the Union representative late Monday afternoon and told him that Krezman had rescinded his raise because there was not enough money in the job. They both agreed to meet the next morning at the jobsite and, at 6:30 a.m. on Tuesday, April 6, handed out flyers at the gate claiming that the Employer treated DeRobertis unfairly regarding his request for a raise. DeRobertis was wearing a Union hat and shirt for the first time. When the Employer's foreman saw the leaflet, he approached DeRobertis to ask what it was about. DeRobertis told him it was about his request for a raise. The foreman then asked the rest of the crew if anyone had gone to talk to a Union representative after work the previous day.⁸ DeRobertis answered "yes." At about 7:30 or 8:30 a.m., the foreman faxed the Union's leaflet to Krezman and during a telephone conversation informed him that DeRobertis had been to see the Union representative.

The project manager delivered DeRobertis' final paycheck to him at the jobsite on Tuesday morning at about

⁶ According to DeRobertis, Krezman had already granted him the raise in their morning conversation, and called to rescind the raise agreement.

⁷ Krezman states that DeRobertis did not ask why his raise was denied and therefore he did not offer an explanation.

⁸ The Region has concluded that the job foreman is not a Section 2(11) supervisor.

10:00 a.m.⁹ The foreman informed DeRobertis that he was being terminated for making false statements on his job application.

Krezman recalls only one other employee, about 10 years ago, who lied on his application - he was an escaped felon from prison. Krezman checked this employee's background after becoming suspicious due to conflicting stories. Upon learning of the employment falsification, Krezman did not immediately discharge this employee but instead let him finish the job, because the employee said he would be quitting after completion. However, police came and arrested the employee the next day at the jobsite.

ACTION

We conclude that the Employer's assertion that it discharged a union salt for falsifying his application is pretextual and that the salt was discharged in violation of 8(a)(1) and (3) due to his union affiliation and activities. [FOIA Exemption 5

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In order to establish that DeRobertis' discharge was discriminatory, the General Counsel has the burden of establishing a prima facie case by a preponderance of the evidence that DeRobertis' protected union activity was a motivating factor in the Employer's decision to discharge.¹⁰ To sustain its initial burden, the General Counsel must show 1) that DeRobertis was engaged in protected activity; 2) the Employer knew or suspected DeRobertis' involvement in activities in support of the Union; and 3) that DeRobertis' prounion sympathies and activities were a substantial or motivating factor underlying the discharge.¹¹ Once established, the burden shifts to the Employer to demonstrate that the discharge would have taken place even

⁹ Evidence reflects that the office manager prepared DeRobertis' final paycheck on Tuesday, April 6, at 7:50 a.m.

¹⁰ Wright Line, 251 NLRB 1983 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in Transportation Management, Inc. v. NLRB, 462 U.S. 393 (1983).

¹¹ Naomi Knitting Plant, 328 NLRB 1279, 1281 (1999).

in the absence of the protected activity.¹² The test applies regardless of whether the case involves pretextual reasons or dual motivation.¹³ A "finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel."¹⁴

Specifically, the Board has repeatedly found the firing of union salts unlawful, even though they misrepresented their union background or affiliation on an employment application where the employer's reliance on the misrepresentation is a pretext for discrimination.¹⁵

The evidence supports a prima facie case that the Employer discharged DeRobertis due to his status as a Union salt. DeRobertis' status as a Union salt is protected under the Act.¹⁶ Further, the Employer's belief that DeRobertis was engaged in protected activity is demonstrated by the suspicions Krezman voiced from the

¹² Wright Line, supra.

¹³ Frank Black Mechanical Services, 271 NLRB 1302 fn. 2 (1984).

¹⁴ Limestone Apparel Corp., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). See also Custom Window Extrusions, 314 NLRB 850, 863-868 (1994).

¹⁵ Winn-Dixie Stores, Inc., 236 NLRB 1547 (1978) (employer seized upon employee's omission of prior union employment from his job application as pretext for discharge); Iplli, Inc., 321 NLRB 463 (1996) (same); Solvay Iron Works, Inc., 341 NLRB No. 25 (2004) (employer's refusal to hire a union organizer for misrepresenting his name, which would have been recognized by the employer as belonging to a union business agent, was pretextual); C.T. Taylor Company, Inc., 342 NLRB No. 102 (2004) (discharge of employee who intentionally omitted both prior union employment and worker's compensation claim unlawful as the employer seized upon the falsification of the application as pretext in order to justify the termination).

¹⁶ NLRB v. Town & Country, 516 U.S. 85 (1995). M.J. Mechanical Services, Inc., 324 NLRB 812 (1997) (Board found salting activities to be protected by the Act).

outset regarding DeRobertis' union affiliation. Upon recognizing DeRobertis' last name and realizing that DeRobertis' father and grandfather were both Union members, Krezman repeatedly asked DeRobertis why he wasn't working union like his father and how his father would feel about his son not working for a union contractor. Krezman's belief was reinforced on Monday, April 5, when the job foreman reported the Union's first visit to the jobsite. Although it is not clear precisely when Krezman learned of the Union's visit, at some point on Monday afternoon he instructed his daughter to confirm that DeRobertis had worked at the places listed on his resume. Krezman's suspicions regarding DeRobertis' union affiliation were confirmed Monday at 4:15 p.m. when he personally called DeRobertis' third listed reference, his old acquaintance, Pede. In their brief conversation Krezman directly asked Pede if DeRobertis was salting him and Pede confirmed the suspicions that Krezman harbored from the outset. Krezman states that he decided to discharge DeRobertis after speaking with Pede.

The inference that DeRobertis' union affiliation motivated the Employer's decision to terminate him is supported by its history of animus, the repeated inquiries into DeRobertis' union affiliation, and the precipitous timing of the reference check and discharge.¹⁷ The Employer's history of animus is evident from the Union's 1999 organizational attempt, when Krezman locked his doors on 20 Union applicants seeking employment.¹⁸ When interviewing DeRobertis, the Employer demonstrated concern about his Union activities. Krezman asked DeRobertis numerous questions about his and his father's union affiliation, and the union's market share. The precipitous timing of the Employer's investigation into DeRobertis' employment references also supports the inference of unlawful motivation given that after one full week of

¹⁷ NLRB v. Nueva Engineering, 761 F.2d 961, 967 (4th Cir. 1984) (motive is a question of fact and the Board may infer discriminatory motivation from either direct or circumstantial evidence).

¹⁸ The Board will allow the use of pre-10(b) evidence to show a discriminatory motive for the allegedly unlawful conduct occurring within the 10(b) period where the ostensible reasons offered for that conduct are equivocal or shown not to be the real reasons. See, e.g., Rikal West, Inc., 266 NLRB 551, 568 (1983), enfd. 721 F.2d 402 (1st Cir. 1983).

employment the Employer told DeRobertis that they loved his work, granted him an unconditional raise on Monday morning,¹⁹ then, coinciding with the Union's visit on Monday afternoon decided to investigate DeRobertis' references. It was only after DeRobertis' status as a Union salt was disclosed that the Employer decided to fire him.

The Employer's claim that DeRobertis' discharge was not motivated by union animus, but by its discovery that DeRobertis falsified his application, is unavailing. As noted below, the Employer's reasons for investigating DeRobertis' employment references do not withstand scrutiny.²⁰ Moreover, even if the Employer had legitimate reasons for investigating DeRobertis' references, the Employer has not demonstrated that it has a practice of discharging employees for application falsification.

First, the evidence demonstrates that the Employer would not have investigated DeRobertis' application but for its concern about his Union affiliation. The Employer has no demonstrated history of checking applicants' references. Although the Employer states that he checks about 70% of applicants' references, usually on larger jobs such as Macy's or Costco, it has not offered any evidence to support this claim. Neither the office manager nor Krezman's daughter has ever been asked to check an applicant's references in the past. In addition, if the Employer's practice was to check references on larger jobs, that practice would not support his checking references for this smaller job.

Evidence also refutes the Employer's assertions that it checked DeRobertis' employment history in order to decide whether to grant his request for a raise. DeRobertis' testimony establishes that Krezman had already promised to give him a raise in the conversation early Monday morning before Krezman began to check references, and the raise was to be implemented immediately. According to DeRobertis, Krezman made no mention of checking his

¹⁹ Krezman disputes DeRobertis' claim that the two agreed on a raise that Monday morning. Although Krezman disputes that he agreed to the raise, in our view, as explained more fully below, DeRobertis' claim is more credible.

²⁰ Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966) (where stated legitimate reason for discharge can not withstand scrutiny, Board can infer a proscribed motive).

employment references or job costs and getting back to him at a later time. DeRobertis' assertions that his raise was negotiated and concluded in a single conversation are bolstered by the Union representative's statement that DeRobertis called him Monday morning and announced that the Employer had just granted him a raise.

Krezman's assertion that he did not agree to the raise in the phone conversation does not withstand scrutiny. The explanation he offered for deferring DeRobertis' raise - that he needed to check the job finances - is belied by the evidence that shows that raises are based solely on employee performance and not on job costs.

Krezman subsequently gave a different reason for allegedly deferring DeRobertis' raise - so that he could speak with the project manager about DeRobertis' job performance. That assertion is belied by evidence that shows that Krezman never asked either the project manager or the job foreman about DeRobertis' performance.

The Employer proffered yet another reason for inquiring into DeRobertis' references - namely, that, at \$20.00 per hour, it wanted to make sure DeRobertis could read plans and run a job on his own. However, at \$20.00 per hour, DeRobertis would still be making less than what Krezman paid other workers doing the same work as DeRobertis. This undercuts the Employer's claim that Krezman had to verify that DeRobertis could take on the additional responsibility of running work on his own, to justify the \$2.00 raise. Krezman's assertion that he sought to verify DeRobertis' abilities is also belied by his instructions to his daughter. Krezman told his daughter to simply check DeRobertis' references and make sure he worked where he had listed. She was not instructed to ask about DeRobertis' skill set or inquire if DeRobertis could run a job on his own or read plans. Indeed, when Krezman spoke with Pede whom DeRobertis listed as a former employer, he did not ask Pede if DeRobertis could run a job on his own or read plans; Krezman simply asked him if DeRobertis was a good worker. Once Pede answered affirmatively, Krezman seized on the opportunity and asked Pede if DeRobertis was salting him.

Thus, taken as a whole, the Employer's assertions regarding its reasons for checking DeRobertis' references fail to withstand scrutiny and support an inference that the real reason was an unlawful motive.²¹

²¹ Shattuck Denn Mining Corp., supra.

Finally, even if the Employer had a legitimate reason for verifying DeRobertis' work history, it has failed to prove that it has a practice of discharging employees for falsification of their job applications. In fact, in the one instance the Employer cites that an employee (an escaped convict) lied on his application, the Employer did not discharge the employee but was prepared to allow him to finish the job. The employee failed to do so only because he was arrested.

[FOIA Exemption 5

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22. [FOIA Exemption 5

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23 [FOIA Exemption 5

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[FOIA Exemption 5, cont'd.

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²⁴ [FOIA Exemption 5.]

²⁵ [FOIA Exemption 5

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²⁶ [FOIA Exemption 5 .]

[FOIA Exemption 5, cont'd.

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²⁷ [FOIA Exemption 5 .]

²⁸ [FOIA Exemption 5 .]

²⁹ [FOIA Exemption 5

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[FOIA Exemption 5, cont'd.

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[FOIA Exemption 5

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In sum, the evidence supports an allegation that the Employer discharged DeRobertis in violation of Section 8(a)(3) due to his status as a Union salt. Although the Employer claims that it fired DeRobertis for falsifying his job application, the evidence shows that the reason is pretextual. For the foregoing reasons, the Region should issue an 8(a)(3) complaint, absent settlement.

B.J.K.

³⁰ [FOIA Exemption 5

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³¹ [FOIA Exemption 5

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