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

Advice Memorandum

DATE: October 11, 2016

TO: Dennis P. Walsh, Regional Director
Region 4

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

SUBJECT: Marble Concepts LLC
Case 04-CA-172029

524-0133-7500
524-5012-7400
524-8338

The Region submitted this case for advice regarding the appropriate remedy for an unlawfully discharged Union salt, where the Employer subsequently discovered that the discriminatee had used an alias on (b) (6), (b) job application that had concealed the fact that (b) (6), (b had been responsible for product damage on a prior job with a related employer. We conclude that neither the discriminatee's use of an alias, nor the damage (b) (6), (b caused on another job, defeats (b) (6), (b) right to full backpay and reinstatement where the Employer has not met its burden of proving that it would have discharged the discriminatee based on a preexisting lawfully applied company policy.

FACTS

Marble Concepts LLC ("Marble") is a tile-setting company located in Feasterville-Trevose, Pennsylvania and is owned by a single individual ("Marble's Owner"). Marble's Owner still receives advice about operating (b) (6), (b) business from (b) (6), (b) (b) (6), (b) (7)(C) who previously (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) a different tile-setting company, Lower State Tile LLC ("LST"). LST and Bricklayers and Allied Craftworkers Local 1 ("the Union") were parties to a contract. In 2009, the discriminatee in the current case, who is an (b) (6), (b) (7)(C) for the Union, visited a jobsite where LST was performing work to discuss money LST owed to the Union's benefit funds. While visiting the LST jobsite, the discriminatee walked across a newly-set tile floor, causing significant damage. The general contractor notified the discriminatee that the damaged floor had to be ripped up and replaced. The discriminatee denied causing intentional damage in an email to the general contractor. Although LST is no longer in operation, the Union claims that it still owes $453,000 in outstanding fund contributions.

Around late 2014 or early 2015, the discriminatee had intermittent contact with Marble in (b) (6), (b) capacity as a Union (b) (6), (b) (7)(C). It is not clear what this contact involved.

In late (b) (6), (b) (7)(C) 2016,[1] the discriminatee applied for a job as a tile setter with Marble, using an alias because (b) (6), (b knew Marble's Owner would recognize (b) (6), (b) (real name and identify (b) (6), (b) (7 as a Union (b) (6), (b) (7)(C). Although (b) (6), (provided a false name and home address, the remainder of the information the discriminatee provided during the hiring process was accurate. On (b) (6), (b) (7)(C) Marble hired the discriminatee, and (b) (6), (b) worked for Marble over the next three weeks. On (b) (6), (b) (7)(C) at (b) (6), (b) (7)(AM, the discriminatee sent a text message to all of Marble's employees identifying (b) (6), (b) (7)(C) as a Union (b) (6), (b) (7)(C) and explaining the process and benefits of joining the Union. At (b) (6), (b) (7)(AM, Marble's Owner sent the discriminatee a text message instructing (b) (6), (b) (7)(not to go to the jobsite that day. Because the discriminatee was already traveling to the jobsite, (b) (6), (b continued there and was sent home over what appeared to be a legitimate issue with the drywall. Later that day, Marble's Owner sent the discriminatee a text message thanking (b) (6), (b) (7) for the work (b) (6), (b had performed and told (b) (6), (b) (7) there would be no more work for several weeks. The discriminatee followed up several times over the following weeks to ask if work was available, but Marble's Owner told (b) (6), (b) (7) there was not.

On (b) (6), (b) (7)(C) the Union filed a charge against Marble using the discriminatee's true name. On (b) (6), (b) (7)(C), during the course of the Region's investigation, Marble learned the discriminatee's true name. The Region concluded that Marble violated Section 8(a)(3) and (1) by unlawfully discharging the discriminatee on (b) (6), (b) (7)(C) because of (b) (6), (b) organizing activities.

With regard to the proper remedy, Marble's Owner informed the Region that (b) (6), (b would not have hired the discriminatee if it had known (b) (6), (b) (true name due to the deliberate damage (b) (6), (b had caused to LST's tile floor in 2009. Marble's Owner did not state that Marble had a company policy against using aliases or engaging in dishonesty. Marble has only been in business for about two years and claims this is the first time it has had to discipline or terminate an employee for being dishonest. Marble admits that the discriminatee was a capable employee who could perform all aspects of the work assigned to (b) (6), (b) (7.

ACTION

We conclude that the discriminatee's use of an alias does not limit (b) (6), (b) right to full backpay and reinstatement where the Employer has not met its burden of proving that it would have discharged the discriminatee based on a preexisting lawfully applied company policy.

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[1] All dates are 2016 unless otherwise specified.

Union salts are considered employees under the Act and are thus entitled to appropriate make-whole remedies if discriminated against by their employers.[2] However, a discriminatee's entitlement to reinstatement and backpay can be limited where, post-discharge, the employer discovers misconduct that would have disqualified any employee from continued or future employment.[3] To make this showing, an employer must establish that the discriminatee's conduct would have provided grounds for termination based on a preexisting lawfully applied policy.[4] The Board will not infer that the employer had such a policy, and any ambiguities regarding the existence of such a policy are to be resolved against the employer.[5] If the employer meets its burden of establishing such a policy exists, the discriminatee's remedy is limited to backpay from the date of discharge until the date the employer learned of the discriminatee's misconduct.[6]

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[2] *See NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 90-92, 98 (1995); *Arrow Flint Electric Co.*, 321 NLRB 1208, 1209 (1996) (finding union salt was a bona fide employee) (citing *Sunland Construction Co.*, 309 NLRB 1224 (1992), and *Ultrasystems Western Constructors*, 310 NLRB 545 (1993), *enforcement denied in relevant part* 18 F.3d 251 (4th Cir. 1994)).

[3] *See, e.g., Marshall Durbin Poultry Co.*, 310 NLRB 68, 69-70 (1993), *enforced in part* 39 F.3d 1312 (5th Cir. 1994).

[4] *Id.* at 70; *see also John Cuneo, Inc.*, 298 NLRB 856, 857 n.7 (1990) (backpay may be limited to the period from discharge to the date the employer discovered knowledge of an offense that would have provided the grounds for termination based on the employer's "preexisting lawfully applied company policy"), *on remand from* 792 F.2d 1181 (D.C. Cir. 1986); *Axelson, Inc.*, 285 NLRB 862, 866 (1987); *Frontier Telephone of Rochester*, 344 NLRB 1270, 1277-78 (2005) (finding employer's discovery, post-discharge, of discriminatee's purloining confidential customer information violated employer's valid work rule and limited the discriminatee's backpay), *enforced* 181 Fed. App'x 85 (2d Cir. 2006). The Region should be prepared to distinguish the Board's decision in *North American Dismantling Corp.*, 341 NLRB 665, 666-67 (2004), *on remand from* 35 Fed. App'x 132 (6th Cir. 2002), where the Board stated that it was applying *Wright Line* as the law of the case because the Sixth Circuit had remanded it with that directive.

[5] *John Cuneo, Inc.*, 298 NLRB at 857, n.7.

[6] *Id.* at 856; *see also A. A. Superior Ambulance Service*, 292 NLRB 835, 835 n.7 (1989), *enforced* 720 F.2d 683 (1983); *East Island Swiss Products, Inc.*, 220 NLRB 175, 175-76 (1975).

An employer may establish the existence of a preexisting lawfully applied policy against the type of misconduct a discriminatee engaged in by demonstrating it discharged employees for similar reasons in the past[7] and by testifying credibly that it would have taken similar disciplinary action regardless of the discriminatee's union affiliation.[8] However, the employer's credited testimony alone is not enough; it must provide additional evidence that it would have discharged or refused to rehire the discriminatee for the misconduct at issue.[9] For example, in *First Transit, Inc.*, the Board found a discriminatee who had failed to disclose a prior felony conviction on (b) (6), (b) (7 job application was entitled to full backpay, even though the employer testified (b) (6), (b) (7 would not have been hired had (b) (6), (b) (7 conviction been known, because the application stated criminal convictions did not *per se* preclude employment and the employer provided no additional evidence that (b) (6), (b) (7 would not have been hired.[10]

Here, Marble has not demonstrated that it has a preexisting lawfully applied policy of discharging employees who use aliases or otherwise engage in dishonesty. Marble has not come forward with a written rule stating that it would not tolerate such conduct. It merely asserted to the Region, without evidentiary support, that it would have discharged the discriminatee, or any employee, upon learning that (b) (6), (b used an alias. Marble has no procedure in place to check the identity of job applicants, such as utilizing E-Verify or asking to see a driver's license or other form of identification, from which to infer that Marble had a zero-tolerance policy against

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[7] *See John Cuneo, Inc.*, 298 NLRB at 860 (employer provided evidence that it had discharged employees in the past for making false statements to the company); *Micrometl Corp.*, 333 NLRB 1133, 1135 (2001) (employer presented evidence that it had discharged employees for engaging in "theft or dishonesty").

[8] *See John Cuneo, Inc.*, 298 NLRB at 860 (employer credibly testified it would not have hired discriminatee who lied on (b) (6), (b) (7 job application, even though the discriminatee was the first employee in the history of the company to have lied on (b) (6), (b) (7 application); *Micrometl Corp.*, 333 NLRB at 1135 (same). *Cf. Smucker Co.*, 341 NLRB 35, 36 (2004) (finding employer's established practice of requiring applicants to complete an employment exam provided the basis for the employer's testimony that it would not hire employees who cheated on the exam, even in the absence of an express policy or past practice for dealing with applicants who cheated on the exam), *enforced mem.* 130 Fed. App'x 596 (3d Cir. 2005).

[9] *First Transit, Inc.*, 350 NLRB 825, 829 (2007), *supplementing Ryder/ATE, Inc.*, 331 NLRB 889 (2000), *enforced mem.* 22 Fed. App'x 3 (D.C. Cir. 2001).

[10] *Id.*

the use of an alias.[11] Similarly, Marble did not substantiate its assertion by providing evidence that it disciplined other employees for work-related dishonesty. Indeed, it did not provide evidence of disciplining employees for any reason at all. Thus, the resulting ambiguity as to whether Marble had a company policy against hiring an employee who applied under an alias must be resolved against it.[12] As a result, Marble has not met its burden of demonstrating that the discriminatee is not entitled to a full make-whole remedy.[13]

For the same reasons, we conclude that Marble has not established that it had a policy of either not hiring or discharging employees who had intentionally damaged work at non-Marble jobsites. Again, Marble failed to provide evidence of a written rule on this topic, failed to show that it previously had disciplined employees who had intentionally damaged work on a non-Marble jobsite (or even a Marble jobsite), and failed to provide any other objective basis to substantiate that it maintained such a policy. Indeed, there is no evidence that the discriminatee intentionally caused damage to the tile work on the LST jobsite, and the Employer is not asserting that this incident demonstrated that the discriminatee was not competent to perform the work; in fact, the Employer concedes that (b) (6), (b) was fully capable.

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[11] *See First Transit, Inc.*, 350 NLRB at 829; *cf. Smucker Co.*, 341 NLRB at 36 & n.5.

[12] *John Cuneo, Inc.*, 298 NLRB at 857, n.7.

[13] In the alternative, an employer cannot limit liability for a prior unlawful discharge by seizing, post-discharge, on a union salt's misrepresentation on a job application that concerns (b) (6), (b) union affiliation rather than (b) (6), (b) job qualifications. *See Winn-Dixie Stores, Inc.*, 236 NLRB 1547, 1547-48 (1978) ("the purposes of the Act would not be effectuated by finding lawful a discharge for failure to disclose information which, were it the basis for a refusal to hire, would render such an initial refusal to employ a clear violation"); *Hartman Bros. Heating & Air Conditioning, Inc. v. NLRB*, 280 F.3d 1110, 1112-13, 1116 (7th 2002), *enforcing* 332 NLRB 1343 (2000). The discriminatee had been in contact with Marble in (b) (6), (b) official Union capacity only a year earlier and feared that using (b) (6), (b) real name would immediately have disclosed (b) (6), (b) (b) Union affiliation. (b) (6), (b) did not otherwise misrepresent (b) (6), (b) qualifications for the job or lie to conceal a criminal background or other legitimate reason for denying (b) (6), (b) (7)(employment.

Accordingly, the Region should seek reinstatement and full backpay for the discriminatee.

/s/
B.J.K.

H: ADV.04-CA-172029.Response.Marble Concepts LLC.(b) (6), (b) (7)