

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

Advice Memorandum

DATE: August 1, 2012

TO : Daniel L. Hubbel, Regional Director
Region 17

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

SUBJECT: Aerotek, Inc.

524-0133-7500

Case 17-CA-075605

The Region submitted this Section 8(a)(3) refusal-to-hire case for advice on the issue of whether six Union applicants—whose applications were submitted in a batch by a Union agent to the Employer—were “genuinely interested in securing employment” with the Employer pursuant to *Toering Electric*.¹

We conclude that three of the applicants were “genuinely interested” under *Toering Electric* because they provided the Union agent with the requisite authority to submit their applications and indicated that they would have accepted employment with the Employer if they had been offered jobs. Accordingly, the Region should issue a Section 8(a)(3) complaint as to those applicants provided the remaining *FES* discriminatory refusal-to-hire factors are met. However, the Region should dismiss the refusal-to-hire allegations with regard to the other three applicants, as there is no evidence that they supplied the Union agent with the requisite authority to submit their applications to the Employer.

FACTS

On August 12, 2011, an agent of IBEW Local 22 (“Union”) submitted the resumes of six Union members to Aerotek, Inc. (“Employer”), a temporary employment agency specializing in the supply of electrical workers. The resumes utilized the same format, and their contents were virtually identical with the exception of contact information, years of relevant experience, and certain educational qualifications. Each resume also identified the applicants as voluntary Union organizers.

At the time the Union agent submitted the resumes, three of the applicants—“H,” “J,” and “W”—had given him prior permission to apply to

¹ *Toering Electric Co.*, 351 NLRB 225 (2007).

the Employer on their behalf, and subsequently testified that they would have accepted a position with the Employer had they been offered one. By contrast, two of the other applicants—“E” and “S”—did not give the Union agent permission to submit their resumes to the Employer, and were not aware that the agent had done so.² Although E stated he would have taken a job with the Employer had he been offered one, S stated that he would have accepted a job with the Employer only if the rate of pay and working conditions were desirable to him. The final applicant, “X,” has not cooperated with the Region during its investigation, so there is no evidence as to whether he was aware the Union agent submitted his resume to the Employer or whether he would have accepted a position with the Employer if offered one.

The Employer placed advertisements for needed electrical workers on at least ten separate occasions between the months of July and December, 2011, and in several instances hired Union members who concealed their union affiliation. As of December 2011, the Employer had not contacted any of the six Union applicants for whom the Union agent submitted resumes identifying them as voluntary Union organizers.

In mid-February of 2012, however, an Employer representative left a voice message for H—one of the three applicants who had given the Union agent permission to submit his resume—inquiring into whether he was still seeking a job. H called the representative back twice and left messages each time stating that he was interested in any position the Employer might have, but did not receive any further contact from the Employer. Thereafter, on March 1, the Union filed the instant charge alleging that the Employer discriminatorily refused to hire the six Union applicants in violation of Section 8(a)(3).

ACTION

We conclude that the *Toering Electric* requirement has been satisfied with respect to H, J, and W, the three Union applicants who authorized the Union agent to submit their applications to the Employer and indicated that they would have accepted a position with the Employer had they been offered

² E recalled traveling with the Union agent to a jobsite in Iowa in order to apply for a job, but couldn't recall the name of the employer, and speculated that the employer could have been Aerotek. However, given that E remembers receiving a backpay settlement from that employer as a result of its failure to hire him, it appears that E is confusing Aerotek with Sentry, the subject of a refusal-to-hire charge filed in Region 18 (Case 18-CA-063619).

one. Therefore, the Region should issue a Section 8(a)(3) complaint, absent settlement, as to those applicants, provided that the remaining *FES* refusal-to-hire factors have been satisfied. However, the Region should dismiss, absent withdrawal, the charge allegations regarding applicants E, S, and X, as there is no evidence that they authorized the Union agent to submit their applications to the Employer.

In *Toering Electric Co.*, the Board modified the traditional *FES* framework for determining a Section 8(a)(3) discriminatory refusal to hire.³ *FES* had required that in order to prove such a violation, the General Counsel must initially demonstrate: 1) that the employer was hiring, or had plans to hire, 2) that the applicant had relevant training or experience for the requirements of the position, or in the alternative, that such requirements were not uniformly adhered to by the employer, or were instead pretextual, and 3) that antiunion animus contributed to the decision not to hire the applicant.⁴ *Toering Electric Co.* imposed the additional element that the applicant must be “genuinely interested in securing employment” with the employer, which embraces two separate requirements: 1) a bona fide application for employment, and 2) the genuine nature of the applicant’s interest in employment.⁵

With regard to the first of these requirements, there must be evidence that the individual directly applied to the employer or authorized a third party to do so on his or her behalf.⁶ Batched applications do not fail this test, so long as the requisite authority is demonstrated.⁷ With regard to the second requirement, if the employer puts at issue the genuine nature of the applicant’s interest in employment through some form of evidence that creates “a reasonable question as to the applicant’s actual interest in going to

³ *Toering Electric Co.*, 351 NLRB at 233. See also Memorandum GC 08-04 (Revised), “Guideline Memorandum Concerning *Toering Electric Company*,” dated February 15, 2008.

⁴ *FES*, 331 NLRB 9, 12 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

⁵ *Toering Electric Co.*, 351 NLRB at 233.

⁶ *Ibid.*

⁷ *Ibid.*

work for the employer,”⁸ the General Counsel must prove by a preponderance of the evidence that the applicant in question was genuinely interested in seeking to establish an employment relationship.⁹ One avenue by which the General Counsel may prove an applicant’s genuine interest in obtaining employment is through direct testimony that the applicant would have accepted a job with the employer if offered one.¹⁰

In the present case, Union applicants H, J, and W state that they gave the Union agent prior permission to submit their resumes to the Employer. Although the Employer has not put the applicants’ genuine interest in employment at issue through any evidence,¹¹ those three applicants have stated that they would have accepted a job with the Employer if offered one. Also, in February 2012, after receiving a voice mail message from the Employer asking whether he was looking for a job, H left messages with the Employer stating that he was interested in any position the Employer might have. Thus, we conclude that these three applicants were “genuinely interested in securing employment” with the Employer within the meaning of *Toering Electric*.

By contrast, Union applicants E and S did not give the Union agent permission to submit their resumes to the Employer, nor is there evidence that they authorized the Union agent to submit their resumes to employers generally. And applicant X did not cooperate with the Region’s investigation. Because the Region will be unable to satisfy the “bona fide applicant” prong of *Toering Electric* as to E, S, and X, it will be unable to establish that the Employer unlawfully refused to hire them.

For the foregoing reasons—and assuming that the remaining *FES* discriminatory refusal-to-hire factors are met—the Region should issue a complaint, absent settlement, alleging that the Employer violated Section

⁸ *Ibid.*

⁹ *Ibid.* If the bona fide application requirement has been satisfied and the employer does *not* place at issue the genuineness of the applicant’s interest in employment, the General Counsel’s burden has been met. Thus, in the absence of contrary evidence, the Board does not presume that an application for employment is “anything other than what it purports to be.” *Ibid.*

¹⁰ *Cossentino Contracting Co.*, 351 NLRB 495, 496 (2007).

¹¹ The Employer did not respond to the Region’s requests for evidence in the instant case.

8(a)(3) by discriminatorily refusing to hire H, J, and W. The Region should dismiss the charge, absent withdrawal, in regards to applicants E, S, and X.

/s/
B.J.K.

ADV.17-CA-075605.Response.Aerotek (b) (6), (b) (7)(C)