OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 08-04 (Revised) February 15, 2008

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Ronald Meisburg, General Counsel

SUBJECT: Guideline Memorandum Concerning Toering Electric Company

In Toering Electric Company,[1] the Board changed the burden of proof required for establishing that an individual is a Section 2(3) "job applicant" entitled to statutory protection against hiring discrimination. The purpose of this memorandum is to provide guidance for analyzing, investigating, and pleading Section 8(a)(3) refusal to hire cases under Toering.

## I. Introduction

Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." This proscription against discrimination in regard to hire extends to discriminatory practices that affect applicants for employment.[2] Thus, an employer commits an unfair labor practice by refusing to hire or consider hiring an applicant because of his or her union affiliation.

Prior to Toering, the Board presumed that an individual who submitted an application for employment was a Section 2(3) employee and thus entitled to protection against discriminatory employer practices.[3] In Toering, the Board "abandon[ed] its previous implicit presumption that anyone who applies for a job is protected as a Section 2(3) employee."[4] The Board stated:

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[1] 351 NLRB No. 18 (September 2007).

[2] Toering Electric Co., 351 NLRB No. 18, slip op. at 3, citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 185-186 (1941).

[3] See, e.g., Progressive Electric, Inc. v. NLRB, 453 F.3d 538, 551-553 (D.C. Cir. 2006), enfg. 344 NLRB 426 (2005).

[4] 351 NLRB No. 18, slip op. at 7.

> We hold that an applicant for employment entitled to protection as a Section 2(3) employee is someone genuinely interested in seeking to establish an employment relationship with the employer . . . . We further hold that the General Counsel bears the ultimate burden of proving an individual's genuine interest in seeking to establish an employment relationship with the employer.[5]

Although the holding in Toering is broadly worded, suggesting that an applicant's genuine interest in employment is an issue in all discriminatory refusal to consider and refusal to hire allegations, the Board's treatment of other refusal to hire or recall situations indicates that Toering is intended to apply only in the salting context.[6]

## II. Burden of Proof under Toering

In FES, the Board held that to prove that an employer engaged in Section 8(a)(3) hiring discrimination, the General Counsel has to demonstrate a prima facie case that (1) the respondent was hiring; (2) the applicant had

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[5] Ibid.

[6] See R. Sabee Company, 351 NLRB No. 100, slip op at. 2, fn. 7 (unlike in the salting context, employees who are discriminatorily laid off, or not retained or recalled, need not testify that they would have accepted employment because in these circumstances, as in any unlawful layoff or discharge case, the discriminatees' interest in continued employment is presumed; thus, backpay is appropriate unless the respondent establishes otherwise in compliance proceedings). It would similarly be appropriate in successorship cases to presume that incumbent employees who are discriminatorily refused rehire retain an interest in continued employment at the facility. See Windsor Convalescent Center, 351 NLRB No. 44, slip op. at 15 (September 30, 2007) (post-Toering case where Board held, without discussion, that successor employer must offer employment to the individuals it discriminatorily refused to hire and make them whole for their losses); In re E.S. Sutton Realty Co., 336 NLRB 405, 408 (2001) (because the successor discriminatorily refused to hire the incumbents, it is presumed that substantially all of them would have been retained, citing Smith & Johnson Construction Co., 324 NLRB 970 (1997)).

experience or training relevant to the announced or generally known requirements; and (3) anti-union animus contributed to the decision not to hire the applicant.[7] In Toering, the Board explained that although the FES burden-shifting framework still applies in refusal to hire and consider cases, proof of an applicant's genuine job interest is now also an element of the General Counsel's prima facie case.[8] Specifically, under Toering's modified FES framework, the General Counsel has the burden of proving that an applicant is genuinely interested in seeking to establish an employment relationship with an employer, rather than the employer having the burden of proving the applicant had no such interest. As discussed below, this requirement embraces two components: (1) there was a bona fide application for employment; and (2) the applicant had a genuine interest in becoming employed by the employer.

(A) Application for employment

As to the first component, the General Counsel must introduce evidence either that the individual actually applied for employment or that the individual authorized someone to do so on his or her behalf. If the latter, then agency must also be shown.

With respect to agency, the Board reaffirmed that the fact that applications are submitted in batches does not itself preclude bonafide applicant status, so long as the submitter of the batched applications had the requisite authorization from the individual applicants.[9] Thus, in cases involving batched applications, the Regions should investigate to determine whether the applicants had in fact authorized the submitter(s) to submit applications on their behalf. Evidence that the union regularly confirmed applicants' continuing interest in employment (such as by routinely updating applicant lists or by contacting

[7] FES (A Division of Thermo Power), 331 NLRB 9, 12-13 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). The Board also explained that to establish a discriminatory refusal to consider, the General Counsel bears the burden of showing (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider that applicant for employment. The burden then shifts to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation. Id. at 10.

[8] 351 NLRB No. 18, slip op. at 12.

[9] Toering, 351 NLRB No. 18, fn. 51.

individuals prior to submitting their applications) would support a finding of agency.[10]

(B) Applicant had "genuine interest" in becoming employed

Once the General Counsel has demonstrated that there was an application for employment, his burden is met unless the employer raises "a reasonable question as to the applicant's actual interest in going to work for the employer."[11] An employer may raise such a question by introducing evidence that an applicant recently refused similar employment with the employer; made belligerent or offensive comments on his or her application; engaged in disruptive, insulting, or antagonistic behavior during the application process; or engaged in other conduct inconsistent with a genuine desire to establish an employment relationship with the employer.[12] Similarly, an application that is "stale" or incomplete may, depending on the circumstances, indicate that the applicant did not genuinely seek to establish an employment relationship with the employer.[13]

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[10] The most effective way to prove that the applicant had authorized the submitter to apply on the applicant's behalf is through the applicant's own credible testimony. However, the submitter may also testify that the applicant had authorized it to submit the applications. See, e.g., Mabey v. Maggas, 2007 WL 2713726, slip op. at 8-9 (Tenn.Ct.App. Oct 2007) (property owner's testimony demonstrated that he was authorized to act as co-owner's agent in negotiating a listing contract with a real estate broker. The court noted that the "[t]estimony of an alleged agent is competent to prove agency"); Brumberg v. Chunghai Chan, 25 Misc.2d 312, 204 N.Y.S.2d 315 (1959) (attorney's testimony demonstrated that he was authorized to act as tenant's agent in entering into stipulation with tenant's landlord). Such testimony is not hearsay because it would be offered to prove that the applicant told the submitter to apply on the applicant's behalf, rather than to prove the truth of an assertion by the applicant. See 30B Fed. Practice & Procedure, Federal Rules of Evidence, (Interim ed.) § 7005, Rule 801(c) (when the mere making of the statement is the relevant fact, i.e., tends to establish a fact of consequence, hearsay is not involved).

[11] Id., slip op. at 12.

[12] Ibid.

[13] Ibid. An application would likely be considered "stale" if a significant amount of time has elapsed since the

Once the employer has placed at issue the genuineness of the applicant's interest in employment, the General Counsel then bears the burden of proving by a preponderance of the evidence that the applicant in question was genuinely interested in seeking to establish an employment relationship; that is, "the ultimate burden of proof" rests with the General Counsel.[14] Thus, an employer's motivation for making an alleged discriminatory hiring decision does not become relevant until the General Counsel satisfies his burden of proof as to the applicant's statutory employee status.[15]

The Region may be able to prove that applicants had a genuine interest in employment through their credible, direct testimony that they would have accepted a position with the Respondent if one had been offered.[16] In addition, the Region may rely on the following kinds of evidence: that an alleged discriminatee submitted an application in accordance with the employer's procedures, arrived on time to interviews, made follow-up inquiries regarding the application, had relevant work experience with other employers, and/or was also seeking similar employment with other employers.[17] In Cossentino Contracting Co., for example, the Board held that individuals were genuine applicants for employment because, although they arrived "en masse" at the request of the union, their behavior was orderly, they attempted to submit applications in a manner consistent with the respondent's established procedures,

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individual authorized filing an application, or if it has been on file for a long period without being submitted to an employer for consideration.

[14] Id., slip op. at 9.

[15] Id., slip op at 12.

[16] See, e.g., Cossentino Contracting Co., 351 NLRB No. 31, slip op. 1 (September 2007)(union organizers' credited testimony established that each would have accepted a position with the Respondent if one had been offered).

[17] Cossentino Contracting Co., 351 NLRB No. 31, slip op. at 1. See also Dial One Hoosier Heating & Air Conditioning Co., 351 NLRB No. 48, slip op at 7 (September 2007)(the 80 union applicants who testified at the hearing stated unequivocally that they would have accepted a position if one had been offered; each had personally filed an employment application; and a number explicitly reiterated their interest in employment with follow-up communications and applications).

they had relevant work experience, and there was no evidence suggesting that they were there for any reason other than to apply for work.[18]

Applicants may also present testimony refuting specific evidence proffered by the employer. For example, evidence that the applicant engaged in conduct inconsistent with a desire for an employment relationship may be refuted by demonstrating that the applicant engaged in no such conduct, or that if he did, that the conduct was in response to inappropriate actions or comments by management interviewers.[19] Similarly, an employer's claim that an applicant would not have been able to perform his job duties because he also worked for the union may be refuted by evidence demonstrating why his union responsibilities would not have interfered with his obligations to the employer.[20]

## III. Investigating and Pleading a Section 8(a)(3) refusal to hire allegation

In its pre-complaint investigation, the Region should question each alleged discriminatee as to whether he made or authorized an application and as to his intentions regarding employment with the employer. Further, if the employer disputes the discriminatee's genuine interest in employment during the initial investigation, or if evidence is uncovered during the investigation that would indicate that the applicant does not have a genuine interest in employment, the Region should conduct a full investigation to determine whether complaint is warranted.

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[18] See Cossentino Contracting Co., 351 NLRB No. 31, slip op. at 1.

[19] Cf. Toering, slip op. at 12.

[20] See Cossentino Contracting Co., 351 NLRB No. 31, slip op. at 2, where the Board affirmed ALJ's finding, based on the applicants' testimony, that two applicants who worked full-time for the union were experienced, would have accepted a position if offered, and had a genuine interest in employment. The Board remanded the complaint allegations concerning three other applicants who worked full time for the union because the respondent had put forward evidence reasonably calling into question their genuine interest in employment; since the hearing had taken place prior to the Board's Toering decision, the General Counsel had to be given an opportunity to prove these applicants' genuine interest in employment.

If the Region concludes that a discriminatee was a genuine applicant, and decides to issue a complaint alleging a Section 8(a)(3) refusal to hire or consider, it should specifically allege in the complaint that "[name of employee] applied for [type of job] at [respondent employer] and therefore is an employee within the meaning of Section 2(3) of the Act." The Employer's admission to that assertion in its Answer will preclude litigation of the issue at trial.[21]

## IV. Retroactivity

The Board in Toering held that it was following its "usual practice" of applying new rules not only to the case at hand but to "all pending cases in whatever stage."[22] In following that practice, the Board determines the propriety of retroactive application by balancing any ill effects of retroactivity against "the mischief of producing a result [that] is contrary to a statutory design or to legal and equitable principles."[23] Thus, the Board will apply an arguably new rule retroactively to the parties in the case in which the new rule is announced, and to parties in other cases pending at that time, so long as doing so will not work a "manifest injustice."[24] The Board considers three factors in determining whether retroactive application of a new rule will work a manifest injustice: (1) the parties' reliance on preexisting law; (2) the effect retroactivity might have on accomplishing the purposes of the Act; and (3) whether the losing party would suffer injustice as a result of retroactive application.[25]

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[21] Toering, 351 NLRB No. 18, fn. 52.

[22] Ibid, quoting Deluxe Metal Furniture Co., 121 NLRB 995, 1006-1007 (1958).

[23] SNE Enterprises, 344 NLRB 673, 673 (2005), citing Securities & Exchange Commission v. Chenery Corp., 332 U.S. 194, 203 (1947) (emphasis added). See also Wal-Mart Stores, Inc., 351 NLRB No. 17 (September 2007), slip op. at 9.

[24] See, e.g., Wal-Mart Stores, Inc., 351 NLRB No. 17, slip op. at 9; Pattern and Model Makers Assn of Warren, 310 NLRB 929, 931 (1993); Loehmann's Plaza, 305 NLRB 663, 672 (1991), supplemented by 316 NLRB 109 (1995), review denied sub nom. Food & Commercial Workers, Local 880 v. NLRB, 74 F.3d 292 (D.C. Cir. 1996), cert. denied sub nom.

[25] See Wal-Mart Stores, Inc., 351 NLRB No. 17, slip op. at 9; SNE Enterprises, 344 NLRB at 673.

Applying these principles here, in cases that have not yet been heard by an Administrative Law Judge, Regions should apply Toering retroactively unless retroactive application of the new rule would work a manifest injustice. In cases pending before the Board where the Respondent seeks a remand to challenge for the first time an applicant's genuine interest in employment, Regions should contact the Division of Advice. In cases in which the Board has already reached a determination on the merits, Regions should oppose the application of Toering at the compliance stage because Toering relates to the question of whether alleged discriminatees should have statutory employee status, a predicate to finding a Section 8(a)(3) refusal to hire or consider, and thus is part of the Board's merit determination. Since the purpose of compliance proceedings is to determine final orders and remedies following a determination on the merits, this issue should not be raised for the first time at the compliance stage of a proceeding.[26]

In all cases where the Regions believe that retroactive application is not appropriate because it would work a manifest injustice, they should submit that issue to Advice.

## V. Submission to the Division of Advice

The Regions should submit Toering refusal to hire and consider cases to Advice in the following circumstances:

- where the evidence obtained in the investigation does not clearly resolve the issue of agency raised by an individual allegedly having authorized another individual or institution to submit an application on his behalf;

- where the evidence obtained in the investigation does not clearly resolve questions regarding an applicant's "genuine interest" in employment;

- where the Region believes that retroactive application of Toering would work a manifest injustice or where the Respondent seeks a

[26] Compare Oil Capitol Sheet Metal, Inc., 349 NLRB No. 118 (May 2007) (Board's application of new method for determining the backpay period and instatement right of a union organizer whom the employer unlawfully refused to hire was a remedial issue properly addressed in the compliance stage of the proceeding).

remand from the Board to challenge for the first time an applicant's genuine interest in employment.

In addition, any questions regarding the implementation of this memorandum should be directed to the Division of Advice.

/s/
R.M.

cc: NLRBU
Release to the Public

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