

NLRA Protection Limited to Applicants with a Genuine Interest in Employment

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The National Labor Relations Board recently changed the standard it applies when determining if job applicants are entitled to the protections of the National Labor Relations Act. *Toering Electric*, 351 NLRB No. 18 (Sept. 29 2007). Previously, all applicants were considered covered by the Act, provided the employer had concrete hiring plans, the applicant had relevant experience, and anti-union animus contributed to the employer's decision not to hire the applicant.

Unions often used this liberal definition of "applicant" to flood employers with applications of qualified union members who had no real interest in working for the employer, and then use any rejections to file unfair labor practice charges claiming anti-union animus. The Board's new standard requires proof that the applicant was genuinely interested in a job with the particular company. A lack of genuine interest may be shown by proving the applicant previously rejected a job offer; incorporated belligerent or offensive comments on the application; engaged in disruptive, insulting or antagonistic behavior during the application process; or engaged in other conduct inconsistent with a genuine interest in employment.

This ruling comes at a time when unions are more aggressively attempting to organize the workplace. As discussed by the Board in its decision, part of the union's strategy when organizing is to "manufacture unfair labor practice charges to enmesh the company in Board litigation, thereby imposing costs that would eliminate any competitive advantage the company enjoyed over union contractors." The Board has now made it more difficult for unions to use

bogus applicants for the sole purpose of tying up employers in endless unfair labor practice litigation.

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