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Employers may Violate Federal Law by Refusing to hire Union Organizers

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Here's a challenging scenario for employers: An individual applies for a job. The employer becomes aware that the applicant is a union volunteer who will likely try to organize the workplace if hired.

Can the employer refuse to hire the applicant without violating federal labor laws?

The answer depends on whether the applicant can demonstrate a "genuine interest in employment" apart from, or in addition to, his or her union activities. As demonstrated in a recent case, this may be an easy standard for union organizers to meet.

A National Labor Relations Board (NLRB) administrative law judge recently ruled that an employment screening service improperly refused to place union organizers in non-union workplaces in *Aerotek, Inc. v. International Brotherhood of Electrical Workers, Local 22, affiliated with the International Brotherhood of Electrical Workers, AFL-CIO*.

The case involved Aerotek, Inc. ("Aerotek"), a national employment placement service that serves non-union contractors. In 2011, four union electricians submitted resumes to Aerotek's Omaha, Nebraska office seeking work as either journeymen or apprentices.

The individuals' resumes prominently noted the fact that they were volunteer union organizers for IBEW, Local 22. One worker allegedly told an Aerotek placement intern that he would take any job "to get in to organize electrical contractors in the union."

Aerotek did not contact the individuals for employment, though it did allegedly place numerous electricians without prominent union affiliations in jobs between December 2011 and March 2012. The excluded individuals sued Aerotek for discriminatory employment practices under the National Labor Relations Act (NLRA).

The labor union tactic of placing members at a specific workplace with the intent of organizing a union is commonly known as "salting." Under NLRB precedent, the worker (through the NLRB General Counsel) alleging a

discriminatory refusal to hire in "salting" cases must demonstrate (1) that there was an application for employment, and (2) that the applicant was genuinely seeking to establish an employment relationship with the employer.

If these elements are met, the burden shifts to the employer to show that it would not have hired the applicant, even in the absence of their union activity or affiliation.

In *Aerotek*, the court held that the excluded employees had proven a sufficient "genuine interest" by a preponderance of evidence. The court noted that three of the four union organizer electricians were unemployed or underemployed when they sent their applications to Aerotek, and that they accepted other jobs that became available. The court also relied on the fact that one employee attempted to contact Aerotek twice.

Furthermore, the court inferred a discriminatory motive from Aerotek's disparate treatment of the union organizers versus other applicants. Aerotek had argued that it declined to place the four electricians, in part, because in the past they had earned too much to qualify for the available positions. The court held that this reasoning was pretextual and ordered the company to make the workers whole for loss of earnings and other benefits.

The *Aerotek* case demonstrates that the bar can be surprisingly low for a union organizer to prove a genuine interest in employment. Employers may face a difficult decision on the front end about whether they have sufficient grounds not to hire such individuals without running afoul of the NLRA.

Topics

National Labor Relations Board (NLRB)