

“SALTING” GUIDELINES SUBJECT OF NLRB MEMOS

In response to two recent decisions by the National Labor Relations Board regarding the union organizing tactic of “salting,” the office of the general counsel, which is responsible for prosecuting unfair labor practice cases, issues two guideline memoranda to regional office personnel regarding the investigation and litigation of salting cases under the new standards adopted by the board. Salting is an organizing strategy in which paid or unpaid union supporters, called “salts,” seek employment at a nonunion workplace, commonly in the construction industry, with the goal of organizing the workforce. Management has alleged that salting also has been used to precipitate unfair labor practice litigation against nonunion employers to weaken them.

General Counsel Ronald Meisburg’s memo addresses the board’s decision in *Toering Electric Co.*, 351 NLRB No.18 (2007), that a salt applying for a job is not entitled to protection against discrimination based on union affiliation or activity unless the salt is “genuinely interested” in an employment relationship with the hiring employer. The board also held in *Toering* that the general counsel has the burden of showing that the salt made a bona fide application for employment and had a genuine interest in becoming employed by the employer. There previously had been an implicit presumption that anyone who applied for a job was covered by the National Labor Relations Act.

The second memo issued by Associate General Counsel Richard A. Siegel addresses the board’s decision in *Oil Capitol Sheet Metal Inc.*, 349 NLRB No. 118 (2007), that it will no longer apply a rebuttable presumption that a salt who was not hired because of his or her union activity would have continued to work indefinitely for the employer and is entitled to back pay for the period from the date of the discrimination until the employer makes a valid hiring offer. The board held that the general counsel must prove that the salt, if hired, would have worked for the employer for the period claimed.

In Meisburg’s memo regarding *Toering*, he explains that regional personnel under his supervision have the burden to show that the salt made a bona fide application for employment and that he or she had a genuine interest in becoming employed by the employer. An employer can raise a question as to whether the salt had a genuine interest in becoming employed by showing that the applicant recently refused similar employment, made belligerent or offensive comments on the application, engaged in disruptive or antagonistic behavior during the application process, or engaged in other conduct inconsistent with a genuine interest in employment, or that the application was stale or incomplete. He explains that regional personnel can rebut the employer’s evidence with applicants’ testimony that they would have accepted a job, properly followed the employer’s application procedures, had relevant work experience, and/or were also seeking similar employment with other employers. The board held in *Toering* that the new rules would apply retroactively to all pending cases unless doing so in a particular case would result in manifest injustice.

In Siegel’s memo regarding *Oil Capitol*, he says the shifted burden of proving the duration of a salt’s back pay period to the general counsel “will significantly affect” investigation and litigation of salting cases, especially in older pending cases. Regional personnel should inquire at the outset of the investigation whether the employer claims the alleged discriminatee is a salt in order to begin gathering applicable evidence. If salting status was not raised during the merits stage of the case, regional personnel should include the issue in the compliance investigation stage. During the investigation, regional personnel should look at the salt’s personal circumstances, contemporaneous union policies and practices regarding salting, specific union plans regarding the targeted employer, union instructions to or agreements with the salts regarding the anticipated duration, and historical information on the duration of salts’ employment during similar organizing campaigns by the same union. In all salting cases at the compliance stage, regional personnel should evaluate the administrative record to determine whether the evidence is sufficient to satisfy the general counsel’s burden of proof under *Oil Capitol*.

Meisburg’s memo on *Toering Electric Co.* (GC 08-04) is available at <http://op.bna.com/dlrcases.nsf/r?Open=smgk-7but7g>. Siegel’s memo on *Oil Capitol Sheet Metal* (OM 08-29) is available at <http://op.bna.com/dlrcases.nsf/r?Open=smgk-7but8x>.

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