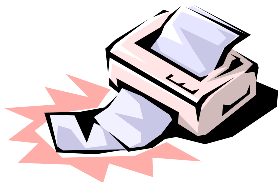
SEATON, BECK & PETERS, P.A.

LAWFAX LAWFAX LAWFAX

ALERTING MANAGEMENT TO BREAKING LABOR AND EMPLOYMENT LAW DEVELOPMENTS



NO. 80 — July 2007

Good News for Employers in Recent National Labor Relations Board Salting Cases

By: Alec J. Beck (with assistance from Law Clerk Todd Garvey)

In This Issue

- Good News for Employers in Recent National Labor Relations Board Salting Cases

Two recent National Labor Relations Board [NLRB] cases together represent a favorable shift in labor law toward support for employers faced with union "salting" campaigns. The result will be more deference to employers in their decisions not to hire certain applicants and higher evidentiary standards for salts seeking damages against employers.

Genuine Proof Of Anti-Union Animus A Necessity In Proving Unfair Hiring Practices

In *E&I Specialists, Inc v. IBEW Local 343,* the NLRB recognized the necessity of actual proof of anti-union animus in complaints against employers for refusal to consider, or hire, union salts. The NLRB held that neither "mere knowledge" by an employer that a pool of applicants were affiliated with a union, nor a stated preference by the employer to remain non-union, would alone, be sufficient to establish anti-union animus. The NLRB also supported the employer's lawful right to accept only applications submitted by individual applicants in person and to prefer ex-employees and referrals from other employees.

The NLRB issued a complaint against E&I, a small industrial electrical contractor represented by Alec Beck of Seaton, Beck & Peters, P.A., for refusal to hire union-employed salts who had applied for advertised openings. Shortly after being awarded a contract for a project, E&I placed a newspaper ad asking for applications from licensed electricians. The International Brotherhood of Electrical Workers [IBEW] immediately began an aggressive salting campaign against E&I. The IBEW sent a number of applications by mail, with a cover letter stating that these applicants would attempt to organize E&I. The Union also sent out "covert" salts, who lied about their intention and their work histories.

At the time, E&I had an unwritten hiring policy that the company would give preference to former employees, applicants known to the owners, and those with industrial experience and proximity to the job site. Despite that, E&I made it clear that all qualified applicants were welcome to apply regardless of union affiliation. Disregarding the fact that E&I eventually hired a handful of known union members, including one salt who was under contract with the IBEW to organize the job site, the union eventually filed a charge against E&I for discriminatory hiring practices for allegedly refusing to consider 23 union members, and the Minneapolis Regional Office of the NLRB sustained the charge and issued a formal complaint against E&I. After a hearing, the NLRB Administrative Law Judge (ALJ) ruled against E&I.

Reversing the ALJ, however, the NLRB held that the union provided insufficient evidence of anti-union animus in E&I's hiring practices to support their claim, and dismissed the complaint outright. The NLRB rejected the ALJ's finding of unfair labor practices and defended E&I's hiring process by stating, "not only is there no direct evidence of animus, but there is evidence *negating* animus." The NLRB refused to infer the

Alec J. Beck
Robin N. Kelleher
Michael L. McCain
Jon S. Olson
Gregory L. Peters
Thomas R. Revnew
Douglas P. Seaton
Sara G. Sidwell
Bryan T. Symes
Corie J. Tarara
Tana S. VanGoethem
Robert L. Grossman, of counsel
Linda C. Schwartz, of counsel

7300 Metro Blvd, #500
Minneapolis, MN 55439
Tel 952-896-1700
Fax 952-896-1704
www.seatonlaw.com

The Upper Midwest's premier management labor and employment law firm.

required animus, emphasizing that simply because an employer knows a group of applicants is affiliated with a union, does not mean the employer is guilty of discrimination if they fail to hire from that group. The holding also supported the right of an employer to maintain a preference to remain non-union without facing charges of anti-union animus, sustaining E&I's preference for personal applications and those with a company connection over impersonal group applications, like those sent by the IBEW.

New Standards For The Refusal To Hire Or Unlawful Termination Of Union Salts

In *Oil Capitol Sheet Metal, Inc and Sheet Metal Workers Local 270*, another breakthrough salting case last month, the NLRB revamped backpay and reinstatement standards in salting cases when National Labor Relations Act [NLRA] violations are found. The NLRB reversed its long-standing (and irrational) presumption that a salt who is not hired is entitled to indefinite wage loss damages. As salts usually remain on the job site for only a short period with no intent to remain to the completion of the job or with the employer thereafter, the NLRB found no reason to treat salts like typical employees who often remain on the site indefinitely. Most importantly, the NLRB shifted the burden of proving the likely length of future employment for determining backpay from the employer to the union salt. If the salt fails to affirmatively prove that the backpay period should run indefinitely, then they will not be entitled to reinstatement in unlawful discharge cases or mandatory hire in refusal to hire cases.

The NLRB affirmed the ALJ's ruling that Oil Capitol had unlawfully refused to hire a union salt, but held that there are different standards for dealing with union salts as opposed to non-salt employees in refusal to hire and unlawful termination cases. The NLRB held that, while the traditional standard that the backpay period should extend indefinitely until the wronged employee is reinstated is "reasonable in an ordinary case," the "policies supporting a presumption of continued employment do not apply with the same force where the applicant is a union salt."

The United States Supreme Court has determined that labor law does not always need to treat paid union organizers and other company employees in an identical manner. The NLRB has now concluded that the standard for calculating backpay remedies for salts is one of those times when union organizers and typical employees must be treated differently. The NLRB has rejected the prior presumption of indefinite employment for salts and shifted the burden of proving the likely duration of a salt's employment from the employer to the salt for three reasons. First, salts typically do not seek long-term employment. Instead, the salt's aim is to organize the independent job site and then quit once the union's "objectives have been achieved or abandoned." Second, the salt or the union are most often in control of how long the employee stays, not the employer. The union that employs the salt possesses most of the evidence as to the intended duration of the salt's employment, and therefore, the burden to produce that evidence is more reasonably placed on the salt or the union rather than on the employer. Finally, the new standard for determining remedies in salting cases effectively avoids punitive backpay awards, which are generally not appropriate under labor law. Awards will now be based on actual damage to the salt flowing from termination, rather than on speculative long-term harm that may "bear no reasonable relation to the injury sustained."

In *Oil Capitol*, the NLRB also linked the established length of backpay owed to any requirement of reinstatement. Since a salt would have terminated his/her employment with the employer once he/she had completed the salting campaign, the employer is not required to reinstate a salt beyond the date to which backpay is proven. If the salt fails to prove any length of warranted backpay, then there is no basis at all for the court to order the salt's reinstatement or mandatory hire.

The decisions in these two NLRB cases mean: (1) it is likelier that an employer's neutral hiring practices can be defended in a salting case (if they have been carefully developed and drafted); and (2) the likely liability if a violation is found will be significantly reduced. Salting is still a problem after these decisions, but an employer can now implement more effective preventive policies and also manage risks better.

For more information regarding these issues and their impact on your business, or for help with the hiring and discipline policies affected by these decisions, please contact the law firm of Seaton, Beck & Peters, P.A. at (952) 896-1700 and ask for Alec Beck or any other available attorney. We would be happy to assist you with a free initial courtesy telephone consultation on these issues. We look forward to hearing from you!

Fax, E-mail or "None of the Above?"

If you are receiving this *LawFax*, you or another member of your organization is a client, a member of one of the trade associations or chambers of which we are also members, or have requested a subscription to our periodic *LawFax*. If you'd rather receive our *LawFax* by e-mail, or if you no longer wish to receive it, please e-mail us at firm@seatonlaw.com or call toll-free at 800-268-5008.

This communication is intended for general informational purposes only and is not intended to constitute legal advice with respect to any individual facts or circumstances. You are urged to consult with one of our attorneys regarding your own situation and your specific question. 2007 Seaton, Beck & Peters, P.A.