

## “SALT” IN THE WOUND? MAKING A CASE AND FORMULATING A REMEDY WHEN AN EMPLOYER REFUSES TO HIRE UNION ORGANIZERS

Unions want access to nonunion employees in order to gain their loyalty and unionize the employer’s business.<sup>1</sup> Employers, conversely, want to restrict a union’s access to their nonunion employees.<sup>2</sup> In the battle for the loyalty of nonunion employees, employers appear to be winning, because union membership continues to decline in America.<sup>3</sup> As a result of this decline, unions have become increasingly creative in their attempts to reach nonunion employees. One tactic unions have employed involves sending paid and unpaid organizers to apply for jobs with nonunion employers<sup>4</sup> for the purpose of attempting to unionize the employer’s workforce.<sup>5</sup> This practice is known as “salting.”<sup>6</sup>

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1. A union’s right to access nonunion employees has been debated for decades. *See, e.g., Bonwit Teller, Inc. v. NLRB*, 96 N.L.R.B. 608, 613 (1951), *enforcement denied on other grounds*, 197 F.2d 640 (2d Cir. 1952) (holding that when an employer addresses nonunion employees on company time, union should have same opportunity to address employees). For examples of the debate concerning the availability of nonunion employees to union organizers, see William B. Gould, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73 (1964); Jay Gresham, Note, *Still as Strangers: Nonemployee Union Organizers on Private Commercial Property*, 62 TEX. L. REV. 111 (1983).

2. There is a wide body of case law concerning employers’ efforts to limit union contact with their employees. *See, e.g., Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (holding that employer had a right to restrict distribution of union literature by nonemployee organizers where employer sought to prevent organizers from entering company property); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 & n.10 (1945) (upholding employer’s right to restrict nonunion employees from soliciting coworkers on company time).

3. In 2001, 13.5% of wage and salary workers were union members. BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR UNION MEMBERS SUMMARY, Jan. 2002, *available at* <http://www.bls.gov/news.release/union2.nr0.html>. This equates to 16.3 million workers. *Id.* The union membership rate has continuously fallen from 20.1% of the working population in 1983, the first year for which comparable union data are available, to its current rate. *Id.* The steadiness of membership rates in the public sector, particularly protective service workers, like police officers and firefighters, has marginally offset the overall decline in unionization. *Id.* The unionization rate of government workers in 2001 was 37.4%, while unionization in the private sector was considerably lower at 9%. *Id.*

4. *See NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 87 (1995) (describing union members applying for jobs with a nonunion employer). For a discussion of union tactics in organizing, see Michael Ballot, *New Directions in Union Organizing*, 45 LAB. L.J. 779 (1994).

5. *See Town & Country Elec.*, 516 U.S. at 88. The Court noted that the union members intended to try to organize the company if they secured jobs. *Id.* *See also* James L. Fox, “Salting” the Construction Industry, 24 WM. MITCHELL L. REV. 681, 683 (1998) (describing the organizer’s goal of getting hired in order to engage in organizing activity).

6. The term “salting” appears to originate from the concept of “salting” a mine, where metal or ore is introduced into a mine to create a false impression that the substance is actually in the mine. *Id.* at 682. It may also relate to the phrase “salting the books,” where books of account are falsified. *See Tualatin Elec., Inc.*, 312 N.L.R.B. 129, 130 n.3 (1993). *See also* R. Wayne Estes & Andrea E. Joseph,

Historically, the infiltrating union organizers, known as “salts,” hid their motives when applying for jobs with nonunion employers.<sup>7</sup> If an employer discovered that an applicant or employee was a union organizer, the employer usually responded by refusing to hire or subsequently discharging the organizer.<sup>8</sup> Once unions lost this kind of insider access to the nonunion employees, their ability to organize the workforce decreased significantly.<sup>9</sup>

The necessity for surreptitiously using salting as an organizing tool ended in 1995 when the Supreme Court extended to salts the statutory protection against discrimination provided to other “employees”<sup>10</sup> in *NLRB v. Town & Country Electric*.<sup>11</sup> In *Town & Country*, the Supreme Court held that paid and unpaid organizers were “employees” like any other job applicant, thus deserving protection from discrimination under the National Labor Relations Act<sup>12</sup> (NLRA). This protection has emboldened union organizers to inform employers of their organizer status either verbally or in writing on the job application.<sup>13</sup> Unions use this

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*Missing Analytical Link in Supreme Court’s “Salting” Decision Disturbs Balance of Union-Management Rights: A Critical Analysis of NLRB v. Town & Country Electric*, 30 IND. L. REV. 445, 446 (1997) (citing Sullivan Elec. Co., 1995 NLRB LEXIS 82 at \*4, \*5) (comparing the fraudulent scheme of salting a mine to the union’s practice of getting people into jobs who are not really interested in employment).

7. “Salts” would not advertise their union status because, prior to the decision in *Town & Country*, some courts held that nonunion employers could deny jobs to applicants simply because of their union affiliation. *See, e.g., H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 72-73 (4th Cir. 1989) (denying union’s argument that union applicants should receive the same protections received by other applicants). *See also infra* note 28.

8. *See, e.g., NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953, 958 (6th Cir. 1998) (describing termination of employee who was affiliated with union and refused to cross picket line); *Ultrasystems W. Constr., Inc. v. NLRB*, 18 F.3d 251, 253 (4th Cir. 1994) (noting employer was aware of salts’ unionizing effort and did not hire any of sixty-six applicants for its open positions). While the National Labor Relations Board sought to protect these workers, *see infra* note 27, unions could not count on the courts of appeals’ support to protect their organizers when they applied for jobs. *See, e.g., Zachry*, 886 F.2d at 73 (holding that union organizers are not “employees” covered by the National Labor Relations Act (NLRA) because they are loyal to the union, not the employer).

9. Refusing to hire union sympathizers is an effective tool for employers in preventing union organization. *See generally* William N. Cooke, *The Rising Toll of Discrimination Against Union Activists*, 24 INDUS. REL. 421 (1985).

10. The Supreme Court had already extended protection to applicants for employment in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

11. 516 U.S. 85 (1995).

12. *Id.* at 87. The pertinent language from the National Labor Relations Act is as follows: “The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer . . . .” 29 U.S.C. § 152(3) (2000).

13. For an example of salts notifying employers of their organizer status, see *NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953, 956 (6th Cir. 1998) (noting that applicants wrote “voluntary union organizer” or similar words on job applications). The practice of salting is particularly pervasive in the construction sector. *See* Northup, *infra* note 14. The construction industry is one of the few private-

disclosure as a challenge to employers either hire organizers and allow them to attempt to organize the workforce, or not to hire the organizers and face the possibility of violating the NLRA.<sup>14</sup> If an employer does not hire the organizers, the union can file a charge with its local branch of the National Labor Relations Board (the Board), anticipating that the General Counsel for the Board (the General Counsel) will in turn file an unfair labor practice charge against the employer on the union’s behalf.<sup>15</sup> The Board and, if a decision is appealed, the federal courts of appeals, have jurisdiction to determine if the General Counsel proved that the employer actually refused to hire the union organizers based on their status, which would be impermissible under the NLRA.<sup>16</sup>

The General Counsel’s decision to file unfair labor practice charges depends upon his ability to establish a prima facie case for refusal to hire. The elements of this prima facie case have evolved over time at the Board’s direction.<sup>17</sup> Initially, the Board held that the General Counsel established a prima facie case by showing that the employer expressed antiunion animus and generally refused to hire union adherents.<sup>18</sup>

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sector areas that witnessed higher-than-average unionization rates at 18.4%—in 2001. *See supra* note 3.

14. Several commentators argue that unions attempt to put employers in a no-win situation by either forcing an employer to hire salts or initiating unfair labor practice charges against an employer who does not hire salts. *See, e.g.*, John A. Litwinski, *Regulation of Labor Market Monopsony*, 22 BERKELEY J. EMP. & LAB. L. 49, 80 (2001) (arguing that unions engage in salting in order to raise nonunion employers’ costs and thereby encourage unionization); Herbert R. Northrup, “*Salting*” the Contractors’ Labor Force: Construction Unions Organizing with NLRB Assistance, 14 J. LAB. RES. 469 (1993).

15. Under these circumstances, the National Labor Relations Board (Board), through its General Counsel, charges an employer with violating section 8(a)(3) of the NLRA, which provides that “it shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .” 29 U.S.C. § 158(a)(3) (2000).

16. Refusing to hire a union organizer solely because of his status is impermissible under section 8(a)(3) of the NLRA. *See supra* note 15. *See also* *Ultrasystems W. Constr., Inc. v. NLRB*, 18 F.3d 251 (4th Cir. 1994) (holding that a refusal to hire applicants because of union affiliation violated Section 8 of the NLRA).

17. *See* Part II of this Note for a discussion of the evolution of the prima facie case under the NLRA. Generally, a prima facie case is “[a] party’s production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party’s favor.” BLACK’S LAW DICTIONARY 1209 (7th ed. 1999). In making a prima facie case, a plaintiff must allege certain elements. The Supreme Court has explained that a prima facie case “not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff’s burden of producing enough evidence to permit the trier of fact to infer the fact at issue.” *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981) (citing 9 J. WIGMORE, EVIDENCE § 2494 (3d ed. 1940)).

18. *See* *Great Lakes Chem. Corp. v. NLRB*, 967 F.2d 624, 627-28 (D.C. Cir. 1992) (upholding Board’s determination that display of antiunion animus was so pervasive during employer hiring that all applicants were discriminated against).

Recently, however, the Board has modified its approach and now requires that the General Counsel show a connection between an applicant and a specific job opening at the time of the alleged discrimination, in addition to showing antiunion animus.<sup>19</sup> While the Board now requires more evidence from the General Counsel,<sup>20</sup> the courts of appeals have not yet examined the Board's new approach,<sup>21</sup> and the Supreme Court has not spoken on the issue. The Board's recent modification of the prima facie case requirements better comport with prior courts of appeals holdings than the earlier tests.<sup>22</sup> However, the Board's approach would better withstand future scrutiny if, in addition to showing antiunion animus, the General Counsel had to match job openings to candidates in order to make a prima facie case for refusal to hire.<sup>23</sup> Job matching would ensure that only those applicants who are actually qualified for a position, and thus legitimate victims of discrimination, are protected under the NLRA.<sup>24</sup>

Part I of this Note examines discrimination in hiring in the salting context from its recognition by the Board in 1975 until today. Part II examines how the Board makes a prima facie case of discrimination in hiring under the NLRA. Part III compares discrimination in hiring in the NLRA context to the similar Title VII context. Part IV examines four courts of appeals' applications of the Board's evolving test to their cases. Finally, Part V of this Note explains why the best approach to determining discrimination in hiring is to require the General Counsel to match job openings to specific candidates, as well as to show evidence of antiunion animus in order to make a prima facie case for discrimination in hiring under the NLRA, and to tailor a remedy that only addresses the applicants who were discriminated against.

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19. The Board announced a new rule for making a prima facie case in *FES (A Division of Thermo Power)* 331 N.L.R.B. (2000), *aff'd* 301 F.3d 83 (3d Cir. 2002). The Board required its General Counsel to show that at least one applicant was not hired for a specific job because of discrimination. *Id.* at 14.

20. *See infra* notes 76-77 and accompanying text.

21. The Board instituted its most recent test in 2000, and the Third Circuit, the only court of appeals to date to apply the new test, did not comment on it in its opinion. *See FES*, 301 F.3d at 87.

22. The Board's most recent test was adopted from the Seventh Circuit's rationale in *Starcon, Inc. v. NLRB*, 176 F.3d 948, 951 (7th Cir. 1999), and is consistent with *Ultrasystems*, 18 F.3d at 256. *See also infra* note 78.

23. *See infra* Part V.

24. *See infra* note 169 and accompanying text.

## I. SALTING AND DISCRIMINATION IN HIRING: A HISTORY

Unions developed salting as a way to gain access to employees of nonunionized companies and to organize their workforces.<sup>25</sup> Prior to 1975, because the courts did not yet protect the practice of salting<sup>26</sup> and the Board did not yet recognize the practice,<sup>27</sup> salts could not identify themselves as such because a prospective employer could, and would, refuse to hire them without facing the threat of an unfair labor practice charge.<sup>28</sup> Under the structure of the NLRA, when a union believes that an employer has committed an unfair labor practice in violation of the NLRA, it files a charge with the Board requesting that the Board's counsel file an unfair labor practice charge against the employer on its behalf.<sup>29</sup> In the first stage of inquiry, the Board's local counsel reviews the union's complaint to determine whether there is evidence to show that the employer has committed an unfair labor practice.<sup>30</sup> If the Board's counsel at the Regional Office believes the employer has committed an unfair labor practice, he attempts settlement with the employer.<sup>31</sup> In the majority of cases, the employer settles with the Board at the Regional Office level.<sup>32</sup> If, however, the matter is not settled, the Board's counsel files a

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25. See Note, *Organizing Worth Its Salt: The Protected Status of Paid Union Organizers*, 108 HARV. L. REV. 1341 (1995). One of the reasons for the growth of the practice of salting is the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. at 541, in which the Court held that employers can prevent union organizers from approaching employees on the employer's property. When the avenue of nonemployee soliciting was closed by the *Lechmere* decision, unions had to find alternate means of reaching nonunion employees. *Organizing Worth Its Salt, supra*, at 1341.

26. Courts did not uniformly protect salting until the Supreme Court's decision in *Town & Country*, 516 U.S. at 90-92.

27. The Board first recognized salting in 1975 in *Oak Apparel, Inc.*, 218 N.L.R.B. 701, 701 (1975).

28. See *Town & Country Elec. v. NLRB*, 34 F.3d 625, 628-29 (8th Cir. 1994), *vacated by*, 516 U.S. 85 (1995); *H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 72-73 (4th Cir. 1989) (holding that union organizers are not an employer's prospective "employees" under the Act because they are already employed by their unions); *NLRB v. Elias Bros. Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964) (holding that union organizer was not bona fide employee).

29. 29 U.S.C. § 160(b)(2000). The union files the charge at one of the Board's Regional Offices, where the initial investigation is conducted. See *infra* note 30. These regional offices are supervised by the General Counsel, who is independent of the Board itself and ultimately decides which cases are prosecuted. When a case is prosecuted, it is heard by an administrative law judge at the regional level and can be appealed to the Board for final agency determination. See *infra* note 32.

30. The Board's Counsel at the Regional Office level collects evidence and interviews employees, union members, and the employer involved in order to make a finding. See generally S. STRAUS & J. HIGGINS, PRACTICE AND PROCEDURE BEFORE THE NATIONAL LABOR RELATIONS BOARD (5th ed. 1996).

31. See STRAUS & HIGGINS, *supra* note 30.

32. Generally, one-third of the approximately 35,000 unfair labor practice cases filed annually are found to have merit, and 90% are settled at the Regional Office level. NATIONAL LABOR

complaint against the employer. Assuming that the General Counsel for the Board in Washington, D.C., agrees to pursue the case, an administrative law judge will be appointed to hear the case.<sup>33</sup> If either party appeals the administrative law judge's decision, a three-member panel or the full five-member Board in Washington, D.C., will have the discretion to hear the case and enter its decision.<sup>34</sup> If the Board rules in favor of the union, the Board will then order the appropriate remedy to cure the unfair labor practice.<sup>35</sup> Either the union or the employer can appeal the Board's final decision directly to the federal court of appeals if it disagrees with the order or if it needs the help of the federal court to enforce the order against the losing party.<sup>36</sup> After the court of appeals decides the case, the only remaining recourse for a losing party is to seek certiorari to the United States Supreme Court.<sup>37</sup>

The Board first addressed salting in *Oak Apparel Inc.* in 1975.<sup>38</sup> In *Oak Apparel*, the Board recognized salting by holding that organizers, including those who were only seeking temporary employment, were still "employees" deserving coverage under the NLRA.<sup>39</sup> In spite of the Board's holding, courts of appeals did not uniformly accept salting as a protected activity, and, as a result, case law on the issue did not develop quickly.<sup>40</sup>

The Supreme Court ultimately extended the protection enjoyed by employees and applicants under the NLRA to salts in its 1995 decision in

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RELATIONS BOARD, FACT SHEET ON THE NATIONAL LABOR RELATIONS BOARD, available at <http://www.nlr.gov/facts.html> (last visited Feb. 1, 2003).

33. 29 U.S.C. § 160(b) (2000). See also *supra* note 30.

34. *Id.*

35. 29 U.S.C. § 160(c) (2000).

36. 29 U.S.C. § 160(f) (2000). Courts of appeals must accept the Board's findings of fact "if supported by substantial evidence on the record considered as a whole." *Id.* The Supreme Court indicated that the Board is due deference because it is "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). The Board has the authority to make law through either adjudication or rulemaking, but generally does so through adjudication. See Edward Silver & Joan McAvoy, *The National Labor Relations Act at the Crossroads*, 56 *FORDHAM L. REV.* 181, 196-99 (1987).

37. U.S. CONST. art. III, § 2. The United States Supreme Court has appellate power over "the Laws of the United States," of which the NLRA is included. *Id.*

38. 218 N.L.R.B. at 701 (1975) (holding that paid union organizers are "employees" deserving protection under the National Labor Relations Act).

39. *Id.*

40. The Board did not again address salting until *Sunland Constr. Co.*, 309 N.L.R.B. 1224 (1992), and *Town & Country Elec., Inc.*, 309 N.L.R.B. 1250 (1992), *enforcement denied* 34 F.3d 625 (8th Cir. 1994), *cert. granted*, 513 U.S. 1125 (1995), and *vacated*, 516 U.S. 85 (1995), where the Supreme Court ultimately recognized salting as a protected activity.

*NLRB v. Town & Country Electric*,<sup>41</sup> ending twenty years of uncertainty regarding the rights of organizers.<sup>42</sup> Since this decision, unions, particularly in the construction industry,<sup>43</sup> have felt strengthened by the new protection, and have begun to order their organizers to advertise their status as such in their job applications.<sup>44</sup> As a result of this protection for organizers, employers are exposed to a union threat in either of two ways. If the applicants are hired, they engage in unionizing activity.<sup>45</sup> If the applicants are not hired, the union can file an unfair labor practice complaint with the Board.<sup>46</sup> Generally, if the Board finds that an employer has committed an unfair labor practice, it will order a remedy in the compliance stage that requires the employer to cease and desist its discriminatory activity and to offer employment with back pay to certain individuals who suffered discrimination in hiring.<sup>47</sup>

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41. *Supra* note 4.

42. *Compare* Willmar Elec. Serv., Inc. v. NLRB, 968 F.2d 1327, 1330-31 (D.C. Cir. 1992) (holding that paid union organizers were protected under the NLRA), *with* H.B. Zachry Co. v. NLRB, 886 F.2d 70, 72-73 (4th Cir. 1989) (holding that paid union organizers are not truly in search of a job and act under instructions from their union).

43. For a discussion of salting in the construction sector, see Northrup, *supra* note 14. Northrup argues that the goal of unions is either to organize the work force or precipitate an unfair labor practice proceeding that will be costly to the employer and weaken its ability to fight the union. *Id.* at 472-73. *See also* Kathleen Scheil Scheidt, National Labor Relations Board v. Town & Country Electric, Inc.: *Allowing a Trojan Horse to Trample Employer Rights*, 24 J. CORP. L. 89 (1998).

44. *See, e.g.,* Int'l Bhd. of Boilermakers v. NLRB, 127 F.3d 1300, 1302 (11th Cir. 1997) (recounting that salts gave employer a letter identifying themselves as union organizers and announcing their intent to organize workers at the job site); *and* NLRB v. Fluor Daniel, Inc., 161 F.3d 953, 956 (6th Cir. 1998) (noting that union organizers wrote “voluntary union organizer” on job applications).

45. *See, e.g.,* Douglas Foods Corp. v. NLRB, 251 F.3d 1056, 1058 (D.C. Cir. 2001) (describing employees’ attempts to organize by passing out union cards and asking coworkers to sign them).

46. *See, e.g.,* Int'l Bhd. of Boilermakers, 127 F.3d at 1308-09 (upholding unfair labor practice determination when employer failed to hire known union organizers and union responded by filing unfair labor practice charge).

47. *See, e.g.,* Eckert Fire Prot., Inc., 332 N.L.R.B. No. 18, 2000-2001 NLRB Dec. (CCH) ¶ 15.617 (Sept. 21, 2000) (holding that where employer refused to hire applicants because they were union organizers, remedy included cease and desist order and order to offer employment to those discriminated against with back pay). The remedy for refusal-to-hire cases has been as inconsistent as the finding of discrimination itself, as seen by the wide variation in orders to hire entered by the Board and the courts of appeals. *See infra* Part IV. In recent cases, the Board appears to be seeking to invoke some consistency into the remedy formula that would more likely be upheld by courts of appeals. In light of courts’ views of the Board’s test in *NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953, 966-71 (6th Cir. 1998) (refusing to uphold Board’s order that all “salt” applicants be offered employment in the original or substantially similar positions where there may have been more applicants than jobs) and *Starcon, Inc., v. NLRB*, 176 F.3d 948, 951-52 (7th Cir. 1999) (overturning Board order to offer positions to all union-organizer applicants where there were substantially fewer available jobs than applicants), the Board announced a new test in *FES*, *supra* note 19, at 14 (outlining new test where General Counsel “must show there were openings for the applicants” to receive an affirmative back pay and instatement order). The risk to employers was particularly high if the Board ordered instatement with back pay as a remedy. *See Eckert, Fluor Daniel, Starcon, and FES, supra.*

## II. HOW DOES THE NLRB MAKE A PRIMA FACIE CASE THAT AN EMPLOYER HAS COMMITTED DISCRIMINATION IN FAILING TO HIRE SALTS?

### A. The Original “In-Part” Test

The Board found it difficult to formulate a test for discrimination in hiring when evaluating a union’s charge that an employer had committed an unfair labor practice.<sup>48</sup> The Board initially looked to discriminatory discharge case law for guidance, because case law in the discharge context had already been developed both by the Board and by courts.<sup>49</sup> If an employer discharged an employee because of his status as a union organizer, the Board determined that it had committed an unfair labor practice by interfering in the employee’s “right to self-organization.”<sup>50</sup>

The Board struggled to determine the employer’s motive because an employer could allege something other than union organizing activity as the reason for discharge.<sup>51</sup> If an employer has an improper motive for discharging an employee, its alleged legitimate nondiscriminatory reason falls into one of two categories. The alleged reason is either a pretext, which is a clear violation of the NLRA, or a combination of permissible and impermissible motives, which is called “mixed” or “dual motive.”<sup>52</sup> Mixed-motive cases were particularly difficult to address because the Board had to sift through permissible and impermissible motives to assess whether an unfair labor practice had indeed been committed.<sup>53</sup> In light of

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48. This difficulty can be seen by the change in the test’s formulation from the 1992 *Great Lakes* decision as upheld by the D.C. Court of Appeals until the most recent test announced in *FES*. See *Great Lakes Chem. Corp. v. NLRB*, 967 F.2d 624 (D.C. Cir. 1992); *FES*, 331 NLRB No. 22.

49. The Board addressed discriminatory discharge as long ago as 1952. See *Connecticut Chem. Research Corp.*, 98 N.L.R.B. 160, 162 (1952) (ordering employer to cease and desist discriminatory activities and reinstate employees discriminatorily discharged).

50. 29 U.S.C. § 157 (2000).

51. See, e.g., *W.C. McQuaide, Inc. v. NLRB*, 133 F.3d 47, 49-50 (D.C. Cir. 1998) (remanding case to Board after acknowledging evidentiary conflict between employer’s and employees’ reason for termination); *In re Carolina Mills, Inc.*, 92 N.L.R.B. 1141, 1140-43 (1951) (overturning an administrative law judge determination that employee was fired because of union activity by finding employer discharged employee because of her poor productivity). There are two ways the employer’s proffered explanation can be improper: either the employer was lying about its legitimate purpose, and actually acted under “pretext;” or the employer had a combination of permissible and impermissible motives that it acted upon, which is called a “mixed” or “dual” motive. See *infra* note 106 for a discussion of pretext and *infra* note 52 concerning mixed motive cases.

52. For a discussion of the history of mixed or dual motive issues under the NLRA, see Leona Green, *Mixed Motives and After-Acquired Evidence: Second Cousins Benefit From 20/20 Hindsight*, 49 ARK. L. REV. 211, 223-44 (1996). For an example of the courts’ treating an employer’s proffered explanation as a pretext under the NLRA, see *Great Lakes*, 967 F.2d at 628-29. For an example of pretext in the Title VII context, see *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 508-09 (1993).

53. For a discussion of the difficulty in meeting the burden of proof to establish that an employer

this difficulty, the Board first used the “in part” test: if the reason for the employer’s discharge was based “in part” on the employee’s organizing activity, the employer had an impermissible motive and thus had committed an unfair labor practice.<sup>54</sup> The Sixth Circuit Court of Appeals,<sup>55</sup> however, discredited the test, and ultimately the Supreme Court abrogated the standard.<sup>56</sup>

*B. The Motivating Factor, or Wright Line, Test*

Following the Supreme Court’s disapproval of the “in part” test for determining a discriminatory discharge, the Board adopted the “motivating factor” test, known as the *Wright Line*<sup>57</sup> test. Under *Wright Line*, the Board’s General Counsel bears the initial burden to show that: (1) the employer had an impermissible motive of antiunion animus<sup>58</sup> and (2) the employer engaged in an activity covered by the NLRA,<sup>59</sup> such as discharging an employee for his union affiliation.<sup>60</sup> Once the General Counsel makes such a showing, the burden shifts to the employer to show that even absent the employee’s affiliation, he would have been

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had committed an unfair labor practice, see Joan E. Baker, *NLRA Section 8(a)(3) and the Search for a National Labor Policy*, 7 HOFSTRA LAB. L.J. 71, 98-102 (1989).

54. Youngstown Osteopathic Hosp. Ass’n, 224 N.L.R.B. 574 (1976), *enforcement denied*, 574 F.2d 891 (6th Cir. 1978). In *Youngstown*, the Board had to assess whether the employer engaged in an unfair labor practice when it claimed it discharged an employee for dereliction of duty, while the employee and union argued that the employee was discharged for distributing union literature. 224 N.L.R.B. at 574. In light of the in-part test, the Board concluded that despite productivity problems, the employee was in part discharged for union participation, and the employer had thus committed an unfair labor practice. *Id.* at 575.

55. Youngstown Osteopathic Hosp. Ass’n, 574 F.2d 891, 891 (6th Cir. 1978). In a terse opinion, the court found that there was insufficient evidence for the Board to find an unfair labor practice. *Id.*

56. See *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). The Court observed that the in-part test would incorrectly allow for an employee who would have been discharged for a permissible purpose to be reinstated merely because an impermissible purpose existed as well. *Id.* at 285-86.

57. The name originates from the case that announced the rule: *Wright Line, A Div. of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980).

58. *Id.* at 1089. See also *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983) (indicating actual intent or motive by the employer, in other words, “antiunion animus” must be shown); *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 311 (1965) (stating that “a finding of violation . . . will normally turn on the employer’s motivation”).

59. 221 N.L.R.B. at 1089. One commentator notes that “[v]irtually any action an employer may take that adversely affects employees who are engaged in organization or other union-related activities will satisfy the ‘discrimination’ element.” See Baker, *supra* note 53, at 96.

60. *Wright Line*, 251 N.L.R.B. at 1090. In *Wright Line*, the employer was discharged for encouraging coworkers to join a union. *Id.* The employer showed antiunion animus through its agent’s comments to employees concerning the employer’s stability should the work force unionize and his reference to a union official’s murder indictment. *Id.*

discharged.<sup>61</sup> The Supreme Court subsequently approved of this formulation,<sup>62</sup> and the test continues to be used in discharge cases and has been adopted for use in hiring situations, as well.

*C. The Problem of Applying the Prima Facie Test to Discrimination in Hiring Situations*

Proving discrimination in hiring poses difficulties that establishing discrimination in discharge does not. For example, if Beth, a nonunion employee of Dan's Widget Company, meets with her local union about organizing her work group, and Dan discharges her soon after discovering the meetings, the General Counsel thereby has the facts he needs to make his prima facie case on Beth's behalf.<sup>63</sup> First, Beth is an ascertainable individual who suffered a "covered action," *i.e.*, she was discharged.<sup>64</sup> Second, as an employee, Beth knows her coworkers and can find out from them if Dan has taken any action or made any statements regarding her organizing activities.<sup>65</sup> Employer statements are a primary method used to show antiunion animus.<sup>66</sup> Further, if Beth had developed a satisfactory work record prior to discharge, Dan's burden of showing a permissible motive becomes more difficult.<sup>67</sup>

In a hiring situation, however, the facts are not as clear or ascertainable as they are in the discharge context. If Beth (the organizer) applies for a job at Dan's Widget Company and is not hired, it could be because the employer decided not to hire at all, which means a "covered action" never took place.<sup>68</sup> Additionally, the employer may have already decided to hire

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61. *Id.* at 1089.

62. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983).

63. See *supra* note 30 and accompanying text concerning the General Counsel's role in gathering evidence.

64. This addresses the second element of the *Wright Line* test. See *supra* note 60 and accompanying text.

65. This addresses the first required element of the *Wright Line* test. See *supra* note 58 and accompanying text.

66. See, e.g., *Great Lakes Chem. Corp. v. NLRB*, 967 F.2d 624, 626 (D.C. Cir. 1992) (concluding antiunion animus was shown where personnel manager for employer told company directors to hire nonunion employees and that union officers were "troublemakers").

67. This addresses the employer's burden when it shifts from the General Counsel for the Board, who has established elements one and two of the *Wright Line* test, to the employer, who must then show that "the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB at 1089.

68. See *NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953, 967 (6th Cir. 1998) ("If an employer has no job openings, and a union activist nonetheless submits a job application, as a matter of law the [discrimination] element of the statutory violation cannot be established.").

someone with better qualifications.<sup>69</sup> Further, if Beth does not know anything about the organization or its current employees, she cannot easily get evidence from other employees or insiders as to the employer’s motivation by making statements or taking actions regarding Beth’s status as an organizer.<sup>70</sup> Thus, proving discrimination in hiring poses more evidentiary difficulty.

As a result of this difficulty, the Board’s application of the two-part test in refusal-to-hire cases has been inconsistently upheld by courts of appeals.<sup>71</sup> Until it formally adopted a new test in 2000,<sup>72</sup> the Board held that an employer who had both antiunion animus and had hired some applicant into some open position rather than a salt had discriminated in hiring.<sup>73</sup> The Board did not inquire about the relationship between the number of positions available at the time of the alleged proscribed conduct and the number of job applications made by salts. Also, the Board failed to compare the qualifications of the persons who ultimately filled the positions with the qualifications of the salts who did not.<sup>74</sup>

Because courts of appeals did not unanimously agree with the Board’s two-part test,<sup>75</sup> the Board made the test for discrimination more specific to

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69. See *id.* at 967. The court stated that if union activists are not qualified for a job, the statutory violation cannot be established because the employer “had no positions for which they could have been considered.” *Id.*

70. See sources cited *supra* note 58 for an explanation that antiunion animus must be shown in order to make out a prima facie case.

71. For a comparison of the inconsistent applications of the two-part test by courts of appeals, see the discussion of *Great Lakes Chem. Corp. v. NLRB*, 967 F.2d 624 (D.C. Cir. 1992); *Ultrasystems W. Constructors, Inc. v. NLRB*, 18 F.3d 251 (4th Cir. 1994); *NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953 (6th Cir. 1998); *Starcon, Inc. v. NLRB*, 176 F.3d 948 (7th Cir. 1999); *infra* Part IV of this Note.

72. See *FES*, *supra* note 19.

73. See, e.g., *Shawnee Ind., Inc.*, 140 N.L.R.B. 1451, 1452-53 (1963), stating:

Under the Act an Employer must consider a request for employment in a lawful, nondiscriminatory manner, and the question whether an application has been given such consideration does not depend on the availability of a job at the time an application for employment is made. Consequently, the Act is violated when an employer fails to consider an application for employment for reasons proscribed by the Act, and the question of job availability is relevant only with respect to the employer’s backpay obligation.

See also *Great Lakes Chem. Corp.*, 298 N.L.R.B. 615 (1990) (finding that antiunion animus was so overwhelming that the animus and general hiring activity of employer was sufficient to make prima facie case).

74. See *Fluor Daniel, Inc.*, 311 N.L.R.B. 498 (1993) (holding that when employer was hiring in various classifications, fifty-four salts applied for jobs in several classifications and were not hired, which showed antiunion animus, thus employer committed unfair labor practice against fifty-three applicants).

75. See, e.g., *NLRB v. Fluor Daniel, Inc.*, 161 F.3d at 967 (rejecting the Board’s argument that “it should be able to establish a prima facie case . . . simply by proving the existence of anti-union animus and by showing that there were *some* job vacancies applied for by some voluntary union organizers”); *Starcon, Inc. v. NLRB*, 176 F.3d 948, 951 (7th Cir. 1999) (finding order to award

job openings and applicants in *FES (A Division of Thermo Power and Plumbers and Pipefitters Local 520 of the United Association)*.<sup>76</sup> The Board's test under *FES* states that discrimination occurs if: (1) the employer was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) antiunion animus contributed to the decision not to hire the applicants.<sup>77</sup> The Board's test therefore maintains the original two-pronged inquiry into protected activity (*i.e.*, hiring or discharge combined with antiunion animus), but makes the test more concrete by requiring the Board's General Counsel to match at least one specific applicant to a specific job opening.<sup>78</sup>

In determining what the most appropriate test for discrimination in hiring should be, and whether the approach taken by the Board is sound, it is useful to examine another federal statutory scheme. Because Title VII<sup>79</sup> is the most closely related federal statute to the NLRA in addressing the issue of discrimination with regard to hiring, comparing the purposes and applications of both statutes can lend insight into the appropriate test for discrimination in hiring.

### III. HOW DOES TITLE VII DISCRIMINATION IN HIRING COMPARE TO THE NLRA?

Comparing the NLRA to Title VII demonstrates why the Title VII test to establish a *prima facie* case could also be applied under the NLRA. As an initial matter, Congress passed the NLRA and Title VII to protect the

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employment to more applicants than there were job openings "overbroad").

76. *FES*, *supra* note 19.

77. *Id.* at 12.

78. The Board adopted its test after requesting that the parties in *FES* address the discrimination in hire issue with respect to the courts of appeals opinions in *Ultrasystems*, *Fluor Daniel*, and *Starcon*, discussed in Part IV of this Note. The Board stated that it agreed with the *Starcon* holding. *FES*, 331 N.L.R.B. at 14. This portion of the opinion, specific to the making of a *prima facie* case, is consistent with the holding in *Ultrasystems*. See *infra* Part IV.D (discussing *Starcon*) and Part IV.B (discussing *Ultrasystems*). The Board also asked the parties to brief the issue of establishing a case of discriminatory refusal to consider applicants for employment. See 331 N.L.R.B. at 9. For a discussion of the refusal to consider issue, see *Ultrasystems*, 18 F.3d at 255; *Fluor Daniel*, 161 F.3d at 967; and *Starcon*, 176 F.3d at 950. The refusal to consider issue is beyond the scope of this Note.

79. 42 U.S.C. §§ 2000e–2000e-17 (2000).

rights of employees in the work place.<sup>80</sup> Further, the NLRA—the older of the two statutes—seems to have influenced the application of Title VII.<sup>81</sup>

Additionally, the Title VII test used to determine whether a prima facie case for discrimination in hiring exists appears facially similar to the NLRA test.<sup>82</sup> The burden-shifting approach adopted in both the NLRA and Title VII contexts is closely related to the formulation of the prima facie case and is similarly applied in both schemes.<sup>83</sup> Under both the NLRA and

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80. Compare unfair labor practices of an employer under the NLRA: “It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization,” 29 U.S.C. § 158(a)(3), with prohibited employer conduct under Title VII: “It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (2000).

81. The NLRA was originally codified in 1932 as the Norris-Laguardia Act, Ch. 90, 47 Stat. 70 (1932); amended by the 1935 Wagner Act (officially named the National Labor Relations Act), ch. 372, 49 Stat. 449 (1935), the 1947 Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947), and the Landrum-Griffin Act of 1959, Pub.L. No. 86-257, 73 Stat. 519 (1959). The final Act has been in force in major part since 1988, subsequent to minor amendments after the 1959 Act was implemented. 29 U.S.C. §§ 151-69 (2000). Title VII was passed under the Civil Rights Act of 1964. The most noted application of the NLRA in the Title VII context is in the remedial phase of litigation. *See Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 849 (2001) (indicating that back pay remedy in § 706(g) of Title VII was modeled after language in NLRA).

82. Compare the test for the prima facie case under the NLRA as most recently articulated in *FES*: (1) the respondent (employer) was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) the applicants had experience or training relevant to the announced or generally or generally known requirements of the positions for hire, or in the alternative, the employer had not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) antiunion animus contributed to the decision not to hire the applicants, *FES*, 331 N.L.R.B. at 12, with the Title VII test for discrimination in a pretext situation:

(1) that [the employee] belongs to [a protected group]; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.

*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); and the test under Title VII for discrimination in a “mixed-motive” situation: the plaintiff in a Title VII case must “show[] that [the protected characteristic] played a motivating part in an employment decision,” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989).

83. Under the NLRA in *FES*, once the General Counsel for the Board has made a prima facie case, the burden shifts to the employer to show that it would not have hired the applicant even in the absence of his union activity or affiliation. *FES*, 331 N.L.R.B. at 12. Under the *McDonnell Douglas* pretext scenario as expanded by *St. Mary’s Honor Center v. Hicks*, once the plaintiff has made out his prima facie case, the burden shifts to the employer to show that there was a legitimate, nondiscriminatory reason for its failure to hire the plaintiff. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993). If the employer meets its burden, the plaintiff must then overcome the defendant’s evidence, either by showing pretext or by using the lack of credibility of the employer coupled with the strength of the employee’s prima facie case. *Id.* at 506-08. In the Title VII “mixed-motive” scenario, once the plaintiff has made the prima facie case, the burden shifts to the employer to show that it would have made the same decision even if it had not allowed the protected characteristic to play a role. *Price Waterhouse*, 490 U.S. at 244-45.

Title VII, burden shifting has been the best way for courts to deal with the fact that cases involving discrimination in hiring are often based on circumstantial evidence.<sup>84</sup>

The major similarity, however, that makes the test used under Title VII applicable in the NLRA context is the fact that the motive requirement of the prima facie case under either scheme can be met by inference alone. Allowing the use of inference is based largely on the difficulties in determining motive.<sup>85</sup>

There are also differences between the two statutes. Originally, one of the key purposes of the NLRA was to maintain workplace peace.<sup>86</sup> Both employers and employees had legitimate business interests<sup>87</sup> that, because of self-interest, occasionally came into conflict. The NLRA also addresses

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84. In the NLRA context, see *Wright Line*, 251 N.L.R.B. at 1083 (supporting the burden-shifting paradigm by stating: “[I]n modern day labor relations, an employer will rarely, if ever, baldly assert that it has disciplined an employee because it detests unions. . .”); in the Title VII context, see Tristin K. Green, *Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CAL. L. REV. 983, 983 (1999) (arguing that for Title VII to “retain its force,” circumstantial evidence must be used “[b]ecause discrimination today is rarely overt”).

85. Under the NLRA, the Supreme Court recognized that animus can be shown by inference with its 1954 decision in *Radio Officers Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 44-45 (1954) (stating that “[t]his recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct”) (citations omitted). For a modern application of the use of inference in making a prima facie case under the NLRA, see *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 777-78 (6th Cir. 2002) (describing the ways animus can be shown entirely circumstantially, such as “the company’s expressed hostility towards unionization combined with knowledge of the employees’ union activities; inconsistencies between the proffered reason for discharge and other actions of the employer; disparate treatment of certain employees compared to other employees with similar work records or offenses; a company’s deviation from past practices in implementing the discharge; and proximity in time between the employees’ union activities and their discharge”). In the Title VII context, the analysis is the same. See *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (“The burden of establishing a prima facie case [under the *McDonnell Douglas* framework] is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to the inference of unlawful discrimination.”). One commentator suggests that a “nominal intent” requirement exists for Title VII cases, by which no discriminatory intent is required for there to be a violation of Title VII. See Deborah L. Brake, *School Liability for Peer Sexual Harassment After Davis: Shifting from Intent to Causation in Discrimination Law*, 12 HASTINGS WOMEN’S L.J. 5, 32 (2001). The author compares Title VII to Title IX in her discussion of Title IX’s lack of an intent requirement. *Id.* at 30-33. For an argument that motive is not the proper inquiry in a discrimination context, see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

86. See *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996).

87. For a discussion of the assumptions of employer interests with respect to the NLRA versus Title VII in the mitigation context, see Howard C. Eglit, *Damages Mitigation Doctrine in the Statutory Anti-Discrimination Context: Mitigating its Negative Impact*, 69 U. CIN. L. REV. 7, 57-58 (2000).

the basic bargaining inequalities between workers and employers.<sup>88</sup> Title VII, in contrast, addresses wholly illegitimate employer considerations, directed at an individual, that have no socially or economically redeeming value.<sup>89</sup> Additionally, the NLRA addresses employment discrimination in cases where the individual is not a target because of any personal characteristics, but because of his affiliation to a union.<sup>90</sup> By contrast, Title VII addresses discrimination on the basis of characteristics that are inherent to individual persons.<sup>91</sup>

Additionally, litigation arising out of discrimination in the NLRA context is usually intended to benefit the bargaining unit or group of employees as a whole. Therefore, the Board is the plaintiff, rather than an individual.<sup>92</sup> In Title VII cases, however, the trend in litigation has been

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88. In its findings, Congress indicated that

[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce . . . and prevent[s] the stabilization of competitive wage rates and working conditions within and between industries.

29 U.S.C. § 151 (2000).

89. While a nonunion employer can argue that it is economically infeasible to operate as a union business, an employer has no legitimate argument for refusing to hire a female or minority applicant solely based on their status as a female or minority. For support of an employer's position with regard to the economic difficulties in operating a nonunion business, see BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, TABLE 4: MEDIAN WEEKLY EARNINGS OF FULL-TIME WAGE AND SALARY WORKERS BY UNION AFFILIATION, OCCUPATION, AND INDUSTRY, 2001, *available at* <http://www.bls.gov/news.release/union2.t04.htm> (last visited Feb. 2, 2003). In the transportation sector, for example, the average union worker earns \$781 per week, while his nonunion counterpart earns \$609. *Id.* In contrast, an employer cannot make an argument that race or sex discrimination has some validity, particularly as seen in light of the congressional findings the Civil Rights Act of 1964 was enacted. S. REP. 88-872 (1964), *reprinted in* 1964 U.S.C.C.A.N. No. 2355, 2362. Congress emphasized that the legislation is based on an overall desire to provide equal opportunity and eliminate discrimination. *Id.* Congress echoed these aspirations when it enacted the Civil Rights Act of 1991, stating that “America is a better country because we as a people have moved forward toward the goal of eradicating discrimination.” H.R. REP. 102-40(I) at 15 (1991) *reprinted in* 1991 U.S.C.C.A.N. 549, 553.

90. The only inquiry under the NLRA involves whether an employer attempted to “interfere with, restrain, or coerce employees in the exercise of . . . the right to self-organization, to form, join, or assist labor organizations . . .” 29 U.S.C. § 157 & 158(a)(1) (2000).

91. Title VII clearly addresses individual issues of discrimination: “It shall be an unlawful employment practice for an employer to . . . discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (2000) (emphasis added). Additionally, the Supreme Court indicated that the purpose of Title VII was to “strike at the entire spectrum of disparate treatment of men and women in employment.” *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986).

92. In fact, an aggrieved party cannot take action against an employer unless the General Counsel files a complaint on his behalf. *See NLRB v. United Food & Comm. Wkrs. Union, Local 23*, 484 U.S. 112, 133 (1987) (holding that under 29 U.S.C. § 160(f), the decision of General Counsel not to file a complaint was not subject to a court's review).

away from disparate—impact cases where an entire class has been the victim of discrimination, and toward individual cases of disparate treatment, where one aggrieved individual has initiated a suit against the employer.<sup>93</sup> The result is that the plaintiff in an NLRA case has more equal bargaining power with the employer than an individual Title VII plaintiff because of the increased leverage that the NLRB provides.<sup>94</sup> A Title VII plaintiff usually has to find his own attorney and stand up to the employer on his own.<sup>95</sup> These differences highlight the fact that the similarities between these statutes far outweigh the differences, particularly in the making of a prima facie case for discrimination in hiring.

The similarities between Title VII and the NLRA in the making of the prima facie case under either regime make the application of the *McDonnell Douglas* test under Title VII applicable to an unfair labor practice under the NLRA.<sup>96</sup> The discrimination-in-hiring issue under the NLRA has not been addressed by several courts of appeals or the Supreme Court to date, and the courts of appeals that have addressed it do not agree.<sup>97</sup> An examination of the four courts of appeals' decisions addressing the issue highlights the evidentiary problem in refusal-to-hire cases and

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93. For a statistical breakdown of lawsuits brought by the EEOC and the private bar, see Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1 (1996).

94. The statistical data in *supra* note 32 shows the extremely high settlement rate of charges brought before the Board. The comparison is similar to the settlement rate for the charges litigated by the EEOC. The EEOC has an 83% settlement rate, where the private bar has a 60% to 65% settlement rate. *See Selmi, supra* note 93, at 14, 22.

95. Together, the EEOC and the Justice Department litigate approximately 5% of the cases brought under Title VII each year. *See Selmi, supra* note 93, at 21 n.82. For a discussion of the plaintiff's difficulty in obtaining evidence in a disparate treatment discrimination case, see Ronald Turner, *30 Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 432-35 (1995).

96. The similarities primarily address the purposes of the statutes and the making of the prima facie case under the two regimes. *See supra* notes 80-85 and accompanying text. The differences, however, primarily relate to the nature of the specific plaintiff in each case. *See supra* notes 90-95 and accompanying text. The court's discussion in *Fluor Daniel* appears to be the only time that the applicability of Title VII to the NLRA refusal-to-hire issue was raised. In briefs before the Sixth Circuit, Fluor Daniel argued that the *McDonnell Douglas* test should be applied to NLRA cases. *See* Brief of Fluor Daniel, Inc. at 32, *NLRB v. Fluor Daniel, Inc.* 161 F.3d 953 (6th Cir. 1998) (No. 94-6108) (“[T]he principles of proof the Supreme Court announced in *McDonnell Douglas* . . . can and should be used as a guide to defining the General Counsel's minimum burden in this case.”). In its original opinion, the Sixth Circuit panel agreed with Fluor Daniel and used the *McDonnell Douglas* framework in its analysis of the refusal-to-hire issue. *Fluor Daniel*, 102 F.3d 818, 832 (6th Cir. 1996). The Sixth Circuit, in its amended opinion, the Sixth Circuit changed course and “happily” refused to address the *McDonnell Douglas* test. *Fluor Daniel*, 161 F.3d at 966.

97. The D.C. Circuit addressed the issue in *Great Lakes Chem. Corp. v. NLRB*, 967 F.2d 624 (D.C. Cir. 1992); the Fourth Circuit in *Ultrasystems W. Constructors, Inc. v. NLRB*, 18 F.3d 251 (4th Cir. 1994); the Sixth Circuit in *NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953 (6th Cir. 1998); and the Seventh Circuit in *Starcon, Inc. v. NLRB*, 176 F.3d 948 (7th Cir. 1999).

evidences that a more concrete test—even more concrete than the test offered by the Board in *FES*—must be adopted.

#### IV. FOUR NLRA CASES WITH FOUR DIFFERENT RESULTS

A. Great Lakes: *If You Were Hiring and You Didn't Like the Union, and As a Result You Failed to Hire Union Adherents into Your Workforce, You Did a Bad Thing and Your Penalty Is to Hire Every Adherent Who Wanted to Work for You*

In *Great Lakes Chemical Corp. v. NLRB*,<sup>98</sup> the D.C. Circuit faced a refusal-to-hire case in which a company purchased an existing company and did not hire the former employees who were union members when it hired new employees.<sup>99</sup> The court analyzed the union's allegation of discrimination in hiring by applying the *Wright Line* model as its test for determining whether an employer has committed an unfair labor practice.<sup>100</sup> First, the court found that the employer was hiring because it had to replace the workers who had been laid off by the prior company.<sup>101</sup> Further, the court found there was evidence of antiunion animus in that the personnel manager of the employer actively sought to hire new employees not affiliated with the union.<sup>102</sup> Specifically, the personnel manager recommended to the company that, with respect to newly hired employees, “it be clearly understood . . . that [the company] wish[es] to operate on a non-union basis,” and also commented that several union officers were “troublemakers.”<sup>103</sup>

Once the court determined that the General Counsel had met his burden by showing both a general failure to hire and antiunion animus, the court used the *Wright Line* burden-shifting analysis to examine the reasons asserted by the employer for its failure to hire the former employees.<sup>104</sup> The employer stated it had a legitimate business reason for its actions because it had fluctuating business demands that precluded the hiring of all former employees.<sup>105</sup> The court rejected the reason as a pretext,<sup>106</sup>

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98. 967 F.2d 624 (D.C. Cir. 1992).

99. *Id.* at 625. Although the case is not specifically a salting case, it highlights the issues of the making of a prima facie case regarding the refusal-to-hire issue and has been used in at least one court's salting analysis. *See Starcon*, 176 F.3d at 950.

100. 967 F.2d at 627.

101. *Id.* at 626.

102. *Id.* at 628. The employer “blacklisted” former union officers and rehired the minimum possible former union member employees. *Id.*

103. *Id.* at 626.

104. *See supra* note 67.

105. 967 F.2d at 628. In addition to refusing to hire former union employees, the employer used

finding that the employer had committed an unfair labor practice.<sup>107</sup>

The court did not inquire into what jobs were available at the time of the alleged discrimination. The fact that the former employees were not hired, coupled with the finding of antiunion animus, was sufficient to show that an unfair labor practice had been committed.<sup>108</sup>

As a result of these findings, the court upheld the Board's order that all former employees be offered employment by the employer.<sup>109</sup> The court indicated that the "broadly damning character of the evidence"<sup>110</sup> against the employer suggested that every former employee had been "turned away because of his union adherence."<sup>111</sup> The court rejected the employer's argument that the order was overbroad and punitive in nature.<sup>112</sup> The court conceded that the employer would have an opportunity, at the compliance stage of the proceedings, to show that certain employees were not suitable for rehire.<sup>113</sup>

*B. Ultrasystems: If You Were Hiring and You Didn't Like the Union, and as a Result You Failed to Hire Any Salts, You Did a Bad Thing, but You Only Have to Hire as Many Salts as You Would Have Hired if You Had Been Good*

In *Ultrasystems Western Constructors, Inc. v. NLRB*,<sup>114</sup> the Fourth Circuit Court of Appeals faced a construction company's refusal to hire sixty-six applicants who were known union organizers.<sup>115</sup> The court, like the *Great Lakes* court, initially followed the *Wright Line* test.<sup>116</sup> It found,

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an employment service that required each prospective employee to sign a waiver agreeing not to file suit against the employment agency if he were later laid off or fired. *Id.* at 626-27.

106. *Id.* at 628-29. The Board has defined pretext as the situation in which the employer's true motive for taking an adverse action against an employee was antiunion animus, but it asserts a legitimate business reason for its action that is actually a "sham." See *Wright Line*, 251 N.L.R.B. at 1083-84.

107. 967 F.2d at 629.

108. *Id.* at 628. The court stated that the employer's "wholesale rejection" of former employees shows a broad pattern that "necessarily entailed refusing to hire individual employees." *Id.*

109. *Id.* at 629-30.

110. *Id.* at 628.

111. *Id.*

112. *Id.* at 629-30.

113. *Id.* The court stated that "any recognized defense to the order's implementation can be raised by a petition to review the compliance order." *Id.* at 630 (citing *Local 512, Warehouse & Office Worker's Union v. NLRB*, 795 F.2d 705, 715 (9th Cir. 1986)).

114. 18 F.3d 251 (4th Cir. 1994).

115. *Id.* at 252.

116. *Id.* at 257. See *supra* notes 57-61 and accompanying text.

agreeing with the Board, that the employer was hiring,<sup>117</sup> and that the reason none of the sixty-six applicants were hired was because the employer was aware that they were members of a union organizing drive.<sup>118</sup> The court also found that, the employer showed antiunion animus.<sup>119</sup>

Because the General Counsel had made a prima facie case, the burden shifted to the employer, who offered evidence that it did not hire any of the applicants because their applications were either stale, or because the applicants were not qualified or not interested.<sup>120</sup> Nonetheless, the court found that the General Counsel had established enough contrary evidence to determine that discrimination did take place.<sup>121</sup>

In this determination, neither the Board nor the court compared the jobs open at the time of the discrimination or the qualifications that the openings required to the pool of available applicants.<sup>122</sup> The *Ultrasystems* court therefore followed the same reasoning as the court in *Great Lakes* in determining if discrimination had occurred. At the remedy stage, however, the court refused to enforce the Board’s order that the employer hire all sixty-six applicants who had not been hired when they had applied for jobs.<sup>123</sup> The court stated that the proposed remedy had to “be tailored to the unfair labor practice it is intended to redress.”<sup>124</sup> The court remanded the case to the Board to fashion a proper remedy of its choosing so long as the remedy fit the actual discrimination.<sup>125</sup> Thus, the court’s remedy departed from the remedy ordered in *Great Lakes*, where the D.C. Circuit

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117. *Id.* at 256.

118. *Id.* at 253.

119. *Id.* at 257. The employer made “direct statements of antiunion motive with respect to the[] applications.” *Id.*

120. *Id.* at 257.

121. *Id.* The court indicated that the employer had an opportunity to show that absent the impermissible motive, it would still have not hired any of the applicants, and it failed to meet the burden in light of the evidence. *See id.*

122. *Id.* at 257-58. The court acknowledged that there was controversy over the appropriate time for the employer to show that specific applicants were not qualified for specific openings, and further acknowledged that there was a “limit” to how much could be deferred to a later compliance proceeding. *Id.* at 257. Nonetheless, it concluded that the evidence showed a violation, and upheld the Board’s finding on that issue. *Id.* at 257-58.

123. *Id.* at 258. The court commented, “the Board went beyond the scope permitted by § 10(c) of the Act.” *Id.*

124. *Id.* at 258 (quoting *Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 900 (1984)). The *Sure-Tan* court stated: “[I]t remains a cardinal, albeit frequently unarticulated assumption, that a backpay remedy must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practice.” *Sure-Tan*, 467 U.S. at 900. The *Ultrasystems* court found additional support for this proposition in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941), which stated “only actual losses should be made good.” 18 F.3d at 258.

125. *Id.* at 259.

agreed with the Board that the proper remedy would be for the employer to offer employment to all applicants who had not been offered employment by the employer.<sup>126</sup>

C. Fluor Daniel: *If You Were Hiring for Certain Jobs and You Denied Qualified Salts Because You Didn't Like the Union, Your Penalty Is to Hire the Qualified Salts*

In *NLRB v. Fluor Daniel, Inc.*,<sup>127</sup> the Sixth Circuit Court of Appeals faced an employer who was charged with an unfair labor practice for refusing to hire forty-two applicants who had written “voluntary union organizer” on their applications.<sup>128</sup> The Sixth Circuit, like the Fourth and D.C. Circuits, used the *Wright Line* test and described how the burdens were assessed against each party.<sup>129</sup> In interpreting the test, the Sixth Circuit, unlike the Fourth and D.C. Circuits, emphasized that the General Counsel must show that an actual failure to hire a qualified person must occur for there to be a violation.<sup>130</sup>

The court first ascertained that the employer was hiring at the time the alleged discrimination took place.<sup>131</sup> The court then examined the Board’s finding that a failure to hire protected employees had taken place.<sup>132</sup> The employer claimed that at the time the alleged discrimination took place it only needed to fill positions for six carpenters, two pipe welders, and eight boilermakers.<sup>133</sup> The Board found that a group of union organizers applied for jobs with the employer, the employer was hiring, and none of the organizers were hired.<sup>134</sup> The Board also found evidence sufficient to constitute antiunion animus.<sup>135</sup> Based on the employer’s refusal to hire the applicants and the evidence of antiunion animus, the Board determined

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126. See *supra* notes 109-13 and accompanying text.

127. 161 F.3d 953 (6th Cir. 1998).

128. *Id.* at 956.

129. *Id.* at 965.

130. *Id.* at 967. The court emphatically stated: “We therefore reject the NLRB’s argument that it should be able to establish a prima facie case of an unfair labor practice in a refusal-to-hire case simply by proving the existence of anti-union animus and by showing there were *some* job vacancies applied for by some voluntary union organizers . . . .” *Id.*

131. *Id.* at 956.

132. *Id.* at 964-71.

133. *Id.* at 956.

134. *Id.* at 956-57. The Board also found, however, that the employer did hire a significant number of employees for other positions that were connected to organized labor. *Id.* at 957.

135. The Board found that the employer gave some applicants easier welding tests than others, and that when one newly hired employee asked what would happen if he refused to cross a picket line, the employer replied that after two warnings he would be fired. *Id.* at 957-58.

that the employer had committed an unfair labor practice.<sup>136</sup> As a remedy, the Board ordered that all the applicants who were not hired be offered the positions they applied for or similarly equivalent positions.<sup>137</sup>

The Sixth Circuit disagreed with the Board with respect to the elements of the prima facie case, as well as with respect to the remedy.<sup>138</sup> The court held that the General Counsel must, in addition to showing antiunion animus, match job openings at the time of the alleged discrimination to the actual applicants to determine if there was discrimination.<sup>139</sup> To illustrate, if twelve welders applied for jobs and the employer had two openings, but the openings were for plumbers, there would be no violation, even if the employer posted signs that said, “We hate unions.” Because the General Counsel failed to match job openings to those applicants who were not hired, the court refused to uphold the Board’s order and remanded that issue to the Board to determine if some nexus existed between antiunion animus and an actual hiring decision.<sup>140</sup>

With its holding, the Sixth Circuit disagreed with the Fourth Circuit’s *Ultrasystems* decision.<sup>141</sup> The *Ultrasystems* court held that if job openings existed at the time the union organizers applied, that finding, in conjunction with a showing of antiunion animus, would be sufficient to make a prima facie case.<sup>142</sup> The Sixth Circuit acknowledged that “*Ultrasystems* stopped short of our holding today”<sup>143</sup> by failing to require job matching in making out a prima facie case.<sup>144</sup>

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136. *Id.* at 960.

137. *Id.* In fact, the Board explicitly disagreed with the *Ultrasystems* court by denying the employer’s motion to review the remedy of offering positions to all applicants based on the holding in the *Ultrasystems* decision. *Id.*

138. *Id.* at 966. The court stated,

[i]t cannot be an unfair labor practice merely for an employer to harbor animus against union members applying for jobs that do not exist or have already been filled, or for which they are not qualified. If such conduct were an unfair labor practice, then the mere entertainment and expression of anti-union animus would constitute an unfair labor practice.

*Id.*

139. *Id.* at 967. To illustrate, the court explained that, with regard to qualifications, “[t]here is no interference with, restraint, or coercion of applicants in the exercise of their protected rights when an employer, even with anti-union animus, rejects applicants who are in fact unqualified . . . .” *Id.* Also, with respect to job openings, it stated, “[i]f an employer has no job openings, and a union activist nonetheless submits a job application, as a matter of law the [occurrence of the covered action of hiring] element of the statutory violation cannot be established.” *Id.*

140. *Id.* at 975.

141. *Id.* at 969-70.

142. *Ultrasystems*, 18 F.3d at 256.

143. *Fluor Daniel*, 161 F.3d at 969.

144. *Id.* The *Fluor Daniel* court did not agree with the Fourth Circuit’s proposition that job matching could be deferred to the compliance stage of Board proceedings. *Id.* at 970. It explained that deferring the determination of employer liability in terms of the actual applicants that were not hired is

The Sixth Circuit did agree with the Fourth Circuit, however, in holding that the remedy for an employer's unfair labor practice in hiring must fit the unfair labor practice committed.<sup>145</sup> The court ultimately remanded the case to the Board for a determination of whether jobs matched the applicants at the time of the alleged discrimination.<sup>146</sup>

*D. Starcon: If You Were Hiring and Didn't Like the Union, and as a Result Refused to Hire at Least One Qualified Salt, You Did a Bad Thing and Your Penalty Will Be to Hire Some Qualified Salts After the Board Looks into Just How Bad You Were*

In *Starcon, Inc. v. NLRB*,<sup>147</sup> the Seventh Circuit Court of Appeals faced a nonunion employer who received applications from eighty union organizers.<sup>148</sup> The employer rejected seventy-eight of the eighty union-affiliated applicants even though it required an influx of manpower.<sup>149</sup> The court found antiunion animus based on Starcon's actions in treating the applicants poorly, treating those union organizers it did hire poorly, and trying to avoid hiring organizers by subcontracting the hiring to an agency.<sup>150</sup>

The *Starcon* court, benefitting from the discussions in prior decisions

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“counterintuitive, even backwards,” and may violate due process. *Id.* The court indicated that Fluor Daniel had raised a “sound objection[.]” on the due process issue before the court. *Id.* In its brief, Fluor Daniel argued that “in order to prove discrimination with regard to hiring, the evidence must show . . . that jobs were available for the applicants when they applied . . .” Fluor Daniel’s Brief of Application for Enforcement of an Order of the National Labor Relations Board at 34, *NLRB v. Fluor Daniel, Inc.* 161 F.3d 953 (6th Cir. 1998) (No. 94-6108) Fluor Daniel went on to argue that:

A party is entitled, of course, to know the issues on which the decision will turn and to be apprised of the factual material on which the agency relies for its decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.

*Id.* (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight*, 419 U.S. 281, 288 n.4 (1974)).

145. The *Fluor Daniel* court indicated that if the job matching is done at the time the prima facie case is made, the Board would have a “broad panoply of remedies” at its disposal, which will lessen the probability that its order will be struck down by a court of appeals for being overly broad. *Id.* at 969-70.

146. *Id.* at 975.

147. 176 F.3d 948 (7th Cir. 1999).

148. *Id.* at 949. The court stated that the union likely knew it had no chance of organizing the workforce, and that applicants identified themselves as union organizers on their employment applications to precipitate unfair labor practice charges against the employer. *Id.* See also Northrup, *supra* notes 14 and 43.

149. *Id.*

150. *Id.* at 949-50. The court did not indicate, however, that it was using the *Wright Line* test in its determination that an unfair labor practice had been committed. It instead focused its opinion on the issue of whether the Board “was required to ‘match’ the organizer applicants to the job openings . . .” *Id.* at 950.

in the D.C., Fourth, and Sixth Circuits in *Great Lakes*,<sup>151</sup> *Ultrasystems*,<sup>152</sup> and *Fluor Daniel*,<sup>153</sup> respectively, examined the salting situation from the three circuits’ perspectives.<sup>154</sup> The *Starcon* court refused to adopt the view held by the Sixth Circuit that the burden must be on the Board to match applicants to jobs, and instead held that it is not necessary for the General Counsel to match applicants to job openings in making his case.<sup>155</sup> The court did agree with the Sixth Circuit, however, that there must be a showing in the making of the prima facie case that at least one applicant was discriminated against in hiring, although the General Counsel need not show which one.<sup>156</sup>

The Seventh Circuit, after determining the requirement for the making of a prima facie case, refused enforcement of the Board’s order to offer employment to all eighty applicants.<sup>157</sup> Because the employer hired far fewer than eighty employees during the period of discrimination, the court reasoned that the Board’s order was overbroad.<sup>158</sup> Thus, the holding with respect to the remedy for the unfair labor practice is consistent with the Fourth Circuit’s holding in *Ultrasystems*,<sup>159</sup> as well as the Sixth Circuit’s holding in *Fluor Daniel*.<sup>160</sup>

In summary, the four circuits have applied the *Wright Line* test in different ways and as a result have reached different conclusions. The D.C. Circuit,<sup>161</sup> at one end of the spectrum, is the most deferential toward the Board’s General Counsel in the establishment of a prima facie case.<sup>162</sup> The

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151. See *supra* Part IV.A.

152. See *supra* Part IV.B.

153. See *supra* Part IV.C.

154. *Starcon*, 176 F.3d at 950. The court acknowledged that the D.C. and Sixth Circuits are in conflict, with the D.C. Circuit agreeing with the Board. *Id.*

155. *Id.* at 951. The court, using the metaphor of a penguin that applies for a job as a welder, commented that adopting the Sixth Circuit approach would force the General Counsel to prove that an employer would hire nonunion applicants who were not qualified for jobs, which is a burden he should not have to meet. *Id.*

156. *Id.* The court noted that job matching is not required “unless and until [the Board] seeks a remedy on behalf of a particular worker. The worker is not the plaintiff; the Board is; and it is entitled to order nonmonetary relief upon proof of a violation.” *Id.*

157. *Id.*

158. *Id.* The court noted there was no evidence that the employer would have offered all eighty applicants jobs. The court went on to indicate that the Board must determine how many of the applicants the employer would have hired had it not been “actuated by hostility to unionization.” *Id.* at 951-52.

159. See *Ultrasystems*, 18 F.3d at 259 and *supra* Part IV.B.

160. See *Fluor Daniel*, 161 F.3d at 969-70 and *supra* Part IV.C.

161. See *supra* Part IV.A.

162. See *supra* note 108 and accompanying text. In the burden-shifting scheme, the D.C. Circuit allowed the General Counsel to make his case on the overwhelming evidence of animus, without delving deeply into the failure-to-hire aspect of the case. *Id.*

Fourth<sup>163</sup> and Seventh<sup>164</sup> Circuits are at the center of the spectrum, requiring the Board to make some specific showing of animus and refusal to hire at least one applicant, but not any specific applicant.<sup>165</sup> The Sixth Circuit,<sup>166</sup> at the opposite end of the spectrum from the D.C. Circuit, requires the most from the General Counsel by requiring him to match applicants to job openings to make out a prima facie case.<sup>167</sup> Thus, the Sixth Circuit has most closely satisfied the language<sup>168</sup> and purpose<sup>169</sup> of the NLRA.

V. PROPOSAL: THE GENERAL COUNSEL SHOULD MAKE A PRIMA FACIE CASE BY MATCHING JOBS TO APPLICANTS AND A VIOLATION SHOULD BE REMEDIED BY OFFERING BACK PAY AND INSTATEMENT TO THOSE WHO WERE DISCRIMINATED AGAINST

The Board must match applicants to job openings in analyzing the General Counsel's prima facie case and then order a remedy based only on the applicants actually discriminated against in order to comport with the language and intent of the NLRA. The Board must first determine that applicants who applied for jobs matched the job qualifications when they were refused an employment opportunity.<sup>170</sup> Then, during compliance, an order can be entered requiring that those applicants who had been discriminated against be offered the same or equivalent positions as those they would have been hired into but for their affiliation to the union.<sup>171</sup> Although the NLRB's decisions in 2000 and 2001<sup>172</sup> have followed the remedies

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163. See *supra* Part IV.B.

164. See *supra* Part IV.D.

165. See *supra* notes 122 and 155 and accompanying text respectively.

166. See *supra* Part IV.C.

167. See *supra* note 130 and accompanying text.

168. See 29 U.S.C. § 158(a)(3) (2000).

169. See 29 U.S.C. § 151 (2000).

170. This requirement would comport with the NLRA, which states, "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire . . . to encourage or discourage membership in any labor organization." § 158(a)(3). If an employer does not hire anyone or does not hire an applicant because she is not qualified, it does not violate the NLRA and a prima facie case is not made, because the requirement of a "covered activity" has not been met. See *supra* Part II.B, discussing the *Wright Line* test requirements. Additionally, job matching comports with the *McDonnell Douglas* requirement that a person must be qualified for a position in order to make out a prima facie case. See *supra* note 82.

171. This requirement would comport with § 160(c) of the NLRA concerning the Board's power to order "such [employer] to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay . . ." 29 U.S.C. § 160(c)(2000). See also *supra* notes 145-146 and accompanying text.

172. *FES*, *supra* note 19; In re *Eckert Fire Prot.*, *supra* note 47 (using the test outlined in *FES*); ITT Federal Serv. Corp., 335 N.L.R.B. No. 79, 2001-2002 NLRB Dec. (CCH) ¶ 16,019 (Aug. 27,

recommended by the Fourth, Sixth, and Seventh Circuits, the NLRB still views as unnecessary the Sixth Circuit’s job-matching requirement to establish a prima facie case.<sup>173</sup>

Because of the requirement that an applicant be qualified for a position in order to be a victim of discrimination, applying the *McDonnell Douglas* test would satisfy the problem of identifying an unfair labor practice in the NLRA context.<sup>174</sup> The similarities in the goals,<sup>175</sup> the elements of the prima facie case,<sup>176</sup> the burden-shifting approach,<sup>177</sup> and most notably the availability of drawing an inference in making a prima facie case<sup>178</sup> make the adoption of the *McDonnell Douglas* test useful in the NLRA context.

The *FES* test, as recently adopted by the Board, is not sufficient to truly identify an employer’s unfair labor practice. In order to make a prima facie case, the General Counsel must show not only antiunion animus, but also that a viable candidate existed who *could* have filled a position for which an employer was actually hiring. Without this requirement, the General Counsel could make a case simply by showing that an employer has antiunion animus.<sup>179</sup> While antiunion animus may be reprehensible, it is simply not enough to satisfy the necessary elements of discrimination in hiring to comport with the requirements of the NLRA.<sup>180</sup> Because the *Wright Line* test requires both animus and discrimination in order to show an employer has committed an unfair labor practice, a showing of both antiunion animus and refusal to hire a qualified applicant for a job that was

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2001) (outlining the test to be used under the *FES* formula).

173. In *FES*, the Board requested that the parties brief the issues based on the decisions in *Ultrasystems*, *Fluor Daniel*, and *Starcon*, and determined that the *Starcon* court presented the best analysis. *FES*, 331 N.L.R.B. at 14.

174. Using the *McDonnell Douglas* test would address the problems in determining discrimination in hiring described in Part II.C, of this Note.

175. See *supra* note 80 and accompanying text.

176. See *supra* note 82 and accompanying text.

177. See *supra* note 83 and accompanying text.

178. See *supra* note 85 and accompanying text. Inference is a way of lowering the burden on a complaining party who is alleging discrimination. Using inference addresses the *Starcon* court’s concern of over-burdening the General Counsel. See *supra* note 155.

179. See *Fluor Daniel*, 161 F.3d at 967. “There is no interference with, restraint, or coercion of applicants in the exercise of their protected rights when an employer, even with anti-union animus, rejects applicants who are in fact unqualified or for whose particular services the employer simply has no need.” *Id.*

180. The NLRA indicates that an unfair labor practice under § 8(a)(1) and § 8(a)(3) is committed when an employer interferes with, restrains, or coerces employees to refrain from exercising their right to organize, or when it commits discrimination in regard to hiring. 29 U.S.C. §§ 158(a)(1) & 158(a)(3). There can be no interference, restraint, coercion, or discrimination where there is no activity, in this case hiring. See *Fluor Daniel*, 161 F.3d at 967. See also *supra* Part II.B of this Note, outlining the *Wright Line* test.

available at the time of the alleged discrimination is required.<sup>181</sup> The Sixth Circuit's approach is therefore the closest to properly determining discrimination in hiring.

The other circuits' approaches are insufficient. The *Great Lakes* and *Ultrasystems* holdings are inadequate because they do not meet the requirements of the NLRA and they do not give an employer notice of the specific unfair labor practice it has committed.<sup>182</sup> The *Starcon* holding would be sufficient when there is a mass hiring and a mass group of applicants who are union organizers, but it wholly fails to address a situation where there are limited job openings and a few applicants with varying qualifications. If the General Counsel can make a prima facie case simply by showing that at least one applicant would have been hired, and it does not matter which one, the burden on the employer to explain its hiring decision will be at least confusing and possibly onerous, considering all the variables involved in hiring decisions when various applicants have various qualifications. Additionally, in cases of mass hiring, the burden on the General Counsel to show at least one specific applicant would have been hired but for his union affiliation is slight<sup>183</sup> because the odds are high that at least one of the multiple applicants will be qualified.

Further, the remedy in cases where an unfair labor practice has been proven must be specific to the number of job openings that existed at the time of the alleged discrimination.<sup>184</sup> The remedy must fit the violation, no more.<sup>185</sup> To force employers to hire employees for whom they have no work is too great a financial burden on an employer, adds a punitive element that is not called for by the NLRA,<sup>186</sup> and simply does not make

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181. See *supra* note 156, where the *Starcon* court curiously stated that the Board is the plaintiff in unfair labor practice cases, justifying why job matching is not required in order to make out a violation. This observation overlooks the fact that a violation cannot be proved until the *Wright Line* test has been met, which requires that both animus and discrimination be shown. It is unclear how, under the *Starcon* proposition, the Board could show both required elements of the prima facie case unless an applicant was actually discriminated against, which requires specific proof that can only be found by comparing actual openings to applicants.

182. If the Board can defer the matching of open jobs with qualified workers until after the determination of an unfair labor practice has been made, there could be a violation of due process. See *Fluor Daniel*, 161 F.3d at 970. See also *supra* note 144.

183. This situation mirrors *Great Lakes*, which shows that the animus question could overwhelm and swallow the discrimination issue altogether. See *supra* note 102-103 and accompanying text.

184. This would be particularly manageable if the Board matched jobs to applicants in the making of the prima facie case. There would be no issue about the party discriminated against in the compliance stage because that information would have already been ascertained.

185. See *supra* note 124, referring to *Phelps Dodge*, 313 U.S. 198.

186. See *supra* note 124, referring to *Sure-Tan*, 467 U.S. at 900.

sense. An employer should not be forced to provide a remedy for something greater than the violation it committed.

## VI. CONCLUSION

Salting provides a way for labor unions to gain access to employees where they otherwise might not have such access.<sup>187</sup> Because salting is a recognized activity,<sup>188</sup> union organizers must be protected from discrimination when they seek employment from nonunion employers.<sup>189</sup> Nonetheless, employers should not be forced to hire salts simply because they know a union could disrupt their business by filing and pursuing unfair labor practice charges whenever the employer did not hire the union’s organizer applicants.<sup>190</sup> The burden must remain on the General Counsel to show discrimination, which includes a showing that an applicant is qualified for a position, in order to pursue charges against an employer for refusing to hire him.

In order to balance the burdens equitably between the parties, the General Counsel must be required to show both the qualifications of the union organizers who applied for the jobs and the employer’s antiunion animus in order to make a prima facie case of discrimination in hiring. To require less would not provide an employer notice of its alleged unfair labor practices.<sup>191</sup> Job matching is not an onerous burden, and it prevents unions from using the Board as a tool to force employers into choosing between hiring applicants they otherwise may not need and facing unfair labor practice charges and possible litigation.

*Pamela A. Howlett\**

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187. *See supra* note 2.

188. *See supra* note 11 and accompanying text.

189. This protection is required pursuant to 29 U.S.C. § 158(a)(3). *See supra* note 15 and accompanying text.

190. *See supra* notes 43 & 138.

191. *See supra* note 144.

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