

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: September 18, 2015

TO: Daniel L. Hubbel, Regional Director  
Region 14

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: UFCW Local 655  
Case 14-CA-144808

506-4067-9500  
506-6090-1700  
506-6090-5400  
506-6090-5900  
524-0133-3125

The Region submitted this case for advice as to whether the Union-Employer unlawfully terminated a union representative for contemplating an election run against the incumbent president while also engaging in discussions with coworkers about working conditions. We conclude that the union representative was engaged in protected concerted activities when he and other employees discussed working conditions. However, the Union-Employer did not violate Section 8(a)(1) when it terminated the business representative because there is insufficient evidence that the Union-Employer was aware of the protected concerted conversations and because it terminated him solely for disloyalty.

### FACTS

The union representative (“Charging Party”) was employed by UFCW Local 655 (the “Union-Employer”) from April 2006 until his termination on November 19, 2014.<sup>1</sup> The President is the chief executive officer of the Union-Employer and is elected by its members. The Secretary Treasurer is also elected by the membership, is under the supervision of the President, and assists the President in conducting the affairs of the Union-Employer.

Around January 2014, several employees, including the Charging Party, discussed how poorly the Secretary Treasurer treated the staff and if the President would do anything about it. The conversation turned to whether any of the employees should run against the incumbents in the election later that year. In June or July,

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<sup>1</sup> All dates hereinafter are in 2014 unless otherwise stated.

the Charging Party again participated in a conversation where employees discussed someone running against the incumbents because of the need for new leadership. Towards the end of July, near the deadline for election nominations, the Charging Party and fellow employees again discussed the Secretary Treasurer's poor treatment of the staff and its effect on working conditions. During the conversation, the employees present suggested that the Charging Party should run for President. The Charging Party indicated that he was considering running for President but wanted someone to run with him. However, the employees, including the Charging Party, also considered that it may not be the right time to mount an election challenge and that they should give the President a chance to fix the office's morale problems. The nomination period passed without the Charging Party or any other employee seeking nomination. The President and Secretary Treasurer ran unopposed and were reelected.

On November 19, the President and Secretary Treasurer called the Charging Party into a meeting and informed him that he was being terminated for disloyalty in contemplating an election run against the President. The President stated his belief that the Charging Party did not formally seek the nomination because he was unable to obtain staff support. The Charging Party alleges that he responded that he and others decided not to run so they could give the President the opportunity to correct the issues that were going on.<sup>2</sup> According to the President, he learned of the Charging Party's contemplated run from several other employees, and those employees did not inform the President that the Charging Party also discussed working conditions with other employees.

### ACTION

We conclude that the Charging Party was engaged in protected concerted activity when he met with fellow employees to discuss working conditions. We also conclude, however, that the Union-Employer did not unlawfully terminate the Charging Party because there is insufficient evidence that it was aware of the protected concerted nature of the discussions and the termination was solely for his disloyalty in contemplating an election challenge against the incumbent President.

It is well-settled that when a union is acting as an employer, its employees have the same rights as any other employees under Section 8(a)(1).<sup>3</sup> Section 8(a)(1) prohibits interference with the Section 7 guarantee that employees have the right "to engage in . . . concerted activities for the purpose of mutual aid and protection."

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<sup>2</sup> The Union-Employer asserts that the Charging Party stated during the meeting only that he did not run because he was unable to obtain staff support.

<sup>3</sup> *Butchers Union Local 115*, 209 NLRB 806, 809 (1974).

Employers may not interfere with employee activity inspired by concerns within the range of interests to which Section 7 is addressed, i.e., “legitimate activity that could improve [the employees’] lots as employees.”<sup>4</sup> Nevertheless, an employee has no protected right to engage in activities designed solely for changing the management hierarchy.<sup>5</sup>

Here, we conclude that the Charging Party’s discussions with other employees about their terms and conditions of employment constituted protected concerted activity. The evidence demonstrates that employees shared the view that their working conditions had become intolerable primarily because of the Secretary Treasurer’s mistreatment of employees and the President’s inability or unwillingness to stop it, and they met on several occasions to discuss their “lot as employees.”

We also conclude, however, that the Charging Party was terminated only for disloyalty and not for his protected concerted activities. In determining whether an employee’s discipline or discharge was unlawful under Section 8(a)(1), the General Counsel must make a prima facie showing sufficient to support the inference that the employee’s protected concerted activity was a motivating factor in the employer’s decision.<sup>6</sup> Here, a prima facie showing cannot be made because there is insufficient evidence that the Union-Employer knew that the Charging Party participated in discussions with other employees about working conditions.<sup>7</sup> Rather, the Union-Employer appears only to have known, as reported to the President by other employees, that the Charging Party considered running for president and that some employees initially supported him. Indeed, the Charging Party, during his termination meeting, failed to mention that he participated in discussions with other employees about working conditions and only stated vaguely that his decision not to run was to give the President a chance to fix undefined issues.

In any event, there is no evidence that the Charging Party’s protected activity played any role in the Union-Employer’s decision to terminate him. While the evidence demonstrates that the President was aware of employee morale issues and

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<sup>4</sup> *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

<sup>5</sup> *Retail Clerks Union, Local 770*, 208 NLRB 356, 357 (1974).

<sup>6</sup> *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

<sup>7</sup> *See, e.g., Plumbers Local 412*, 328 NLRB 1079, 1084-85 (1999) (finding no evidence that union-employer was aware of employee’s ostensibly protected activity and that employee’s termination was lawful because she abandoned her work station in violation of union-employer’s policies and procedures).

the Secretary Treasurer's mistreatment of staff, that is not sufficient to ascribe any unlawful motive to the Union-Employer's termination decision. Rather, the evidence clearly shows that the President's singular focus in terminating the Charging Party was for his disloyalty in contemplating running against the President, as the President perceived a threat to his own job and a threat to his continued management of the Union-Employer's direction and policies.<sup>8</sup>

Accordingly, for the foregoing reasons, the 8(a)(1) charge should be dismissed, absent withdrawal.<sup>9</sup>

/s/  
B.J.K.

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<sup>8</sup> See *Finnegan v. Leu*, 456 U.S. 431, 441 (1982) (elected union leader has the freedom to choose a staff whose views are compatible with his own); *Oregon State Employees Assn.*, 242 NLRB 976, 995 (1979) (union-employer lawfully removed employee from his position for complaining about the executive director to the board of directors and making derogatory remarks about staff competency in an effort to oust and replace the executive director); *Butchers Union Local 115*, 209 NLRB at 806 n.1, 811 (no violation where union-employer terminated employee because it thought employee was seeking an executive position on management staff at the expense of incumbent official).

<sup>9</sup> Because the Charging Party was not discharged for engaging in activity protected by Section 7, it is unnecessary to apply the balancing test set forth by the Board in *Operating Engineers Local 370*, 341 NLRB 822, 824-25 (2004) (where a union-employer discharges a paid employee in a key position for activity that is critical of the union but also protected by Section 7, the employee's right to engage in such activity must be balanced against the union's legitimate interest in ensuring loyalty, support, and cooperation). See, e.g., *Service Employees Local 1*, 344 NLRB 1104, 1105 (2005) (where employee was engaged in Section 7 activity in repeatedly complaining about union-employer's policy that affected daily working conditions and union-employer discharged him because of that protected activity, the *Operating Engineers Local 370* balancing framework was applicable).