

**DECISION OF THE NATIONAL OFFICER ELECTION
COMMITTEE ON AUGUST 10, 2021 PRE-ELECTION PROTEST**

Statement of Facts

On August 10, 2021, Camryn Manheim, William Charlton, Ben Whitehair, Ellen Crawford, Jenny O’Hara, Woody Schultz, Clyde Kusatsu, Rob Archer, and Armand Vasquez (collectively the “protesters”) filed a pre-election protest. The protesters allege that employer resources were used to promote the candidacies of Matthew Modine (“Modine”), Joely Fisher (“Fisher”) and other members of the Membership First (“MF”) slate (collectively the “Modine/Fisher/MF Slate”) in violation of Article IV.B of the SAG-AFTRA Nominations and Election Policy (the “Election Policy”) and Title IV, Section 401(g) of the LMRDA. On August 13, 2021, the protesters filed an amendment to their protest adding additional allegations concerning the use of employer resources.

First, the protesters allege that Eleven Films is an employer and that, in its capacity as an employer, Eleven Films repeatedly posted social media endorsements of the Modine/Fisher/MF Slate. The protesters further contend that Eleven Films contributed \$100 to a GoFundMe account supporting the Modine/Fisher/MF Slate and prepared a campaign video in support of the Modine/Fisher/MF Slate. The protesters also allege that Modine/Fisher/MF Slate did not pay for either the video prepared by Eleven Films or for numerous movie clips featured during the video. In support of these allegations, the protesters provided copies of 74 tweets from the Eleven Films twitter account, a screenshot of the GoFundMe payment, and a copy of the campaign video.

Second, the protesters allege that, on August 4, 2021, KTLA, an employer of SAG-AFTRA members, permitted KTLA employee and Los Angeles MF Local Board candidate Sam Rubin (“Rubin”), to promote his candidacy and the Modine/Fisher/MF Slate on air during his regular morning show. During the program, the protesters allege that Rubin invited MF Secretary-Treasurer candidate Joely Fisher to participate as a guest with the sole purpose of promoting her candidacy and the Modine/Fisher/MF Slate. In support of this allegation, the protesters provided a recording of the program, a transcript of the program, and posts made by KTLA advertising the broadcast.

In the recording of the KTLA broadcast, Rubin opens his program by stating that he is a candidate for a Board seat on the MF ticket. Rubin then says, “I want you to be aware of that, and as I'm doing set that aside. Candidates from both groups are very much welcome on our show here.” Next, Rubin introduces MF Secretary-Treasurer candidate Joely Fisher. Fisher speaks at length about the MF platform, starting with a critique of the Unite for Strength (“UFS”) affiliated incumbents in connection with the recent contract negotiations and the health plan changes.¹ Fisher states, “So that's one thing that we're running on, Membership First. I'm running with Matthew Modine as president, myself as National Secretary-Treasurer.”

¹ MF-affiliated members have filed two lawsuits against the incumbents and the SAG-AFTRA health plan in connection with these issues. *See Fisher v. SAG-AFTRA, et al.*, 2:21-cv-5215-CAS-JEM; *Asner v. The SAG-AFTRA Health Fund*, 2:20-cv-10914-CAS-JEM.

As Fisher makes these remarks, the MF logo and pictures of Modine and Fisher are displayed across the screen. Additionally, throughout the entire interview, the address for MF's campaign website is shown below Fisher's name.

Later in the interview, Fisher states that the current President and Secretary-Treasurer, both of whom are UFS candidates, are "jumping ship" and disparages the qualifications of other UFS candidates who they are supporting. In closing the segment, Rubin tells viewers that ballots for the SAG-AFTRA election have been mailed and that "if you're a SAG-AFTRA member, look for that ballot it's probably coming your way."

On August 5, 2021, counsel for members of the UFS slate sent a letter to KTLA alleging that this conduct violated Section 401(g) and requesting that: 1) KTLA prohibit Rubin from "further unlawfully misusing KTLA resources to promote his and Modine/Fisher's candidacies;" 2) broadcast a statement advising viewers that Rubin used airtime to promote his candidacy and that of two other candidates and that this action violated KTLA policies and federal law; and 3) immediately invite three corresponding opposing candidates to be interviewed on KTLA by a neutral reporter at the same time of day and for an equal amount of time as the initial broadcast. On August 12, 2021, KTLA denied the requested remedy.

In an amendment to their protest, the protesters provided evidence that on August 11, 2021, KTLA again improperly used its resources to promote the candidacy of MF candidates during an on-air interview. During this segment, Rubin interviewed MF candidate Sheryl Lee Ralph ("Ralph"). Ralph notes that she and Rubin recently were on a phone meeting "running for Vice President of the LA local of our SAG-AFTRA union."

On August 12, 2021, in accordance with Article VI.B(1)(c) of the Election Policy, the Election Committee offered the Modine/Fisher/MF Slate the opportunity to submit evidence and their position in response to the protest. On August 16, 2021, counsel for MF submitted a statement and signed declaration from Eleven Films' owners stating that Eleven Films is not an employer. Counsel further contended that Rubin's interviews on the KTLA morning show constituted part of Rubin and KTLA's "ordinary business practice" and that an employer does not violate Section 401(g) if the employer, in its ordinary business, confers a benefit on a candidate if it makes the same benefit available to others.²

Discussion

Article IV.B of the Election Policy and Section 401(g) of the LMRDA, 29 U.S.C. § 481(g) ("Section 401(g)") prohibit the use of employer funds to promote or denigrate the

² We note that the protesters submitted additional evidence regarding Eleven Films after counsel for MF submitted a response to the protest. In pre-election protests, we will limit our review to the evidence submitted with the protest and the response submitted by the affected candidate(s). Accordingly, we will not consider this subsequently submitted evidence in deciding this pre-election protest. If the protesters wish for the Election Committee to review this or any other evidence, they may include it as part of a post-election protest, if one is filed.

candidacy of any person. Department of Labor (the “DOL”) regulations provide that employer resources include both direct and indirect expenditures. 29 C.F.R. § 452.78. An employer may not contribute anything of value to support the candidacy of any individual in an election. *Id.* Additionally, as discussed below, where remedial actions are taken to neutralize disparate treatment by an employer, there is no outcome-determinative violation.

Eleven Films

The protesters contend that a company called Eleven Films is an employer and violated Section 401(g) by promoting the candidacies of members of the Modine/Fisher/MF Slate through a GoFundMe donation, social media posts, and a campaign video. In response to the protest, counsel for MF asserted that Eleven Films is a personal loan-out tax vehicle for Tiffany and James Dugger, its sole owners. In support of this claim, counsel for MF provided a signed declaration from the Duggers stating that Eleven Films is a limited liability company that has no employees, issues no W-2s, and pays no payroll taxes. Based on the information provided, we find that there is insufficient evidence to establish that Eleven Films is an employer as defined under the LMRDA.³ Accordingly, we find no violation of the Election Policy or applicable federal law arising from Eleven Film’s donation, Twitter posts, or its production of a MF campaign video.⁴

KTLA Broadcasts

The protesters contend that KTLA, indisputably an employer, improperly used its resources when KTLA employee and MF Los Angeles Local Board candidate Sam Rubin used his morning show to promote the Modine/Fisher/MF Slate. Additionally, the protesters claim that the content of Rubin’s program denigrated candidates on the UFS slate.

In determining whether a particular communication “went beyond the scope of legitimate coverage of newsworthy activities”⁵ and constituted a Section 401(g) violation, the DOL, often in the context of union publications, looks at the tone, timing, and content of the communication. For example, a federal district court found a 401(g) violation where a union-sponsored weather forecast program aired on local radio stations discussed the union’s health plan and the incumbent candidate while mentioning the upcoming election; it also found a

³ See *SAG-AFTRA (National Headquarters) (3)* (May 15, 2020) (finding company was not an “employer” under the LMRDA, but rather a “‘loan-out’ tax vehicle”).

⁴ The protesters also contend that the MF campaign video produced by Eleven Films included movie clips that were not properly paid for. Counsel for MF does not dispute this factual assertion. He contends, however, that the movie clips were used pursuant to the “fair use” doctrine under federal copyright law. It is not within the jurisdiction of the Election Committee to determine whether a violation of copyright law has occurred.

⁵ *McLaughlin v. Amer. Fed’n of Musicians of U.S. and Canada*, 700 F. Supp. 726 (S.D.N.Y. 1988).

violation where the union purchased newspaper ads attacking the incumbent's rival.⁶ In so finding, the court noted that although "the newspaper advertisements and the sponsorship of the weather forecast could arguably have some useful purpose in extolling the accomplishments and publicizing the activities of the union... in considering the totality of the circumstances regarding the activities, there is reflected an intention to endorse and encourage the candidacy of certain individuals to the detriment of others."⁷ Similarly, a federal district court, upholding a DOL decision, found that a publication promoted incumbent candidates and denigrated their opponents in violation of Section 401(g) where the union newspaper criticized the challenger slate during the month of its officer election.⁸ Furthermore, courts and the DOL have found 401(g) violations even where the employer had no knowledge of the use of its resources. For example, the Ninth Circuit found a Section 401(g) violation where members of a union used two trailers belonging to their employer as billboards to promote the candidacy of incumbent candidates in an election, without the employer's knowledge.⁹

First, applying the "timing, tone, content" test to the present protest, we look at the timing of the broadcasts in question. Rubin's interview with Fisher on August 4 and Rubin's interview with Ralph on August 11 both aired during the critical election period -- shortly after SAG-AFTRA mailed ballots to members on August 3, 2021, but before the return deadline of September 2, 2021. The timing of the broadcast, in the midst of mail ballot voting, points to its possible influence on election results.

Second, Rubin, a KTLA employee, conducted the interviews during KTLA's regularly scheduled programming -- and thus on KTLA paid work time -- using KTLA resources. Rubin is not a neutral journalist; as he acknowledged at the beginning of the August 4 program, he is a candidate for a Los Angeles Local Board seat on the MF ticket. During this broadcast, Rubin interviewed MF Secretary-Treasurer Joely Fisher and asked her multiple questions about her candidacy and the MF platform. Fisher spoke at length about SAG-AFTRA's recent contract negotiations and modifications to its health plan, criticizing the incumbents, who are candidates on the UFS slate, for their handling of these issues. She then claimed that the MF candidates are "the agents of change." Fisher also made comments that denigrated UFS incumbents, who are also candidates, stating that she and others thought there may have been some "nefariousness" in the boardroom and that the incumbents were "jumping ship." She also questioned the qualifications and commitment of the UFS candidates for President and Secretary-Treasurer, stating that they "have never stepped foot in our boardroom, or maybe even in the building that we have on Wilshire..." Notably, after the interview, which

⁶ *Brennan v. Sindicato Empleados De Equipo Pesado, Construcción y Ramas Anexas de Puerto Rico*, 370 F. Supp. 872, 878 (D. P.R. 1974).

⁷ *Id.*

⁸ *Hodgson v. Liquor Salesmen's Union, Local No. 2*, 334 F. Supp. 1369 (S.D.N.Y. 1971), *aff'd*, 444 F.2d 1344 (2d Cir. 1971).

⁹ *Donovan v. Local Union 70, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, 661 F.2d 1199, 1201 (9th Cir.1981).

clearly promoted the Modine/Fisher/MF slate and denigrated the UFS slate, Rubin encouraged SAG-AFTRA members to “look for that ballot, it’s probably coming your way.”

Third, we note that while Fisher was promoting her slate and denigrating the opposition slate during the interview, KTLA displayed pictures of Modine and Fisher and the MF logo and included the address for the MF campaign website below Fisher’s name throughout the interview. KTLA also posted about the segment on its Twitter page and on its website. By including MF’s website address and logo and then promoting the interview on its platforms, we find that KTLA assisted MF candidates, including Rubin, a KTLA employee, in promoting his candidacy, as well as that of Modine, Fisher and the MF slate, to potential voters.¹⁰ By so doing, it created the impression that KTLA, a SAG-AFTRA employer, supported the MF slate.

Fourth, although Rubin started his August 4 broadcast by stating that “[c]andidates from both groups are very much welcome on our show here,” KTLA flatly denied a request to provide candidates from the UFS slate an equal opportunity to appear on air. Although Section 401(g) does not “extend to ordinary business practices which result in conferring a benefit, such as, for example, a discount on the cost of printing campaign literature which is made available on the same terms to other customers,” KTLA denied the benefit of this promotional broadcast time to other candidates. In fact, six days after counsel for UFS requested equal access for UFS candidates, KTLA allowed Rubin to interview fellow MF candidate Sheryl Lee Ralph on air. During this broadcast, Ralph highlighted the fact that she and Rubin were running for office. A day later, counsel for KTLA denied UFS’s request for equal access.

Considering the totality of the circumstances, we find that KTLA resources were used to promote members of the Modine/Fisher/MF Slate and to denigrate candidates of the UFS slate in violation of Section 401(g) and Article IV.B of the Election Policy. In particular, we note: a) the timing of the broadcast, i.e. shortly after ballots were mailed to the members; b) Rubin’s status as both a KTLA employee and MF candidate; c) the promotional tone of the broadcast; d) the display of the MF website address and logo during the interview; and e) the subsequent denial of equal access to candidates on the opposing slate. By permitting an employee running for office to interview and promote a candidate running on the same slate during work time, while displaying the MF campaign logo and website address during the interview, KTLA crossed the line from journalistically appropriate news coverage of the election to improper promotion of MF candidates and denigration of UFS candidates.

We note that our decision should not be read to preclude media outlets from broadcasting or distributing interviews by journalists who are unattached to any SAG-AFTRA slate of candidates for SAG-AFTRA office. Indeed, given the newsworthiness of the SAG-AFTRA election, numerous such interviews have already occurred. The KTLA broadcast involved special circumstances warranting a finding of a 401(g) violation -- in particular the presence of a candidate interviewer from the same slate as the candidate interviewee, the display of the slate logo and website address during this promotional use of employer resources, and the

¹⁰ According to documents provided by the protesters, Los Angeles, California, where KTLA broadcasts, has a population of approximately 19 million and 5.145 million television households. KTLA has 6.2 million followers on its social media platforms.

admonition that members look out for their election ballots in order to vote in the upcoming election.

Having found a violation of the Election Policy and Section 401(g), we now consider how best to remedy these violations. The DOL has recognized that a “controlling principle of the LMRDA is that unions should retain independent authority to remedy violations before the Department's intervention into internal union matters.”¹¹ In circumstances involving the use of union or employer resources to promote or denigrate a candidate, the DOL has recognized reimbursement, retraction, and the provision of an equal campaign opportunity as appropriate remedies.

For example, where an employer violated Section 401(g) by allowing a candidate to campaign at its worksite, the DOL found that the union adequately remedied the violation by requiring the employer to offer opposing candidates the same opportunity, even where ballots had already been mailed out when the offer was made.¹² Similarly, the DOL held that the union properly remedied a violation of Section 401(c) (prohibiting the union and employer from discriminating in favor of or against any candidate with respect to candidate mailings) by providing an opposing candidate with access to a list of members’ personal email addresses that an incumbent candidate had acquired through use of union resources.¹³ In another decision, where a candidate used an employer’s copy machine to prepare campaign fliers, the DOL found that the union adequately remedied the 401(g) violation by requiring the candidate to reimburse the employer for the fliers.¹⁴ Likewise, the DOL found no outcome-determinative violation where the union promptly removed a candidate’s campaign materials from a union bulletin board upon discovery and after only a few days of being posted.¹⁵

¹¹ *International Brotherhood of Electrical Workers (IBEW) Local 1269* (May 12, 2015) citing 29 U.S.C. § 482(b) (“The Secretary shall investigate such complaint and, if he finds probable cause to believe a violation of this title occurred *and has not been remedied*, he shall ... bring a civil action against the labor organization...”) (emphasis added).

¹² *International Brotherhood of Electrical Workers (IBEW), Local 611* (Feb. 13, 2018). The Second Circuit has upheld the same principle, ordering distribution of opposition candidate campaign literature to remedy a 401(g) violation where an incumbent candidate distributed campaign literature using union funds. *Guzman v. Local 32B-32J, Serv. Employees Int’l Union, AFL-CIO*, 151 F.3d 86 (2d Cir. 1998).

¹³ *American Federation of Government Employees (AFGE) Council 2065* (July 29, 2013) (“For the Department to seek to overturn an election there must be evidence that a violation occurred that has not been remedied.”).

¹⁴ *International Brotherhood of Electrical Workers (IBEW) Local 1269* (May 12, 2015).

¹⁵ *Communications Workers of America Local 13000* (Oct. 8, 2015); *see also United Food and Commercial Workers (UFCW)* (May 28, 2014) (possible Section 401(g) violation sufficiently remedied and thus “not a basis for the Secretary to seek to overturn the election”

As KTLA has on multiple occasions provided significant promotional time to MF candidates, we strongly encourage KTLA, by no later than August 24, 2021, to provide an equal opportunity to three candidates from the UFS slate to appear on a program under the same terms and conditions as the MF candidates. KTLA should allot the same amount of time at the same time of day, provide a neutral interviewer who is not a candidate for office, and display the candidates' pictures, the UFS web address, and the UFS logo with the same prominence and in the same manner that the MF candidates' pictures, the MF web address and the MF logo were displayed. The program should be advertised in the same manner the Fisher interview was advertised. We would also strongly encourage KTLA to post a statement during this program and on its website expressly stating that KTLA is providing equal access to UFS candidates in order to cure a prior federal labor law violation and that KTLA does not and will not promote any candidate in the SAG-AFTRA election. If KTLA fails to provide equal access and to issue a statement, we will have to determine whether this violation was outcome determinative in the election once the ballots are counted.¹⁶

where union deducted eight hours from union employees' paychecks to reflect time they had spent campaigning).

¹⁶ Although the protesters also asked the Election Committee to require the Modine/Fisher/MF Slate to fund a USF mailing to the Los Angeles membership, we find the remedy discussed above to be the most appropriate way to remedy the violations that occurred here.