ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OREGON

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 75, LOCAL 2043,

Respondent-Petitioner on Review,

v.

CITY OF LEBANON,

Petitioner-Respondent on Review.

Employment Relations Board
Case No. UP1411

CA A152059

SC S062750

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER ON REVIEW

Petition for Review of the decision of the Court of Appeals on judicial review from a final order of the Employment Relations Board

Opinion Filed: September 4, 201
Author of Opinion: Tookey, J.
Concurring: Sercombe, J. and Hadlock, J.

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I. Introduction.

Under Oregon's Public Employee Collective Bargaining Act (PECBA), public employees have "the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining." ORS 243.662. To protect that right, the PECBA makes it an unfair labor practice for public employers to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." ORS 243.672(1)(a). It further makes it an unfair labor practice for public employers to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization." ORS 243.672(1)(b).

The legislative findings behind these provisions are expressly aimed at discouraging public employers from interfering with employees' choice to be represented by a union. ORS 243.668. Toward that end, the PECBA prohibits public employers from doing anything to influence the decision of its employees regarding whether to support or oppose a labor organization that represents them. ORS 243.670(1)(a)(A).

Within that framework, this court must decide whether the City of Lebanon committed an unfair labor practice when one of its city councilors publicly responded to a letter from the union's president protesting impending layoffs of union-represented employees by excoriating unions generally,

specifically lashing out against the union that represents city employees, and expressly encouraging city employees to decertify their "union captors." The clear answer, as the Employment Relations Board held below, should be "yes" because the councilor's statements were "an attempt to implicitly coerce employees in the exercise of an important protected right - choosing whether to be represented by a union". *American Federation of State, County and Municipal Employees, Council 75, Local 2043 v. City of Lebanon*, 24 PECBR 996, 1003 (2012).

The Court of Appeals erred by reversing the Employment Relations Board decision and determining that the answer is "no" because the individual councilor was neither a "public employer" herself nor a "designated representative" of the public employer. By so ruling, the Court of Appeals misses the forest for the trees. Permitting such brazen anti-union animus by one of city's highest-ranking officials coupled with her express interference in the union president's advocacy and the employees' free choice of their labor representative flies in the face of the principles and purposes behind the PECBA. *American Federation of State, County and Municipal Employees, Council 75, Local 2043 v. City of Lebanon*, 265 Or App 288, 336 P3d 519 (2014).

Employers act through people, not as monolithic entities. Allowing the Court of Appeals' decision to stand would invalidate decades of labor cases

holding public employers responsible for the impermissible conduct of their managers and supervisors. Moving forward, it would permit managers to interfere with impunity with employees' PECBA-protected rights so long as those managers' actions are not authorized by a majority of the governing body or are not carried out by a specifically designated bargaining representative. By the Court of Appeals' reasoning, the outcome would be no different if three of the six Lebanon City Councilors had signed the letter castigating the union and encouraging employees to decertify it. Only if a fourth councilor joined the "rogue" group to constitute a majority would it be unlawful. That is an unreasonable result that turns the PECBA on its head.

Public employers have long been held responsible for the unlawful acts of their managers, even if those managers are acting as rogues. that is because even rogue managers who are in an inherent position of power over rank-and-file employees, can chill protected activity. Under the facts presented here, where City Councilor Campbell wrote a public letter she signed as "City Councilor, Ward II," responding directly to the union's opposition to layoffs of the employees it represents, and directed specifically to those union-represented employees, and where the city failed to communicate to the employees that it disavowed or repudiated her unlawful message, the city should be found to have committed an unfair labor practice.

II. The Undisputed Facts Demonstrate that, in Response to a Letter from the Union Regarding a Disputed Matter of Employment Relations Between the City and the Union, One of the City's Highest-Ranking Officials Excoriated the Union and Expressly Encouraged City Employees to Decertify the Union, That the City Took no Action to Disavow or Repudiate the Official's Statements, and that Most City Employees Were Aware of Statements and Felt Threatened and Intimidated by Them.

The facts in this case are undisputed. Indeed, the city assigned no error to any of the ERB's findings of fact. As such, they must be accepted by the court. A brief review of the context in which Councilor Campbell's statements were made, to whom they were made, the shockingly offensive content of the statements, the city's utter failure to disavow or repudiate them, and the impact it had on the union and its members informs the legal analysis here:

- City Councilor Campbell wrote her offending letter in direct response to a letter co-written by the AFSCME Local 2043 Union President and the Teamsters Local 223 President opposing the city's prior statements that it was considering layoffs of union-represented employees to address the budget shortfall. 24 PECBR at 998 (Findings of Fact 7-9).[1]

- Campbell was <u>not</u> writing about something unrelated to her job as a city councilor. She was addressing a dispute between the city and the union about whether the budget crisis should be bourne on the backs of rank-and-file union workers or alternatively, as the unions proposed, the elimination of

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[1]"With that as background, let me talk about the letter the City received from Messrs. Nelson and Burroughs." *Id.* at 999 (Finding of Fact 9). The title of the newspaper article covering her letter was: "Campbell responds to city unions' letter." Rec. 169 (Jt Exh 8).

management-level positions. 24 PECBR at 998 (Finding of Fact 8).

- Because Campbell sits on the city's budget committee and her "duties include voting on and ratifying any collective bargaining agreement with the Union that is negotiated by the city's bargaining team," the issues she addressed in her letter were ones she would consider in her official role as city Councilor. *Id.* (Finding of Fact 6).

- The newspaper article covering Campbell's letter reported that Campbell would read the letter at the city council meeting that evening. Rec. 169 (Jt Exh 8).[2]

- In her letter, Campbell referred to unions as "the last refuge of the incompetent, inept, uncooperative, intransigent and impotent employee." 24 PECBR at 1000; Rec. 171 (Jt Exh 7, p 2).

- Campbell addressed part of her public letter specifically "To employees of the City." *Id.*

- In that same paragraph, she referred to city employees as "imprisoned by the dictatorship of a union" and expressly advised them "to seek out the Department of Labor website where you can find instructions on how to de-certify your union captors." *Id.*

- Campbell signed the letter "Margaret A. Campbell, City Councilor, Ward II." 24 PECBR at 998 (Finding of Fact 9); Rec. 171 (Jt Exh 7, p.2).

- The city took no action whatsoever to repudiate or disavow Campbell's letter.

- Nearly every employee represented by the union read Campbell's letter. As a result, bargaining unit members questioned whether the

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[2]She did not, in the end, read the letter at the city council meeting. Rec. 107 (Stip Fact 5). Employees who read the article, however, were informed that she would do so. Rec. 168 (Jt Exh 8).

> union was benefitting them and whether they should continue to be represented by the union, and became fearful of engaging in any sort of concerted activity to protest the city's actions. 24 PECBR at 1000-01 (Findings of Fact 10 and 11).

These undisputed facts demonstrate that Campbell's comments were made regarding an ongoing dispute between the city and the Union regarding impending layoffs.[3] The city should not be able to duck the reality that she was writing about matters squarely within her role as a city councilor simply because Campbell included a disclaimer that she was writing as "a private citizen." Had she been writing about something unrelated to her official duties – the Portland Trailblazers or Obamacare, for example – it more likely would have been understood by readers as the personal views of a private citizen. But she wrote about an official city matter, in direct response to a letter from the union president, and she signed it, quite officially and unambiguously, as "Margaret A. Campbell, City Councilor, Ward II." While the city could have responded with a letter to employees or a published response in the local newspaper, it did absolutely nothing to repudiate or disavow Campbell's statements.

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[3]Layoffs are unquestionably within the PECBA definition of "employment relations" that must be bargained. ORS 243.650(7); *Eugene Education Assn. v. Eugene School Dist.*, 6 PECBR 4849, 4856 (1981).

III. The ERB's Findings and Conclusions Below that Advising Employees to Decertify Their "Union Captors" Violates ORS 243.672(1)(a) and (b) Should be Upheld if the Court Holds that City Councilor's Statements Should be Ascribed to the City.

The Employment Relations Board (ERB) concluded that the city violated ORS 243.672(1)(a), which prohibits restraint, interference, or coercion of employees in or because of the exercise of protected rights, when Campbell advised City employees in a February 7, 2011 letter "to seek out the Department of Labor website where you can find instructions on how to de-certify your union captors." 24 PECBR at 1001. The ERB reached this conclusion because "[g]iven the circumstances that gave rise to the statement, it constitutes an attempt to impliedly coerce employees in their exercise of an important protected right – choosing whether to be represented by a union." *Id.* Just as the ERB had previously held, it concluded in this case that advising employees to decertify their "union captors," in the midst of a budget crisis in which the employer was weighing whether to implement layoffs and reductions in services and benefits, would reasonably chill employees' exercise of protected rights by making them less willing to support the union. *Id.* at 1004-05, citing *Oregon Public Employees Union v. Jefferson County*, 18 PECBR 310, 316 (1999).

The ERB further held that this same statement constituted a violation of ORS 243.672(1)(b), which makes it an unfair labor practice for an employer

to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization," because "[b]argaining unit members' confidence in and support for the Union lessened as members questioned whether the Union provided them with any benefit, and whether it was worthwhile to continue being represented by the Union" thereby impairing the Union's ability to represent its members." 24 PECBR at 1005.

The city did not challenge any of the ERB's fact findings, including those regarding the impact of Campbell's statements on the employees, or the ERB's legal conclusions that such statements, if ascribable to the city, violated ORS 243.672(1)(a) and (b). Rather, the city's only assignment of error was that the ERB erroneously concluded that a lone city councilor's statement violated ORS 243.672(1)(a) and (b) because a "single rogue councilor" is not a "public employer" or "designated representative." Pet's Opening Br., p 4. Thus, the only question presented on appeal was whether the ERB erred as a matter of law in finding the city committed an unfair labor practice based on a single city councilor's statements. *Id.* at 2. That the conduct would constitute an unfair labor practice if ascribable to the city is unchallenged.

As such, if the court finds that the city should be accountable for Campbell's statement, then it must accept the ERB's fact findings and legal

conclusions that the statements constituted violations of ORS 243.672(1)(a) and (b).

IV. Public and Private Sector Labor Law has Long Recognized that Individual Supervisor or Manager Statements can Be Sufficient to Constitute Employer Unfair Labor Practices.

The issue in this case should be analyzed within its proper context as a labor case. Labor law, in both the public and private sectors, has long been clear that conduct of individual supervisory or managerial employees that restrains, interferes with or coerces employees in or because of the exercise of their protected rights constitutes an employer unfair labor practice. After all, when it comes to communicating with employees about their jobs, managers and supervisors do the talking. While majorities of governing boards of public entities and corporations may need to take official action to exercise certain powers, they do not authorize the day-to-day communications with employees about their jobs or their unions. Managers and supervisors do that, and when they do that in a manner that interferes with, restrains or coerce employees in the exercise of protected rights or in a manner that interferes with the existence of their union, it constitutes an employer unfair labor practice.

Under long-established principles of labor law, the crux of the issue when analyzing whether the conduct of managers and supervisors constitutes unlawful interference, restraint or coercion is whether it would have the

natural and probable effect of chilling protected activity of the employees. When a supervisor threatens to fire an employee if she votes for the union, the question is not whether the supervisor's conduct was authorized by the employer's governing body. It is whether the threat would reasonably chill the employee in the exercise of her right to choose to be represented by a union. Likewise, the question here should be whether Campbell's scathing letter excoriating unions and encouraging city employees to decertify their union would naturally and probably discourage employees from engaging in protected activity.

Whether Campbell was specifically authorized by the city council to send her missive is a red herring. The court need not determine whether Campbell herself is a "public employer" or a "designated representative." That is simply not an inquiry the courts, the ERB, or the National Labor Relations Board make in these cases. Rather, the court should determine whether Campbell's conduct would tend to chill protected activity and, if so, it should conclude that the city, as the public employer, committed an unfair labor practice.

1. Oregon Law has Long Been Clear that Individual Supervisor or Manager Conduct May be Sufficient to Constitute a Public Employer Unfair Labor Practice.

The ERB and Oregon appellate courts reviewing its decisions have long held that conduct by supervisors or managers that has the natural and

probable effect of chilling or deterring employees from exercising a protected right is sufficient to constitute an unfair labor practice by the public employer. *See e.g. Clackamas County Employees Ass'n v. Clackamas County*, 243 Or App 34, 259 P3d 932 (2011); *Wy'east Educ. Ass'n v. Or. Trail School District*, 244 Or App 194, 208, 260 P3d 626 (2011); *AFSCME Council 75 v. Josephine County*, 234 Or App 553, 559-60, 228 P3d 673 (2010); *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 624, 16 P3d 1189 (2000); *AFSCME Local 88 v. Multnomah County*, 24 PECBR 978, 991 (2012) (holding supervisor's negative comments in union steward's evaluation had natural and probable effect of deterring employee protected activity); *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, 23 PECBR 108, 127 (2009) (finding violation where manager threatened layoffs if employees exercised right to seek position reclassification and compensation for additional duties); *OPEU v. Jefferson County*, 18 PECBR at 317 (1999); *Monroe Elementary Education Assn. v. Monroe School Dist.*, 13 PECBR 54, 67 (1991); *Polk County Deputy Sheriff's Association v. Polk County*, 16 PECBR 64, 77 (1995); *Oregon Public Employees Union and Termine v. Malheur County*, 10 PECBR 514, 521 (1988); *OSEA v. Medford School Dist.*, 10 PECBR 402, 430 (1988) (holding supervisor's directives to stay away from union grievance chair and get rid of "bitch" business agent violated (1)(a)), *AWOP* 94 Or App 781 (1989); *Tigard Police Officers Assn v. City of*

Tigard, 8 PECBR 7989, 7999 (1985) (specifically rejecting argument that supervisors' comments aimed at discouraging sergeants to give up union representation were "personal" remarks and finding City violated (1)(a) and (1)(b) because comments would reasonably tend to have coercive effect on employees).

In these cases, neither the courts nor the ERB asked whether a majority of the governing body authorized the supervisor or manager conduct; the question was whether the conduct would reasonably deter protected activity. In the instant case, the Court of Appeals did not even mention this test even though the ERB decision below relied on it. 24 PECBR at 1003. By failing to address it, much less explain why it does not apply, the Court of Appeals' decision implicitly undermines the holdings and core test underlying those decisions.

By way of example, in *Clackamas County*, the county's District Attorney, a single manager, threatened to remove a union representative from a meeting in which he was representing a bargaining unit member facing discipline if the representative did not stop smirking. 243 Or App at 37. Although the union representative was not removed, and the meeting continued, the union filed a complaint with the ERB alleging that the DA's statements to the union representative violated ORS 243.672(1)(a). *Id.* The ERB, in a divided opinion, held that the DA's statements were merely heated

words that can be expected in a contentious meeting and did not rise to the level of constituting an unfair labor practice. *Id.* The Court of Appeals reversed. *Id.* at 43. In so doing, it laid out the "essential test" for determining whether a public employer commits an "in the exercise of protected rights" unfair labor practice:

> "...whether, objectively viewed, the action that the employer took under the particular circumstances would chill union members generally in their exercise of protected rights."

Id. at 40, citing *Portland Assn. of Teachers*, 171 Or App at 624. This is an objective test, and neither the employer's motive nor the extent to which employees actually were coerced is controlling. *Id.* The court went on to conclude that, merely making the threat to remove the union representative, even though the representative was not removed, was nonetheless objectively likely to chill employees from exercising protected rights," namely the representative's rights to represent the member in the meeting and the member's right to have such representation. *Id.* at 43.

If a mere threat by a single manager to remove a smirking union representative from a meeting would tend to chill protected activity, then a letter from a city councilor to city employees, in response to their union president's letter opposing impending layoffs and directing them to decertify their "union captors" would naturally and probably chill protected activity, both by the union president in speaking up on behalf of the employees he

represents, and on behalf of the represented employees who have freely chosen to be represented by the union. The Court of Appeals' decision in this case cannot be reconciled with *Clackamas County* or *Portland Association of Teachers*.

Monroe School District is even more instructive because it squarely addressed whether the school district was liable for the rogue statements of is superintendent. 13 PECBR at 66. The superintendent had told a newly hired teacher that the union did not help teachers, and that teachers would be on strike in the fall. *Id.* at 68. The ERB held that the natural and probable effect of the comments would be to discourage the new teacher from joining or participating in the union. *Id.* The district argued, as the city does here, that it should not be held liable for the superintendent's remarks because they did not reflect the attitude of the district and because the teacher should have known he was merely expressing his own opinion. *Id.* at 66-67, n 10. The ERB rejected this argument, holding that the district was liable for the acts of the superintendent. *Id.* The issue was whether the superintendent's comments had the natural and probable effect of discouraging the teacher from engaging in protected activity, not whether the district board specifically authorized those comments.

The ERB went on to award a civil penalty against the district, in part because the superintendent's statements were directed at "the most basic and

the explicitly stated right of an employee to join a labor organization" and "[w]ithout the free exercise of that basic right, the entire PECBA becomes superfluous." *Id.* at 80. *Cf. OEA v. Christy v. Wasco ESD*, 13 PECBR 532, 535 (1992) (holding single school board member's comment at board meeting had natural and probable effect of interfering with protected rights because "(1)(a) liability in this situation is ascribed to the public employer rather than to Miller as a private individual" and there was accordingly no free speech protection).

The facts here are quite similar: City Councilor Campbell, although adding a hollow disclaimer that she was speaking as a private citizen while she simultaneously signed the letter as "City Councilor, Ward II," addressed union-represented employees regarding a tense dispute between the city and the union over whether the budget crisis should be answered with layoffs, attacked the union, tried to convince employees that it was not representing their interests, and expressly encouraged them to decertify the union. As in *Monroe School District*, Campbell's statements were directed at the most basic right to join and participate in a union, and without the free exercise of that right, the entire PECBA becomes superflous.

The *Jefferson County* decision, upon which the ERB it relied in its decision below in this case, is also particularly instructive. 24 PECBR at 1003, citing *OPEU v. Jefferson County*, 18 PECBR at 317 (1999). There, a

single county commissioner, who was upset that the union had picketed his private business, called the union president to say he wanted to arrange a meeting with county employees, he wanted them to be represented by a different union, and he wanted different union representatives at the bargaining table. 18 PECBR at 313-14. While he never met directly with the employees, the ERB nonetheless held that the commissioner's statements violated the "in the exercise" prong of ORS 243.672(1)(a) because "[i]t is reasonable to conclude that the natural and probable effect of such comments would be to chill employees' exercise of protected rights." *Id.* at 316. The ERB rejected the county's argument that the lone commissioner was expressing his personal opinion and not speaking for the county. *Id.* at 316-17. Even though he was not authorized to speak for the county, his stated reason for calling the union president was to meet with the employees about the ongoing labor dispute, which made it proper to ascribe his comments to the County: "Ahern may be free to say what he will, but if his statements interfere with County employees in the exercise of their protected rights, then the County will be liable." *Id.* at 317.

Like Commissioner Ahern, Councilor Campbell was free to say what she did, but because the reason for and content of her letter was directly related to the dispute between the city and the union about whether the budget crisis should be addressed by laying off union-represented employees, and

because her statements so clearly interfered with city employees in the exercise of their protected rights by boldly directing them to decertify their union, her statements should be ascribed to the city, and the city should be found to have violated the PECBA.[4]

As all of these Oregon unfair labor practice cases make clear, the test has nothing to do with whether the manager's conduct is authorized by the public employer's governing body or whether the manager is acting as an officially "designated representative." The only issue is whether the conduct would reasonably chill employees in the exercise of protected rights. That test recognizes the inherent power disparity between rank-and-file employees on the one hand, and the supervisors and managers who have the potential to wield tremendous control over their livelihood. The position of the supervisor or manager, and the context in which the statements or actions are made may be relevant to whether the statements or conduct would reasonably chill employees. Perhaps a low-level supervisor making the same comments to a neighbor, who happens to be an employee, in the grocery store would be analyzed differently from a city councilor writing to all city employees in

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[4]Likewise, just as Ahern's comments were found to have directly impacted OPEU in its relationship with the bargaining unit and therefore constitute a violation of ORS 243.672(1)(b), Campbell's direction to employees that they decertify the union should also be found to have violated that provision. *Id.* at 318.

response to a letter from their union president. The Court of Appeals, however, completely ignored whether Campbell's statements would reasonably chill union members in the exercise of their rights.

2. The ERB's Long-Held Test is Consistent with National Labor Relations Board Decisions Holding that Individual Supervisor or Manager Conduct May Constitute an Employer Unfair Labor Practice.

Oregon public sector labor law on this issue is consistent with nearly three quarters of a century of federal private sector labor law. Because the PECBA was modeled on the federal statute, the court should look to cases decided under that law for guidance.

A. The Oregon Public Employee Collective Bargaining Act was Modeled on the National Labor Relations Act, and the ERB has Long Looked to the Decisions of the NLRB for Guidance in Interpreting the PECBA.

The Oregon PECBA, which was enacted in 1973, was modeled on the National Labor Relations Act (NLRA), 29 USC §§ 151-169. Or Laws 1973, ch 536. *Elvin v. OPEU*, 313 Or 165, 175 n 7, 177, 832 P2d 36 (1992) (noting that PECBA "was adopted to model the NLRA" and that, although PECBA "was not identical to the NLRA, PECBA was very similar in structure and language, as well as purpose"); *Rogue River Education Association/Southern Oregon Bargaining Council/OEA/NEA v. Rogue River School Dist.*, 244 Or App 181, 186, 260 P3d 619 (2011). As such, cases interpreting the NLRA – particularly those cases decided before the PECBA was enacted in 1973 –

inform the intended meaning of similar PECBA provisions. *Elvin*, 313 Or at 177, 179; *Rogue River School Dist.*, 244 Or App 187.

The relevant unfair labor practice language in the two statutes is nearly identical. Under the PECBA:

> "(1) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
> "(a) Interfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662.
> "(b) Dominate, interfere with or assist in the formation, existence or administration of any employee organization."

ORS 243.672(1)(a) and (b).

Section 8 of NLRA, which contains the provisions on which these PECBA provisions were modeled, provides:

> It shall be an unfair labor practice for an employer--
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];
>
> "(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

29 USC §158(a)(1) and (2) (Section 8(a)(1) and (2) of the Act).

As such, decisions of the NLRB interpreting Section 8(a)(1) and (2) provide helpful guidance in interpreting ORS 243.672(1)(a) and (b).

B. The NLRB has Long Held, Since Well Before 1973, that the Coercive Statements of Individual Managers or Supervisors Constitute Employer Unfair Labor Practices if They Have the Natural and Probable Effect of Deterring Protected Activity.

Like the ERB – and for many years before the PECBA was enacted – the NLRB has held that managers' and supervisors' anti-union statements may constitute employer unfair labor practices without regard to whether the statements were authorized by superiors, much less the employer's governing board. *Progressive Electric, Inc. v. NLRB*, 453 F3d 538 (DC Cir 2006); *RC Aluminum Industries, Inc.*, 343 NLRB 939, 941 (2004) (finding manager's questioning why employee was wearing a union pullover and whether he wanted to "continue the war" conveyed a threat of unspecified reprisals and violated Section 8(a)(1)); *Hialeah Hospital*, 343 NLRB 391 (2004) (finding employer violated Section 8(a)(1) when its vice president told employees he felt "betrayed" and "stabbed in the back" because they had contacted the union); *J.S. Abercrombie Co.*, 83 NLRB 524 (1949), *enf'd* 180 F2d 578 (5th Cir. 1950); *Engineered Comfort Systems, Inc.*, 346 NLRB 661, 669 (2006) (holding employer violated 8(a)(1) when company president told single employee, "I can't believe you're going union; you want to bring the whole fucking world down with you.")

As the NLRB held in 1949, long before the PECBA was enacted, the question is to be gauged from the point of view of the employees:

> "The test applied by the Board, with the approval of the courts, in determining whether an employer is responsible for coercive statements by a supervisor is not whether the statements were, in fact, within the scope of the supervisor's employment, but whether the employees have just cause to believe that the supervisor is acting for and on behalf of management in the situation under dispute. Under this test, the Board and the courts have held that, in the absence of special circumstances not present here, an employer is responsible for coercive statements and other conduct of a supervisor."

J.S. Abercrombie Co., 83 NLRB at 529 (footnote omitted), citing *Matter of Peter Freund Knitting Mills*, 61 NLRB 118, 123 (1945); *Matter of Columbian Carbon Co.*, 79 NLRB 62 (1948); *NLRB v. Link Belt Co.*, 311 US 584, 599 (1941); *International Association of Machinists v. NLRB*, 311 US 72, 80 (1940); *NLRB v. Schaefer-Hitchcock*, 131 F2d 1004, 1007 (9th Cir. 1942); *NLRB v. Cities Service Oil Co.*, 129 F2d 933, 935 (2nd Cir. 1942). *Cf. Henry I. Siegel Co. v. NLRB*, 417 F2d 1206, 1213 (6th Cir. 1969) (holding town mayor liable as agent of company for violation of 8 (a)(1) when he took out ad in local paper discussing reasons why he opposed the union organizing workers at the company), *cert. denied* 398 US 959 (1970).

That same test has endured over the decades. In the more recent *Progressive Electric*, for example, the NLRB held that the employer violated NLRA Sections 8(a)(1) and 8(a)(3) when the company president, in a rant similar to Campbell's, referred to the union as a "dirty word," made it clear he personally did not support unions, referred to a union representative as "Mr.

Asshole Union Rep," and referred to union members generally as a "bunch of dummies." 453 F3d at 542. He also wrote the word "union" on a chalk board, then drew a circle around it and a line through the circle. *Id.* In holding that such conduct constituted interference, restraint, or coercion in the exercise of protected rights, the NLRB recited the test that an employer's statement violates Section 8(a)(1) if, "considering the totality of the circumstances, the statement has a reasonable tendency to coerce or to interfere with [protected] rights." *Id.* at 544, citing *Tasty Baking Co. v. NLRB*, 254 F3d 114, 124 (DC Cir 2001). The Board also held that even a low-level foreman's threats of facility closure if the employees went union should be imputed to the employer because employees could reasonably believe he spoke on behalf of management. *Id.* at 545-46. The question was not whether he did, in fact, speak on behalf of management, but rather whether the employees could reasonably believe he did. *Id.*, citing *Indus. Constr. Servs., Inc.*, 323 NLRB 1037, 1039 (1997); *Garvey Marine, Inc.* v. NLRB, 245 F3d 819, 823-24 (DC Cir 2001); *K.W. Elec., Inc.*, 342 NLRB No. 126, (2004); *Triple H Elec. Co.*, 323 NLRB 549, 552 (1997); *GM Elecs.*, 323 NLRB 125 (1997); *Delta Mech., Inc.*, 323 NLRB 76, 77-78 (1997).

These cases demonstrate that the test the ERB followed in its order below followed the test that has long been used, not only by the ERB and Oregon courts for many years but also in the private sector, for determining

whether anti-union attacks by individual managers are sufficient to constitute employer unfair labor practices. The Court of Appeals decision marks a frightening departure from this long-accepted tenet of labor law.

C. Individual Supervisor or Manager Conduct Encouraging Employees to Decertify a Union is Even More Clearly Unlawful.

It is even more evident that an employer commits an unfair labor practice when a supervisor or manager solicits, encourages, promotes, or provides assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative. *Corrections Corp. of America*, 347 NLRB 632 (2006) (finding unlawful manager's posting of memo referencing a website that displayed sample decertification petition and purportedly responding to questions asked by employees, including: "Do you have to be a member of the Union to sign a decertification petition or to vote in any certification election?" and "How can we get rid of the union?"); *Sociedad Espanola De Auxijo Mutuo Y Benefiecentia DE P.R.*, 342 NLRB 458, 459 (2004); *Kentucky Fried Chicken Caribbean Holdings*, 341 NLRB 69, 78 (2004) (noting test is whether statement may reasonably tend to interfere with employees' exercise of protected rights and holding that human resource manager's speech did so by blaming union for failing to secure wage increase and implying that employees should withdraw their support for union); *Armored Transport, Inc.*, 339 NLRB 374, 377-78 (2003) (finding

employer's letters sent to employees disparaging union and containing a "thinly-veiled admonition to decertify the union" unlawfully interfered in the relationship between the employees and their representative); *Wire Products Mfg. Co.*, 326 NLRB 625, 626 (1998) ("It suffices that an employer's communications to employees regarding a decertification petition, when viewed in the context of the relevant circumstances, reasonably communicate that employees will fare better with respect to employment opportunities and security if they act in accordance with the employer's desire to get rid of the union"), *enfd. sub nom. NLRB v R.T. Blankenship & Associates, Inc.*, 210 F3d 375 (7th Cir. 2000); *Inter-Mountain Dairymen*, 157 NLRB 1590, 1613 (1966).

The NLRB has held that employers committed unfair labor practices even where low-level supervisors engage in relatively minor efforts to encourage decertification. *See e.g. St. George Warehouse, Inc.*, 349 NLRB 870, 895-96 (2007) (finding unfair labor practice where supervisor, upon request of employee circulating a decertification petition, spent five minutes translating the petition into Spanish for another employee); *Mickey's Linen & Towel Supply*, 349 NLRB 790, 791 (2007) (also finding supervisor provided unlawful assistance by translating decertification petition for employees and by standing and watching as employees signed it). Even merely telling an employee who initiated a decertification petition and had already collected

signatures that he should obtain more signatures is enough improper employer influence to constitute an employer unfair labor practice. *Alamo Rent-A-Car*, 359 NLRB No. 149, 2013 NLRB LEXIS 488, *9 (2013).[5]

These cases make it clear that, even subtle, minor acts by supervisors or managers to encourage employees to decertify their union interferes with and coerces employees in the exercise of their protected rights to choose and participate in the activities of their union. City Councilor Campbell's letter "to employees of the City" castigating the union and then expressly encouraging decertification was far more egregious than the conduct found to be unlawful in many of these cases:

> "To employees of the City and other organizations imprisoned by the dictatorship of a union as a private citizen I advise you to seek out the Department of Labor website where you can find instructions on how to de-certify your union captors. As an individual and former union member I believe you can put your dues to better use in your own household budget and in supporting causes that truly express your own values."

24 PECBR at 1000.

Again, that Campbell referred to herself as a "private citizen" and "individual" is insufficient to innoculate her toxic statements given that she

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[5]The NLRB's decision in this case was set aside and remanded for further proceedings following *Noel Canning v. NLRB,* 134 S Ct 2550 (2014), in which the US Supreme Court invalidated NLRB cases decided by a Board including improper "recess" appointments. 2014 NLRB LEXIS 487 (2014).

signed the letter as "Margaret A. Campbell, City Councilor, Ward II," the letter expressly responded to "this letter from the unions" about the impending layoffs, her statement encouraging decertification was directed specifically "[t]o employees of the City," and the city council, which was well-aware of the letter, did nothing to disavow or repudiate it. *Id.* at 1000-01.[6]

Moreover, the city did not assign error to ERB's fact findings that, after reading the letter, which virtually all bargaining unit members did, they became fearful of engaging in concerted activity and began to question the union. *Id.* at 1001. While subjective evidence that employees were in fact chilled is not required, that such evidence existed here lends further support to the conclusion that the statements would objectively chill protected activity.

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[6]Without citing any authority, the city argued to the Court of Appeals that it could not sanction Campbell for expressing her opinions in a public way because her letter was protected speech. Petitioner's Opening Brief /CA, p 12. It is highly unlikely that a court would find Campbell's letter to constitute protected speech given its connection to her official duties. *See Garcetti v. Ceballos*, 547 US 410 (2006). In any event, the city did not have to "sanction" Campbell to disavow or repudiate her statements. For example, the Council could have sent an official letter to the same newspaper making it clear that it does not agree with, condone, or authorize Campbell's statements and that it respects the rights of city employees to freely choose and support their union. That it did nothing of the sort only underscores why employees reasonably felt threatened and restrained by Campbell's statements. *See Roseburg Education Assn. v. Douglas County School Dist.*, 3 PECBR 1828 (1978) (holding school district responsible for conduct of principal because district did not clearly repudiate it).

V. Common Sense Holds that, if the Law Protects Employees' Free Choice of Whether to Have a Union, Then a Letter, Written and Signed by One of The Employer's Highest Ranking Managers, Excoriating Unions and Specifically Advising City Employees to Decertify Their Union Would Tend to Interfere with that Free Choice, and Affirming the Court of Appeals Decision to the Contrary Would Lead to Unreasonable Results.

The Court of Appeals decision in this case was, quite frankly, shocking to the labor community. The ERB decision below was unanimous, with no dissent even from the management board member. That is because, as the cases cited herein make clear, employers are routinely held to have committed unfair labor practices because of the statements and conduct of supervisors and managers – statements far less egregious than Campbell's. Even apart from the copious case law, common sense supports the conclusion that a letter signed by one of the city's highest-ranking officials, bashing unions and directing city employees to decertify their union would naturally and probably interfere with employees' free choice to be represented by the union and to support its activities. Lebanon is a relatively small town of approximately 15,000. Any city employee, knowing after reading her letter how passionately anti-union Campbell is, would at least hesitate about openly supporting their union, and some might feel compelled by her directive to take action to decertify it.

The city's argument before the Court of Appeals that "no action of any single city councilor has any legal effect on the City" and "an action by a city

council member outside of a public meeting or without the concurrence of a majority of the council has no legal effect" is a shockingly broad and incorrect statement of the law and of the realities of the workplace. Pet's Opening Br., p 6-7. By this reasoning, city councilors could directly threaten to fire employees who support the union.

As if that result would not be unreasonable enough, under the city's rationale, three city councilors could together call employees into a meeting and make those threats without the city committing an unfair labor practice because the threats would not have been made by a majority of the council. Worse yet, by the city's argument, *all six* councilors could do that, and it still would not constitute an unfair labor practice, because the threat would not have been made in compliance with the public meetings law. Moreover, under the city's argument, supervisors and managers lower in the chain of command have free reign to make any kind of threatening or coercive statements to discourage protected activity, because their actions can never be ascribed to the employer to find that the employer committed an unfair labor practice. This obviously turns labor law on its head and would render the PECBA utterly impotent in protecting the rights of public employees.

The fact is that rank-and-file employees are justified in fearing individual supervisors' and managers' anti-union statements because those individuals, even if they cannot legally bind the public entity for other

purposes, have great power over employees' job security and working conditions. While a rogue city councilor may not have the official authority to fire an employee directly, she clearly has influence over her subordinate managers and supervisors who, in turn, have great power to influence employees' job security, promotional opportunities, performance evaluations, and work assignments. Sadly, it is far too easy to come up with a pretext for taking adverse action against employees, and employees justifiably fear taking positions that would anger their bosses for precisely that reason. The concern is not whether Campbell could act to fire them if they openly defied her anti-union sensibilities. It is whether they would reasonably choose not to make waves by supporting their union for fear that her views might impact their livelihoods. Given that layoffs were on the table, those fears were far from remote. That inherent power disparity between rank-and-file employees and their managers and supervisors is the practical and economic reality that must inform the analysis here.

The Court of Appeals did not explicitly adopt the city's argument that no action of any city councilor can ever have a legal effect on the city. It concluded instead that Campbell is neither a "designated representative" within the meaning of ORS 243.672(1) nor was she acting as an "agent" of the City, because writing public letters was not one of the duties "ordinarily entrusted" to a city council and therefore her conduct could not have been

reasonably interpreted to have been on behalf of the city. 265 Or App at 298-99. Again, however, that reasoning ignores decades of public and private sector labor law recognizing the inherent power disparity and holding that the test to determine whether a manager's conduct constitutes an employer unfair labor practice is whether it would have the natural and probable effect of deterring protected union activity. While the court's rationale is not as sweeping as the city's, it too dramatically diminishes the ability of the ERB to protect the rights of public employees to be free from interference, restraint and coercion in the exercise of their protected rights.

The Court of Appeals relied in significant part on Campbell's disclaimer that she was writing as an individual. *Id.* at 299. As discussed already, the court gave too much weight to the disclaimer and not enough weight to other factors, like the context in which the letter was written, fear of impending layoffs, and the fact that she signed the letter as a "City Councilor."

Furthermore, permitting such a disclaimer loophole would lead to absurd results. For example, could Campbell have written, so long as she included a similar disclaimer, that any employees who go on strike should be fired? Could three city councilors sign such a letter without it being an unfair labor practice so long as they all included such disclaimers? Could all six do so, so long as the letter clarified that they were expressing their personal

opinions and were not taking official action pursuant to a public meeting? These questions all miss the mark. Such a statement by any manager, much less a city councilor, should never be permissible.

VI. Conclusion.

For all the reasons set forth herein, the Oregon AFL-CIO, Oregon Education Association, Oregon State Firefighters Council, and Service Employees International Union, Local 503, Oregon Public Employees Union respectfully request that the court reverse the Court of Appeals decision and instead, consistent with the ERB, hold that the City violated ORS 243.672(1)(a) and (b).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limitation in ORAP 5.05(2)(b), and the word-count of this brief is 7464.

I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

DATED this 4th day of March, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I filed the original BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER ON REVIEW by Certified Mail, Return Receipt Requested on the following:

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