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

Advice Memorandum

DATE: June 24, 2019

TO: Paula Sawyer, Regional Director
Region 27

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Centura
Case 27-CA-234214

506-2017-5000
506-6090-3400
512-5072-2000
512-7550-0143

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) of the Act when it discharged the Charging Party, who worked in its human resources department, based on its belief that the Charging Party shared wage information with fellow employees that [redacted] improperly obtained through [redacted] position. We conclude that the Employer lawfully discharged the Charging Party based on a reasonable belief that the Charging Party engaged in misconduct by breaching the confidentiality required in [redacted] position. Accordingly, absent withdrawal, the charge should be dismissed.

FACTS

The Charging Party was employed by Centura ("Employer") as a [redacted] in the Recruitment Department, which is part of the Employer's human resources division. [redacted] duties included "onboarding" new employees and current employees who changed positions. The Charging Party's duties allowed [redacted] access to, inter alia, employees' wage information and [redacted] understood that the information was confidential.[1]

Around the end of May 2018[2], the Charging Party told [redacted] supervisor that [redacted] was interested in moving to a new position with higher pay.[3] The supervisor

[1] The Charging Party also signed the Employer's Confidentiality Agreement, which the Region determined was not unlawfully overbroad and was not submitted for advice.

[2] All dates hereinafter are in 2018.

[3] The Charging Party's pay rate was approximately $23 per hour.

suggested that the Charging Party seek an Executive Assistant ("EA") position and advised [redacted] to meet with an internal recruiter. The Charging Party subsequently met with a recruiter to discuss open EA positions, which the recruiter informed the Charging Party had a starting wage rate of $25 per hour.[4]

The Charging Party applied to two open EA positions. For the first opening, the Charging Party contacted the employee who previously held the position and was the position's [redacted]. The first EA position was ultimately put on hold and remained unfilled. The Charging Party then applied for a second EA position and contacted the appropriate hiring manager. The Charging Party discussed the second position with another employee who was applying for the same opening. [redacted] claims that they discussed only the fact that they were each granted an interview for the EA position and specifically denies they discussed EA wage rates.

The Employer maintains an "Integrity Hotline" that has an online employee website that allows its employees to make anonymous reports regarding issues of concern. On July 30, the Employer received an anonymous report via its hotline claiming that the Charging Party had,

> ". . . on two occasions, (to myself), diclosed [*sic*] exact salaries of others while discussing [redacted] own desire for personal advancement. [redacted] has stated: 'I have access to these things. That is the one benefit to working in [redacted].' There are others that have expressed that [redacted] has been innaproporiate [*sic*] and and [*sic*] crossed the line in what [redacted] discloses. [redacted] has checked to see who is applying for jobs, and relayed that information as well . . . [Charging Party] came to me and said that [redacted] was applying for a job, because someone at another location [i.e., the employee who previously held the first EA position] with the same title was making $38.00/hr[.]"

A subsequent hotline report was filed on August 1, stating, "I have learned that [Charging Party] has also spoken to [the employee who also applied for the second EA position] regarding positions, and salaries of others."

The Employer met with the Charging Party and asked whether [redacted] had shared confidential information with anyone. Although the Charging Party denied sharing confidential information, the Employer continued to press [redacted] on whether [redacted] divulged confidential information, specifically wage rates. According to the Charging Party, [redacted] continued to deny the accusations. At the end of the meeting the Employer suspended the Charging Party without pay pending an investigation.

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[4] According to the Employer, the starting wage rates for EAs were between $32 and $38 per hour and the recruiter therefore gave the Charging Party incorrect information.

The Employer's investigation included meetings with other employees. According to the Employer, those employees claimed that the Charging Party had relayed wage information to them and told them that EA's make more money. According to the Employer's notes from its interviews, the employees stated that the Charging Party told other employees that the wage rate earned by the former EA for the first position (b) (6), (b) applied for was between $32 to $38 per hour. According to the employees, they did not engage with the Charging Party and sought to keep their distance.

Based on its investigation, on (b) (6), (b) (7)(C) the Employer terminated the Charging Party for violating its integrity standard by divulging confidential information and because it lost confidence that the Charging Party could continue to effectively do (b) (6), (b) job within the Employer's confidentiality expectations.

The Charging Party testified that (b) (6), (b) had no conversations with employees about wage rates or other confidential information, or (b) (6), (b) EA applications, and that (b) (6), (b) wanted to keep quiet the fact that (b) (6), (b) was looking for a new position. Instead, the Charging Party testified that the only employee with whom (b) (6), (b) discussed the EA position was the employee who was applying for the same position, and that those discussions were about keeping each other appraised of their respective interview schedules and any additional EA openings.

ACTION

We conclude that the Employer's termination of the Charging Party did not violate Section 8(a)(1) because the Employer discharged (b) (6), (b) based on a reasonable belief that the Charging Party inappropriately divulged confidential information obtained through (b) (6), (b) human resources position. Further, assuming the Charging Party's assertions about (b) (6), (b) own statements are accurate, the Charging Party did not discuss wages with (b) (6), (b) fellow employees and (b) (6), (b) communications with coworkers thus did not constitute protected concerted activity. Accordingly, absent withdrawal, the charge should be dismissed.

An employer may lawfully terminate an employee based on a mistaken belief of misconduct as long as the employer's belief regarding the conduct does not relate to Section 7 activity.[5] In *Yuker Construction*, the Board agreed with the ALJ's

[5] *Yuker Constr.*, 335 NLRB 1072, 1073 (2001) (employer lawfully terminated two employees based on mistaken belief that they were seeking alternative employment while being paid by the employer). *See also Flex Frac Logistics, LLC*, 360 NLRB 1004, 1005 (2014) (employer lawfully discharged accounting department employee, despite application of overbroad confidentiality rule, because it reasonably believed she had

characterization that the employer "shot from the hip" by acting hastily on its mistaken belief that two employees were seeking other employment, while being paid by the employer, but that such conduct did not constitute an unfair labor practice because the employer's decision was not based on protected activity.[6]

"Employees are entitled to use for [NLRA] purposes information and knowledge which comes to their attention in the normal course of work activity and association . . . ."[7] Employees are not, however, engaged in protected conduct when they go outside their normal work activity to obtain an employer's confidential information, even when they use it to support otherwise legitimate Section 7 activity.[8]

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disclosed client rates and profit margins to which she had access but knew the employer deemed confidential).

[6] *Yuker Constr.*, 335 NLRB at 1073 (citing *Manimark Corp. v. NLRB*, 7 F.3d 547, 552 (6th Cir. 1993) (employer may discharge employee for any reason, whether or not it is just, as long as it is not for protected activity) (citations omitted)). *See also Clinton Corn Processing Co.*, 253 NLRB 622, 625 (1980) (termination based solely on employee divulging confidential information not unlawful where employer was concerned only with confidentiality breach and asked no questions about union activity or any other line of inquiry that would tend to show it was basing termination on protected activity); *Clearwater Finishing Co.*, 100 NLRB 1473, 1474 (1952) (employer lawfully terminated confidential clerk for providing list of work projects to another employee where employer had no knowledge that the employee provided the list for union purposes and terminated employee for the sole reason of breaching confidentiality), *enforcement denied on other grounds*, 203 F.2d 938 (D.C. Cir. 1953); *Flex Frac Logistics, LLC*, 360 NLRB at 1005.

[7] *Ridgely Mfg. Co.*, 207 NLRB 193, 196–97 (1973) (employee who attempted to write down or memorize coworkers' names and addresses from their timecards for the purpose of contacting them about organizing had engaged in protected activity because timecards near the timeclock were "information available to all employees in the course of their normal work relationship" and not private records); *Gray Flooring*, 212 NLRB 668, 669 (1974) (employee who wrote down names and phone numbers of coworkers for organizing purposes had engaged in protected activity because index cards containing the information were not confidential records considering the employer had never restricted employee access to them nor considered their content confidential).

[8] *See, e.g., Roadway Express*, 271 NLRB 1238, 1239 (1984) (employee engaged in unprotected conduct by taking bills of lading from files in a limited-access office and furnishing copies to union to support its claim that employer had assigned unit work to non-unit employees); *First Data Resources*, 241 NLRB 713, 716–17, 719 (1979) (employer lawfully discharged customer service representative because she "willfully

Here, there is no evidence that the Employer regarded the Charging Party's actions as relating to Section 7 activity.[9] Instead, the Employer reasonably believed, based on the hotline tips, and meetings with the Charging Party and other employees, that the Charging Party misappropriated confidential wage records, which [redacted] had access to by virtue of [redacted] job, but which were unrelated to [redacted] normal work activity.[10] The Employer also reasonably believed the Charging Party violated the Employer's prohibition against employees in [redacted] position—i.e., with special access to confidential employer information such as these wage rates— divulging that information, and that it terminated [redacted] solely for that reason.[11] Like in *Yuker*, whether or not the Employer was ultimately mistaken in its conclusion that the Charging Party abused [redacted] position by divulging wage rates, [redacted] termination was not unlawful because it was based on that conclusion and not on any actual or perceived Section 7 activity.

We further note that the Charging Party's own description of [redacted] communications with [redacted] coworkers did not constitute protected concerted activity. For employee conduct to be protected under Section 7, it must be both concerted and pursued either for collective-bargaining purposes or for other "mutual aid or protection."[12] An individual employee's conduct is concerted when it is "engaged in with or on the authority of other employees," or when an individual employee seeks "to initiate or to induce or to prepare for group action" or to bring group complaints to management's attention.[13] Here, the Charging Party herself testified that [redacted] did not

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violated express instructions not to look at personnel files other than the files which she was assigned to photocopy," including a manager's file).

[9] *See Matrix Equities, Inc.*, 365 NLRB No. 69, slip op. at 3 (May 15, 2017) (General Counsel has burden to demonstrate that employer's intent to suppress protected activity was motivating factor in decision to take adverse action).

[10] The Employer's belief was also based on the fact that the Charging Party had been told by the recruiter that the EA position paid $25 an hour and yet the anonymous hotline tip claimed [redacted] was telling employees the position paid between $32 and $38 an hour, which the Employer surmised [redacted] could only have known if [redacted] accessed confidential wage data outside of [redacted] normal work activity.

[11] *Cf. Asheville School, Inc.*, 347 NLRB 877, 877 n.2 (2006) (employee's termination not unlawful because she was confidential employee who divulged confidential wage information obtained in course of her work).

[12] *See, e.g.*, *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 8 (Jan. 11, 2019).

[13] *Meyers Indus. (Meyers II)*, 281 NLRB 882, 885, 887 (1986), *enforced sub nom.*, *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987); *Churchill's Restaurant*, 276 NLRB 775, 777

discuss wage rates with other employees and that [redacted] did not want [redacted] coworkers to know that [redacted] was seeking a new position. Moreover, by [redacted] own admission [redacted] discussions were not pursued for "mutual aid or protection." Rather, [redacted] herself stated that [redacted] discussions about the EA position with the employee who was applying for the same position were merely for the purpose of keeping each other apprised of interview dates and of any new EA openings.

Accordingly, for the foregoing reasons, the charge should be dismissed, absent withdrawal.

/s/
J.L.S.

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(1985); *Vought Corp.*, 273 NLRB 1290, 1294 (1984), *enforced*, 788 F.2d 1378 (8th Cir. 1986).