

Explicit Graffiti Case Illuminates The Necessity of Consistent and Uniform Enforcement of Anti-Bias Workplace Rules

Labor & Employment Law Update

By Timm Schowalter on August 12, 2022

In *Constellium Rolled Products Ravenswood v. NLRB*, the U.S. Court of Appeals for the District of Columbia Circuit addressed the tension between a worker's Section 7 protected and concerted activity rights under the National Labor Relations Act and workplace harassment that's forbidden by workplace anti-bias laws. In a 2-1 ruling, the Court of Appeals held that the NLRB had adequate justification to rule that an employer violated federal labor law for firing a worker who wrote "whore board" on overtime sign-up sheets despite the employer's contention that it was enforcing its anti-harassment policy.

The genesis of the dispute was Constellium unilaterally changing their system for scheduling overtime assignments, that resulted in immediate protest among the unionized workers and the filing of over 50 grievances. In an act of continued protest, an employee wrote on the top of the overtime sign-in sheet "whore board." Constellium, who had recently incurred a million-dollar sexual harassment judgment against it for maintaining a hostile workplace, fired the employee for violating its sex harassment policy. Thereafter, the employee filed a Section 8(a)(3) unfair labor practice and the Board agreed.

Constellium believed it was on solid ground under the Board's most recent precedent on the issue. In *General Motors LLC*, 369 NLRB No. 127 (2020), the Board recognized the potential conflict between employers' obligations under federal, state, and local antidiscrimination laws and determined that the best way to harmonize the potential conflict between an employer's duties under the Act and under antidiscrimination laws in cases involving offensive or abusive speech in the workplace was to apply the Board's familiar *Wright Line* standard. The Board explained:

Under this approach, the Board will properly find an unfair labor practice for an employer's discipline following abusive conduct committed in the course of Section 7 activity when the General Counsel shows that the Section 7 activity was a motivating factor in the discipline, and the

employer fails to show that it would have issued the same discipline even in the absence of the related Section 7 activity. . . . [This] will . . . avoid potential conflicts with antidiscrimination laws. The Board will no longer stand in the way of employers' legal obligation to take prompt and appropriate corrective action to avoid a hostile work environment on the basis of protected characteristics.

Relying on *General Motors*, Constellium argued that the Board should not stand in its way of complying with its legal obligations to provide a hostile free work environment and that it would have disciplined the employee even in the absence of his Section 7 activity. But, the D.C. Court of Appeals was not persuaded because it found Constellium's argument to lack factual merit.

The court agreed with Constellium that it could have avoided NLRA liability by showing that it had a history of enforcing laws and policies against discrimination and harassment in a consistent manner. But the court's striking rebuke found that Constellium failed to comply with its "obligations under antidiscrimination laws" because the company "allow[ed] wide use" of the offensive term for several months, "until the employee alone was singled out for discipline and discharge for use of the term." Specifically, the record established that Constellium tolerated graffiti and the common use of vulgarities without imposing discipline, including use of the term "whore board," even by supervisors and it reiterated the Board's position that "there appears to have been a general laxity toward profane and vulgar language in the workplace." The court concluded it found no evidence in the record that Constellium began enforcing any such standards prior to the employee who was discharged, which was "fatal." In upholding the Board's decision the court held that Constellium failed to prove that it would have issued the same discipline even in the absence of the related Section 7 activity.

Employer Take Away: *Constellium* reiterates the general proposition that an employer may defend against allegations that its act of discipline against an employee engaged in protected activity by demonstrating that its motive was adherence to antidiscrimination laws. However, in doing so, the D.C. Circuit further emphasizes the truism of HR 101 of the paramount importance of consistent and uniform enforcement of workplace rules. As stressed by the D.C. Circuit, prior tolerance, *i.e.*, lack of enforcement, of similar offensive conduct is "fatal" to any employer's ability to prove that it would have issued the same discipline even in the absence of the related Section 7 activity.

Explicit Graffiti Case Illuminates The Necessity of Consistent and Uniform Enforcement of Anti-Bias Workplace Rules