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DISTRICT OF COLUMBIA CIRCUIT COURT SAYS EMPLOYER'S PAST FAILURE TO ENFORCE ANTI-DISCRIMINATION POLICIES PROVES THAT DISCIPLINE OF EMPLOYEE WAS UNLAWFUL RETALIATION FOR PROTECTED ACTIVITY UNDER LABOR ACT

On August 9, 2022, the District of Columbia Circuit Court decided *Constellium Rolled Products Ravenswood, LLC v. NLRB*. The Court affirmed the NLRB's ruling that an employer violated Sections 8(a)(1) and (3) of the NLRA when it terminated an employee for a written comment that was vulgar, but was also protected under NLRA Section 7. The employer's failure to discipline past instances of vulgarity indicated that the disciplinary decision was motivated by animus against protected activity, not by a desire to comply with anti-discrimination or anti-harassment policies. This ruling affirms that employees have wide latitude to express their views. Discipline must be consistent and may not be used selectively to deter union activity.

In 2013, the Employer, Constellium, changed its overtime scheduling system, requiring employees to sign up for overtime on a sheet of paper in a high-traffic area. The unpopular policy led many employees to call the sign-up sheet the "whore board." When Andrew "Jack" Williams wrote "Whore Board" on the sheet, the Employer terminated him. This termination was challenged based on the writing being protected activity.

Initially, the NLRB found that the termination violated Sections 8(a)(1) and (3) under a "totality of the circumstances" framework from *Atlantic Steel* and other rulings, which focuses on the nature of the employee's conduct. On appeal, the D.C. Circuit Court remanded for the NLRB to address whether its ruling conflicted with the Employer's legal obligations against discrimination and harassment. Meanwhile, the NLRB switched to the *Wright Line* framework for these cases. *Wright Line* gives an employer's motive greater weight, and it can generally prevail by showing that it would have imposed equal discipline for conduct that was equally harassing or discriminatory, but was not protected by Section 7. Even under the more employer-friendly *Wright Line*, the NLRB found that the Employer violated Sections 8(a)(1) and (3).

The D.C. Circuit Court affirmed. The key question was the Employer's motive, and the Court concluded the motive was anti-union. The Employer's facility was replete with vulgar language. Graffiti in public areas referred to specific employees with harassing nicknames. Employees and supervisors both verbally used the term "whore board," including over the radio. One employee testified that if all the language used at the facility was rated on a "G" to "NC-17" scale, "whore board" would get a "PG" rating. None of this language was disciplined until Williams's writing. The Employer did not adopt a new policy that would justify this different treatment. Williams's discipline singled him out from all others who engaged in similar conduct, supporting the inference that the Employer disciplined him due to animus toward union activity.

The Employer argued that it would have disciplined Williams if his conduct was not protected activity, but the Court was not persuaded. The Employer had lost a hostile work environment case to two female employees less than a year before it disciplined Williams. But the Employer made absolutely no changes to its

policies or their enforcement, even then. Vulgarity was widespread, and the Employer only took action against Williams. The Court recognized that an employer may generally discipline any conduct that is harassing or discriminatory, as long as it is actually motivated by a desire to comply with its obligations. That was not the case here. The Court upheld the finding of Sections 8(a)(1) and (3) violations.

Constellium reinforces that an employer cannot defend anti-union discipline on the grounds that the discipline could, in the abstract, be justified by anti-discrimination obligations. The employer must have actually acted with the motive of complying with those obligations. Because *Wright Line* makes the employer's motive central to the analysis, *Constellium* is a welcome and necessary confirmation that the NLRB and courts will examine employers' actual motives, even though such analyses are often difficult, rather than rubber-stamping discipline based on motives that are plausible, but that the employer did not hold. Further, *Constellium* allows unionized employees to rely on an employer's past failure to discipline conduct as an indication that the employer cannot use that conduct as a pretext to punish protected activity. This allows employees more freedom of expression and guarantees that dormant rules will not spring to life to silence union and employee advocates.

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