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DC Circuit Highlights Potential Conflict Between Union Protections and Antidiscrimination Law

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On December 31, 2019, the U.S. Court of Appeals for the D.C. Circuit remanded a decision to the National Labor Relations Board ("NLRB") in which the Board had held that Constellium Rolled Products Ravenswood, LLC violated the National Labor Relations Act when it terminated an employee for engaging in protected union activity. See Constellium Rolled Prod. Ravenswood, LLC v. Nat'l Labor Relations Bd., 945 F.3d 546, 552 (D.C. Cir.), judgment entered, 790 F. App'x 219 (D.C. Cir. 2019). The court of appeals instructed the Board to consider Constellium's argument that it fired the employee to avoid violation of Title VII. The court's decision raises important questions about the potential conflict between labor law's protections of certain speech and the protections all employees enjoy under anti-discrimination laws against workplace harassment.

Constellium Rolled Products Ravenswood, LLC v. NLRB

In 2013, having reached impasse in efforts to negotiate a new collective bargaining agreement, Constellium departed from its prior overtime work agreement with its Union and unilaterally implemented a sign-up system for overtime work. In response, the Union filed an unfair labor practice charge, which the Board dismissed. In addition to the Union's filing the charge, over 50 employees filed grievances, and some employees, including Andrew "Jack" Williams, organized a boycott. Many Union members began referring to the Company bulletin board where the overtime sign-up sheets were posted as the "whore board," and Williams wrote "whore board" at the top of two sign-up sheets. Shortly thereafter, the Company suspended, then fired him.

Sections 8(a)(3) and (1) of the National Labor Relations Act make it unlawful for an employer to take an adverse action against an employee because of the employee's protected union activity. See 1281 29 U.S.C. §§ 158(a)(3), (1). The NLRB held that Williams was engaging in protected activity when he wrote "whore board" on the sign-up sheets. The Board reasoned that Williams's act was protected because it was "a continuation and outgrowth of the employees' boycott and opposition to" Constellium's unilateral defection from a collective bargaining

agreement.

On appeal, the U.S. Court of Appeals for the D.C. Circuit held that substantial evidence supported the Board's conclusion that Williams engaged in protected union activity. However, the court remanded to the NLRB to address "the potential conflict it was arguably creating between the NLRA and state and federal equal employment opportunity laws."

Courts Must not Confuse Anti-harassment Law with Workplace Civility Codes

In so remanding, the court instructed the Board to consider in the first instance Constellium's argument that protecting Williams's union activity would conflict with equal employment opportunity laws. Constellium argued that (1) Williams's use of the word "whore" could create a hostile work environment for female employees; (2) protecting Williams's message would prevent the Company from policing foul language in the workplace; and (3) Williams's conduct violated the Company's anti-harassment rule. The court quite properly required the Board to consider "the potential conflict with equal employment opportunity laws" because harassing conduct or speech that violates anti-discrimination laws cannot be shielded merely because it also expresses a worker's objections to an employer's workplace policies. Although the line is sometimes difficult to draw, the Board and courts must attempt to balance these competing interests.

Title VII prohibits harassment that creates a hostile work environment. See, e.g., Harris v. Forklift Sys., Inc., 510 U.S. 17, 24 (1993) (on the basis of sex); Vance v. Ball State Univ., 570 U.S. 421, 427 (2013) (on the basis of race); Abramson v. William Paterson Coll. of New Jersey, 260 F.3d 265, 276 (3d Cir. 2001) (on the basis of religion); Alamo v. Bliss, 864 F.3d 541, 551 (7th Cir. 2017) (on the basis of national origin). Title VII and its state corollaries are crucial to the effort to establish and maintain equal employment opportunities for historically oppressed minorities. The court was justified in its concern that labor law protections should not override these important civil rights laws. Under the standard the Supreme Court has endorsed, harassment is actionable when it is "so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin." Harris, 510 U.S. at 22. While it might appear that Williams's one-time use of the word "whore" was not pervasive, in some cases courts have found a single use of an offensive epithet might meet the severity standard. See, e.g., Boyer Liberto v. Fontainebleau Corp., 786 F.3d 264, 281 (4th Cir. 2015) (use of epithet "porch monkey" sufficient for hostile environment claim). Further, in this case, Mr. Williams's action in writing "whore board" was part of a general and pervasive use of that term by other employees and even supervisors. Mr. Williams and others apparently did not use this offensive and misogynistic

word to insult a particular woman or women in general, but rather used it to "imply[] that those who signed [the overtime sheet] were compromising their loyalty to the Union and their coworkers in order to benefit themselves and accommodate" Constellium. Their intention does not end the consideration of whether this pervasive use of the word "whore" created a hostile environment for women because the law is concerned with the effects on the victim of harassment, not the intentions of the harasser. Williams's activity thus clearly did implicate equal employment opportunity laws.

Constellium's argument that protecting Williams's message interfered with the Company's ability to police foul language in the workplace, has less force but is also relevant to the assessment of Constellium's obligations under anti-harassment laws. Although Title VII is not a general civility code, employers are well advised to police language that may contribute to an offensive and hostile environment for some workers. Constellium had made no efforts to restrain or penalize this speech before it terminated Mr. Williams, so its concern may be somewhat disingenuous in this case, but its argument and evidence should be assessed by the Board. On remand, the Board should take care to balance the competing and overlapping goals of labor and anti-discrimination laws. The shield against harassment should not be used as a sword by employers to eviscerate the protection of workers' concerted activities under labor law. Where protected union activity conflicts with the guarantees of antidiscrimination laws, the Board must be mindful to preserve these statutory protections to the extent possible. See Can-Am Plumbing, Inc. v. N.L.R.B., 321 F.3d 145, 153–54 (D.C. Cir. 2003) ("[W]here the policies of the Act conflict with another federal statute, the Board . . . must fully enforce the requirements of its own statute. . . insofar as possible, in a manner that minimizes the impact of its actions on the policies of the other statute."). Anti-discrimination protections should not be sacrificed out of respect for speech rights in the labor union context any more than in other settings.