

EMPLOYER CAN'T TERMINATE VULGAR EMPLOYEE BECAUSE OF SPOTTY DISCIPLINARY RECORD – A 5-STEP PLAN TO AVOID THE SAME FATE

Insights
Aug 12, 2022

One of the nation's most powerful federal appeals courts just ruled that the NLRB was correct when it said a West Virginia-based manufacturing company couldn't fire a worker for vulgar comments because it failed to consistently apply its workplace disciplinary policies prior to terminating him. Instead, the August 9 decision from the D.C. Circuit Court of Appeals agreed that the termination amounted to an unfair labor practice under the National Labor Relations Act – a federal statute that covers unionized and non-unionized workplaces alike – and therefore ordered the company to compensate and re-hire the worker. This ruling helps draw some distinct lines about what will fly and what won't cut it when it comes to applying your disciplinary policies in the face of alleged harassing behavior balanced against protected protest activity. What lessons can your organization learn from this decision? This Insight provides you with a five-point plan to put into action to avoid a similar fate.

“Whore Board” Was the Last Straw

When aluminum manufacturer Constellium changed its system for scheduling overtime assignments at its Ravenswood, West Virginia, plant, many workers became upset. The new system required workers who wanted to get OT assignments to sign up on sheets posted outside the lunchroom and subjected them to discipline if they then didn't work. This was a change from the prior system, whereby the company would solicit workers to see if they wanted to work those shifts rather than the other way

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around (with no threat of discipline if they ultimately didn't work them).

For a period of time, the Constellium employees protested the new system by boycotting the sign-up sheets and not signing up for OT. Eventually workers started signing up when the employer did not change the system. But employee Andrew Williams was still especially upset at the change and expressed his anger in a vulgar way. He wrote the term "Whore Board" on the sign-up sheet to criticize management's new system and those workers willing to follow the procedure. In response to this action, the company terminated his employment for violating company policy.

His union helped him grieve his termination and the National Labor Relations Board (NLRB) eventually ruled in his favor. It said that he was engaging in Section 7 protected concerted activity (which can apply in non-unionized environments as well) since it was part of a larger protest whereby a group of employees took action for their mutual aid or protection regarding their terms and conditions of employment.

Failure to Deal with Past Vulgarity Doomed Employer's Defense

The employer took the case to federal court, arguing that the vulgar manner in which the employee lodged the protest should remove him from the protection of Section 7. But the D.C. Circuit disagreed in the August 9 decision and said the employer doomed its own chances of winning the case by tolerating vulgar behavior in the past.

The court applied a relatively new standard that the NLRB announced in 2020 for balancing the rights of workers and employers when someone is disciplined for protest behavior that may cross the line into "abusive conduct." Essentially the court is instructed to look at whether the employer knew the behavior was part of a larger protest and whether there is evidence that it was motivated by that protest behavior when dropping the hammer on the worker. Here, in this case, the court ruled that such evidence existed in the form of inconsistent application of company policies.

According to the court, Constellium failed to discipline or censor the use of the epithet "whore" in other circumstances before Williams wrote it in protest on the OT sign-up sheets. In fact, the evidence showed that the

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company “tolerated extensive profanity, vulgarity, and graffiti in the workplace” before the incident in question – even some supervisors used the term “whore board” according to court evidence. “There appears to have been a general laxity toward profane and vulgar language in the workplace,” the court said, and that doomed the company’s defense. It even pointed to the fact the employees were unclear about what company policies were in this regard given the inconsistent application of discipline.

What Can You Do? A 5-Step Plan

To avoid the same fate as Constellium, we recommend every employer work with your management team and H.R. department to deploy a five-step plan to address harassing behavior in the workplace. [You can read it in more detail here](#), but in sum:

1. Make sure your policies match modern standards;
2. Disseminate your policies in a thoughtful way;
3. Train your managers to address issues and avoid common mistakes;
4. Promptly investigate any issues raised; and
5. Consistently enforce your standards.

Conclusion

We will continue to monitor the situation and provide updates as more information becomes available. Make sure you are subscribed to [Fisher Phillips’ Insight system](#) to get the most up-to-date information. If you have questions, reach out to your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Labor Relations Practice Group](#).