COALITION FOR A
DEMOCRATIC WORKPLACE

February 6, 2024

The Honorable Bernie Sanders
Chair
U.S. Senate Committee on Health,
Education, Labor & Pensions
Washington, DC 20510

The Honorable Virginia Foxx
Chair
House Education and the Workforce Committee
Washington, DC 20510

The Honorable Bill Cassidy
Ranking Member
U.S. Senate Committee on Health,
Education, Labor & Pensions
Washington, DC 20510

The Honorable Bobby Scott
Ranking Member
House Education and the Workforce Committee
Washington, DC 20510

Dear Chairs Sanders and Foxx, Ranking Members Cassidy and Scott, and members of the U.S. Senate Committee on Health, Education, Labor & Pensions and House Education and the Workforce Committee:

In light of the recent supplemental decision made by Administrative Law Judge ("ALJ") Benjamin Green in *Amazon.com Services LLC v. Gerald Bryson*, the Coalition for a Democratic Workplace ("CDW") writes to urge that your committees use their oversight authority to question the National Labor Relations Board ("NLRB" or "Board") and the Board's General Counsel about the current tension and inconsistencies their actions and interpretations have created between federal antidiscrimination laws that apply to employers, including institutions of higher education, and federal labor law. Rulings by the Board and enforcement positions by the General Counsel are creating an impossible situation for employers in which they are forced to choose between either complying with federal antidiscrimination laws (and thereby protecting their employees from harassment in the workplace) or complying with the current NLRB and General Counsel's bizarre interpretations of labor law. The *Bryson* case is a prime example. ALJ Green held, in accordance with the Board's recent *Lion Elastomers*[1] decision, that "strikers' profane, vulgar, racist, and otherwise insulting language [is] protected so long as the comments contain no threats of violence." This standard protects harassers that violate federal antidiscrimination laws, is dangerous for employees' wellbeing, and exposes employers to significant liability under the law.

CDW is a broad-based coalition of over 500 major business and trade organizations representing hundreds of thousands of employers and millions of employees in various industries across the country concerned with a longstanding effort by some in the labor movement to make radical changes to the National Labor Relations Act ("NLRA") without regard to the severely negative impact they would have on employees, employers, and the economy. CDW was originally formed in 2005 and has since focused on pushing back against the regulatory overreach of the NLRB.

[1] *Lion Elastomers LLC*, 372 NLRB No. 83 (2023).

On January 29, 2024, ALJ Green held, in a supplemental decision, that Amazon.com Services LLC violated Section 8(a)(1) of the NLRA by illegally firing a worker who was protesting to urge the company to improve COVID-19 protocols. In actuality, however, the individual in question was fired nearly four years earlier for shouting profane, sexually charged obscenities at a female coworker over a bullhorn at Amazon's Staten Island facility where they both worked. A friend of the terminated employee captured the incident on video and posted it to Facebook, further disseminating the harassment and abuse. The video evidence proves that the individual called the female coworker a "gutter bitch," "ignorant and stupid," "crack-head ass," "crack ho," and "queen of the slums" and accused her of being "high" and on "fentanyl."

The case was originally decided by the NLRB on April 18, 2022, and relied upon precedent set by *General Motors LLC*, 369 NLRB No. 127 (2020) ("*General Motors*"). The Board remanded the case in August 2023 in light of the Board-issued decision in *Lion Elastomers LLC*, 372 NLRB No. 83 (2023) ("*Lion Elastomers*"), which overruled *General Motors* and reinstated "setting-specific" standards for evaluating misconduct in the course of protected activity. According to ALJ Green, "setting-specific" standards include *Clear Pine Mouldings, Inc.*, 268 NLRB 1044 (1984) ("*Clear Pine"),* the standard governing picket line misconduct, as well as *Pier Sixty, LLC*, 362 NLRB 505 (2015) ("*Pier Sixty"*) and *Desert Springs Hospital Medical Center*, 363 NLRB 1824 (2016) ("*Desert Springs"*), both of which govern the totality-of-the-circumstances standards governing social-media posts and conversations among employees in the workplace.

In analyzing the standards, ALJ Green held that Bryson had been unlawfully discharged for the following reasons. Under consideration of *Pier Sixty*, the Board held that "an objective review of the evidence under the foregoing factors establishes that none of them weighs in favor of finding that [Bryson's] comments were so egregious as to take them outside the protection of the Act."[2] Under the same standard, "[t]hat Bryson's argument with Evans was not a planned or deliberate part of the demonstration is a factor favoring continued protection."[3] Through consideration of *Desert Springs,* ALJ Green determined that "it is a strong factor favoring continued protection under the totality-of-the-circumstances test that Bryson's 'use of profanity was unaccompanied by any threat of harm.'"[4] Further, Green asserted that Bryson did not act in a manner that would lose him protection under *Clear Pine*: "**The Board has found strikers' profane, vulgar, racist, and otherwise insulting language to be protected so long as the comments contain no threats of violence.**"[5]

To render Bryson's language and actions "unaccompanied by threat or harm" and determine "none of them… so egregious as to take them outside the protection of the act" is inconceivable and in direct conflict with federal antidiscrimination laws. The clearly inappropriate language and conduct over which Bryson was fired should not be tolerated in any workplace. To allow such behavior would create unsafe and hostile

[2] *Amazon.com Services LLC v. Gerald Bryson,* No. 29-CA-261755 (2024) at 5.
[3] *Id*. at 9.
[4] *Id*. at 8.
[5] *Id*. at 7 (emphasis added).

work environments, which is specifically prohibited by federal antidiscrimination laws as enforced by the Equal Employment Opportunity Commission ("EEOC" or "Commission").

Importantly, the EEOC has cautioned the NLRB from protecting blatantly hostile and inappropriate workplace behavior in the past. In a 2019 amicus brief before the Board in *General Motors*, the EEOC explained, "[E]mployers should be able to address and take corrective action vis-à-vis workers who use this kind of racist and sexist language while otherwise lawfully exercising their rights under the NLRA."[6] The Commission argued that denying employers this authority would result in employer liability under Title VII of the Civil Rights Act, stating, "[u]nder [Title VII's] negligence standard employers bear the obligation of preventing and correcting harassment in the workplace… if the employer *fails* to take corrective action, and the harassment continues and rises to the level of an actionable hostile work environment, then the employer may face liability."[7] The EEOC called on the Board to "consider a standard that permits employers to take action to correct conduct that violates Title VII or other antidiscrimination statutes."[8]

In addition, federal courts have also expressed concerns with the NLRB's tolerance of abusive misconduct during organizing campaigns. In a 2016 concurring opinion in *Consolidated Communications v. NLRB*,[9] Judge Patricia Millet, an Obama-appointee who sits on the US Court of Appeals for the DC Circuit, chastised the Board for their "too-often cavalier and enabling approach… toward the sexually and racially demeaning misconduct of some employees during strikes." She explained:

> Those decisions have repeatedly given refuge to conduct that is not only intolerable by any standard of decency, but also illegal in every other corner of the workplace. The sexually and racially disparaging conduct that Board decisions have winked away encapsulates the very types of demeaning and degrading messages that for too much of our history have trapped women and minorities in a second-class workplace status…Conduct that is designed to humiliate and intimidate another individual because of and in terms of that person's gender or race should be unacceptable in the work environment. Full stop…Such language and behavior have nothing to do with attempted persuasion about the striker's cause… Indeed, such behavior is flatly forbidden in every other corner of the workplace because it is dangerously wrong and breathes new life into economically suffocating and dehumanizing discrimination that we have labored for generations to eliminate. Brushing that same behavior off when it occurs during a strike simply legitimates the entirely illegitimate, and it signals that, when push comes to shove, discriminatory and degrading stereotypes can still be a legitimate weapon in economic disputes.[10]

---

[6] *General Motors LLC*, 369 NLRB No. 127 (2020) at 22.
[7] *Id.* at 18 (emphasis in original).
[8] *Id.* at 24.
[9] *Consolidated Communications, Inc. v. NLRB*, 837 F.3d 1 (D.C. Cir. 2016)
[10] *Id.* at 34.

Moreover, permitting language like that used by Bryson would create additional conflict with educational institutions' obligations under Title IX of the Education Amendments of 1972 and Title VI of the Civil Rights Act of 1964. This would be on top of institutions' obligations under the laws enforced by the EEOC. The Board's position would also allow for racist, sexist and abusive language aimed at students as long as it was deemed "protected activity." This is increasingly a concern given the Board's current expansive application of the NLRA to students at colleges and universities, which includes graduate students and arguably student athletes.[11]

Federal agencies should not deliberately create conflicts between federal laws as it puts employers in the impossible position of choosing which laws to comply with in a given situation. Additionally, union organizers and their supporters should not have the right to create unsafe and hostile workplaces. Most union leaders would agree that union organizers can organize, advocate for workplace issues, and criticize their employers without repeatedly calling a female co-worker a "crack ho," "gutter bitch" or "drug addict" over a bullhorn. CDW urges you to use your authority to rein in the NLRB and General Counsel and ensure cohesion across agency enforcement of federal antidiscrimination laws and federal labor relations laws.

Sincerely,

Kristen Swearingen
Chair
The Coalition for a Democratic Workplace

[11] "During 2022 and 2023 alone unions won 30 new student-worker collective bargaining units, representing a total of 35,655." See https://www.lawcha.org/2023/10/21/union-organizing-and-strikes-2022-23-historical-context2022-2023/#:~:text=This%20explosive%20growth%20in%20strike,each%20year%20starting%20in%202019.