



COALITION FOR A
DEMOCRATIC WORKPLACE

May 9, 2022

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

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

Dear Chair Murray, Ranking Member Burr and members of the U.S. Senate Committee on Health, Education, Labor & Pensions:

In light of the committee's scheduled hearing with President Biden's nominee to serve as Commissioner of the Equal Employment Opportunity Commission ("EEOC"), the Coalition for a Democratic Workplace ("CDW") writes to you to express our concerns with the current tension between federal antidiscrimination laws and federal labor relations laws as implemented by the National Labor Relations Board ("NLRB") and its General Counsel. Enforcement efforts by General Counsel Jennifer Abruzzo are creating an impossible situation for the employer community where they will be forced to choose between compliance with federal antidiscrimination laws or federal labor relations laws, exposing employers to significant liability and employees to unsafe, hostile workplaces.

CDW is a broad-based coalition of hundreds of 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 regulatory overreach by the NLRB.

On March 17, 2022, the General Counsel filed suit against Amazon asking the US District Court for the Eastern District of New York to force the company to reinstate a former employee who was fired nearly two years before. The individual in question was fired for shouting profane, sexually charged obscenities at a female coworker over a bullhorn at Amazon's Staten Island facility where they both worked. [Video evidence](#) proves the individual called the female coworker a "gutter bitch," "ignorant and stupid," "crack-head ass," "crack ho," and "queen of the swamp" and accused her of being "high" and on "fentanyl." This video was live-streamed and posted on social media, further disseminating the harassment and abuse.

Such clearly inappropriate language and conduct should not and cannot be tolerated in any workplace. Allowing it would create unsafe and hostile workplaces, which is specifically prohibited by federal antidiscrimination laws enforced by the EEOC.

Importantly, the EEOC has already cautioned the NLRB from protecting such blatantly inappropriate workplace misconduct. In 2019, in an [amicus brief](#) before the Board in *General Motors*, the Commission 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.”¹ The EEOC explained that, in denying employers this authority, employers would face liability under Title VII of the Civil Rights Act; “Under [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.”² 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.”³

Furthermore, federal courts have already expressed significant concerns with the NLRB’s tolerance for abusive misconduct during organizing campaigns. In 2016, in a [concurring opinion](#) in *Consolidated Communications v NLRB*,⁴ Judge Patricia Millet, an Obama-appointee who sits on the US Court of Appeals for the DC Circuit, excoriated 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.⁵

As recently as last week, another DC Circuit Judge, David Sentelle, chastised the Board for its position. Judge Sentelle asked the NLRB’s attorney, “Are you saying a union employee can use

¹ *General Motors LLC*, 369 NLRB No. 127 (2020) at 22.

² *Id.* at 18 (emphasis in original).

³ *Id.* at 24.

⁴ *Consolidated Communications, Inc. v. NLRB*, 837 F.3d 1 (D.C. Cir. 2016).

⁵ *Id.* at 34.

union status to immunize contributing to a hostile workplace?” The attorney answered, “I acknowledge there can be a tricky situation there, it can be a rock and a hard place. . . .”⁶

Federal agencies should not deliberately create conflicts between federal laws and should not put 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. Employees are entitled to safe work environments free from harassment and abuse. The EEOC and NLRB should work together to ensure employers understand their obligations under their respective laws and employees have the ability to collectively bargain without violating the rights and well-being of others.

Sincerely,

A handwritten signature in black ink, appearing to read "Kristen Swearingen". The signature is written in a cursive, flowing style.

Kristen Swearingen
Chair
The Coalition for a Democratic Workplace

⁶ Iafolla, Robert. “NLRB’s ‘Whore Board’ Decision Faces D.C. Cir. Judge’s Skepticism.” Bloomberg News, May 4, 2022, <https://news.bloomberglaw.com/daily-labor-report/nlrbs-whore-board-decision-faces-d-c-cir-judges-skepticism?context=search&index=2&s=09>.