371 NLRB No. 16 (N.L.R.B.), 2021 L.R.R.M. (BNA) 320623, 2020-21 NLRB Dec. P 16846, 2021 WL 3812209

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

CONSTELLIUM ROLLED PRODUCTS RAVENSWOOD, LLC
AND
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 5668

Case 09-CA-116410
August 25, 2021

SUMMARY

***1** On remand from the D.C. Circuit Court, the Board unanimously affirmed its previous conclusion that the Respondent violated Section 8(a)(3) and (1) by suspending and terminating an employee. In its initial decision, the Board had found that the employee engaged in protected conduct concerning the Respondent's overtime procedures when he wrote "whore board" on the Respondent's overtime signup sheets; that the Respondent disciplined him for the protected conduct of his writing; and that his conduct was not so egregious as to cause him to lose the protection of the Act. The Court remanded the proceeding to the Board to address the limited issue of the potential conflict between the Board's interpretation of the NLRA in its underlying decision and the Respondent's obligations under state and federal equal employment opportunity laws. On remand, a Board majority (Members Kaplan and Emanuel) explained that the analytical framework set forth in *General Motors LLC*, 369 NLRB No. 127 (2020), represents the Board's reconciliation of the precise issue remanded by the court: potential conflict between an employer's duties under the NLRA and under antidiscrimination laws. The majority thus found it appropriate to apply the *General Motors* test to resolve the issue remanded by the Court, and, applying that test, concluded that the Respondent failed to show that it would have suspended and discharged the employee for misconduct under antidiscrimination laws even absent his protected Section 7 activity.

Chairman McFerran concurred in the result, agreeing that the Respondent violated Section 8(a)(3) and (1) by suspending and discharging the employee. Chairman McFerran observed that she did not participate in *General Motors LLC,* and she took no position on whether that decision was correctly decided and whether it is appropriate to apply that decision on remand. Instead, Chairman McFerran found that the Board's underlying Decision and Order did not create any conflict--actual or potential--with the Respondent's obligations under equal employment opportunity laws, stating that the employee's conduct could not plausibly constitute a basis for establishing a claim under federal and state anti-discrimination precedent. Chairman McFerran further stated that the Board's Order would not have required the Respondent to tolerate hostile work conditions or forgo its obligations under equal employment opportunity laws.

Charge filed by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 5668. Administrative Law Judge Keltner W. Locke issued his decision on September 29, 2016. Chairman McFerran and Members Kaplan and Emanuel participated.

SUPPLEMENTAL DECISION AND ORDER [1]

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND EMANUEL

On July 24, 2018, the National Labor Relations Board issued its Decision and Order in this proceeding finding that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and terminating employee Andrew "Jack" Williams after he wrote "whore board" on the Respondent's overtime signup sheets. [2] On October 17, 2018, the Board denied the Respondent's Motion for Reconsideration. [3]

The Respondent filed a petition for review of the Board's Order, and the Board filed a cross-petition for enforcement. On December 31, 2019, the United States Court of Appeals for the District of Columbia Circuit remanded the case to the Board to address the potential conflict between the Board's interpretation of the NLRA and the Respondent's obligations under state and federal equal employment opportunity laws. *Constellium Rolled Products Ravenswood, LLC v. NLRB*, 945 F.3d 546, 548-49 (D.C. Cir. 2019).

By letter dated March 10, 2020, the Board invited the parties to file statements of position with respect to the issues raised by the court's opinion. The Respondent, the Union, and the General Counsel each filed a statement of position. [4]

The Board has reviewed the entire record in light of the court's decision, which is the law of the case. We find that application here of *General Motors LLC,* 369 NLRB No. 127 (2020), resolves potential conflict between the Board's finding of an NLRA violation in this proceeding and the Respondent's obligations under equal employment opportunity laws. We accordingly reaffirm the Board's conclusion that the Respondent violated Section 8(a)(3) and (1) by suspending and terminating Williams.

A.

In 2013, the Respondent unilaterally imposed new overtime procedures. Under the new procedures, overtime signup sheets were posted on a bulletin board and employees who volunteered for overtime were required to sign up a week in advance. Union members protested the Respondent's new procedures by refusing to sign up for overtime and by widely referring to the overtime sheets as the ""whore board" without disciplinary action imposed by the Respondent. On October 2, 2013, employee Williams wrote "whore board" on the top of the posted signup sheets. The Respondent suspended Williams and later discharged him on October 22.

The Board in a divided opinion found that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging Williams. [5] The Board found that Williams was engaged in a continuing course of protected activity protesting the overtime procedures when he wrote "whore board" on the Respondent's overtime signup sheets, and rejected that his use of graffiti rendered his conduct inherently unprotected. 366 NLRB No. 131, slip op. at 2. The Board further found that the evidence showed that the Respondent disciplined Williams for the protected content of his writing. Id., slip op. at 2, fn. 8. The Board concluded that Williams's conduct was not so egregious as to cause him to lose the protection of the Act under the factors in *Atlantic Steel Co.*, 245 NLRB 814 (1979) or viewing the circumstances as a whole. Id., slip op. at 2-4. [6]

B.

***2** On review, the court held that the Board did not impermissibly depart from its precedent in finding that defacement of employer property can constitute protected activity in some circumstances. See 945 F.3d at 550. The court further held that the Board's decision that the Respondent disciplined Williams based on the content of his message was supported by substantial evidence. Id. at 550-51. The court found, however, that the Board had failed to address "the potential conflict between its interpretation of the NLRA and [the Respondent's] obligations under state and federal equal employment opportunity laws" including to maintain a harassment-free workplace. The court remanded the case to the Board to address that limited issue. Id. at 549, 551-52.

C.

In *General Motors*, the Board recognized the potential conflict between employers' obligations under federal, state, and local antidiscrimination laws and the Board's "setting-specific standards" under *Atlantic Steel* and similar precedent [7] aimed at deciding whether an employee has or has not lost the Act's protections. 369 NLRB No. 127, slip op. at 1, 6-7. In addressing this issue, the Board declared that its "current standards for analyzing abusive conduct . . . have been wholly indifferent to

employers' legal obligations to prevent hostile work environments on the basis of protected traits." Id., slip op. at 7. The Board further explained that violations found under *Atlantic Steel* have "conflicted alarmingly" with employers' obligations under antidiscrimination laws because they fail to take into account that the discipline at issue may have been motivated by employers' efforts to fulfill their obligations under antidiscrimination laws. [8]

In light of these issues, the Board determined that the best way to harmonize the potential conflict between an employer's duties under the Act and under antidiscrimination laws in cases involving offensive or abusive speech in the workplace was to apply the Board's familiar *Wright Line* [9] standard. As the Board explained:

> Under this approach, the Board will properly find an unfair labor practice for an employer's discipline following abusive conduct committed in the course of Section 7 activity when the General Counsel shows that the Section 7 activity was a motivating factor in the discipline, and the employer fails to show that it would have issued the same discipline even in the absence of the related Section 7 activity. . . . [This] will . . . avoid potential conflicts with antidiscrimination laws. The Board will no longer stand in the way of employers' legal obligation to take prompt and appropriate corrective action to avoid a hostile work environment on the basis of protected characteristics.

***3** 369 NLRB No. 127, slip op. at 10, footnotes omitted.

The *General Motors* analytic framework applying the *Wright Line* test represents the Board's reconciliation of the precise issue remanded by the court here: potential conflict between an employer's duties under the NLRA and under antidiscrimination laws. The *General Motors* framework harmonizes the conflict by permitting an employer to show that its imposition of discipline was lawfully motivated by its efforts to fulfill its obligations under antidiscrimination laws. We thus find it appropriate to apply the *Wright Line* test, as set forth in *General Motors*, to address and resolve the issue remanded by the court. The record before us provides ample evidence to do so, as the parties fully litigated the facts and circumstances of the suspension and discharge of Williams, including the Respondent's asserted reasons for imposing discipline on him.

D.

Under *Wright Line*, the General Counsel bears the initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in the employer's adverse employment action. The General Counsel meets this burden by proving that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity. See *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 1, 6 (2019) (clarifying that "the evidence of animus must support finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee"). Once the General Counsel makes his initial case, the employer will be found to have violated the Act unless it meets its defense burden to prove that it would have taken the same action even in the absence of the Section 7 activity. See *General Motors*, supra, slip op. at 10; *Hobson Bearing International*, Inc., 365 NLRB No. 73, slip op. at 1, fn. 1 (2017).

We find that the General Counsel has satisfied his initial burden under *Wright Line*. There is no dispute under the law of the case that Williams engaged in protected Section 7 activity when he wrote "whore board' on the overtime signup sheets. The Board found that conduct to be part of a continuing course of protected activity protesting the Respondent's overtime procedures, and that "the Respondent disciplined Williams for the protected content of his writing." 366 NLRB No. 131, supra, slip op. at 2 & fn. 8. The court did not disturb these findings, rather holding that the Board did not depart from its precedent by finding Williams'

conduct to be protected. 945 F.3d at 550. There is likewise no dispute that the Respondent had knowledge of Williams' Section 7 activity in connection with the overtime sign-up sheets.

***4** We further find that the *Wright Line* element of animus is established here. The Board in *Tschiggfrie Properties* confirmed that evidence of animus may be established by direct or circumstantial evidence. "We continue to adhere to the Board's longstanding principle that proof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole." 368 NLRB No. 120, slip op. at 8 (quotation omitted). Circumstantial evidence of disparate treatment of the discriminatee constitutes strong evidence of animus under *Tschiggfrie Properties*. See *Wendt Corp*, 369 NLRB No. 135, slip op. at 4 (2020) ("circumstantial evidence of animus under *Tschiggfrie Properties* is clearly established by the Respondent's disparate treatment of [employee] Hudson"); *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 2-3 (2020) (lack of evidence that employer disciplined others for similar offenses shows animus); *Overnite Transportation Co*., 335 NLRB 372, 375 (2001) (unlawful motive inferred from evidence of disparate treatment), cited with approval in *Tschiggfrie Properties*, supra, slip op. at 8.

There is ample evidence here of the Respondent's disparate treatment of Williams in suspending and discharging him for writing "whore board" on the signup sheets. The record is replete with unrebutted evidence that use of vulgarity, graffiti, and profane language were commonplace at the Respondent's facility, and were tolerated by the Respondent without imposing discipline. This included references--even by supervisors--to the overtime signup sheets as the "whore board." [10] In contrast, the Respondent singled Williams out from all others who engaged in similar conduct, and imposed discipline-- including discharge-- only on him. This blatant disparate treatment evidences a strong causal relationship between Williams' protected activity and the Respondent's discharge decision, and it is precisely the type of circumstantial evidence found to establish animus under *Tschiggfrie Properties*. [11] We accordingly find that the General Counsel has met his initial *Wright Line* burden of establishing that Williams' protected activity was a motivating factor in the Respondent's discharge of him. [12]

***5** We further find that the Respondent has not met its *Wright Line* rebuttal burden of showing it that it would have disciplined Williams for writing "whore board" on the sheets even absent his Section 7 activity. The Respondent argues that Williams' use of the gender-based epithet "whore" triggered its obligations under equal opportunity laws to address and eliminate harassment in its workplace. It further argues that the Board's underlying decision prevents it from eradicating such harassing workplace behavior, and thus subjects it to liability under the antidiscrimination laws. [13] The Respondent argues in essence that its suspension and discharge of Williams was lawfully motivated by its efforts to comply with antidiscrimination laws.

The Respondent's contention is not supported by the record, however. The Respondent tolerated extensive profanity, vulgarity, and graffiti in the workplace even following its adverse jury verdict in December 2012. Indeed, following the Respondent's unilateral implementation of its new overtime policy on April 15, 2013, the Respondent permitted the common use of the term "whore board" in its workplace to refer to the overtime signup sheets. The Respondent's lack of enforcement of its obligations under antidiscrimination laws allowing wide use of the term persisted for some 6 months, until Williams alone was singled out for discipline and discharge for use of the term. The Respondent's blatant disparate treatment of Williams while allowing others to engage in extensive unacceptable behavior forecloses the Respondent from establishing its *Wright Line* defense that it would have discharged Williams under antidiscrimination laws even absent his protected conduct. See *General Motors,* supra, slip op. at 10 fn. 26 (explaining that the Board would find a violation under *Wright Line* when an employer is unable to rebut the General Counsel's burden because it had a history of tolerating inappropriate conduct).

E.

Under *General Motors*, an employer may defend against allegations that its imposition of discipline violated the NLRA by showing that it was motivated by its obligation to comply with equal employment opportunity laws. This allocation of burdens pursuant to *Wright Line* recognizes and accommodates an employer's duties under the two respective statutory schemes, and thus ameliorates the potential for conflict between them. See *General Motors*, slip op. at 10. Applying this framework on remand,

we have found that the Respondent has failed to show that it would have suspended and discharged Williams for misconduct under antidiscrimination laws even absent his Section 7 activity. We accordingly reaffirm our prior holding that the Respondent suspended and discharged Williams in violation of Section 8(a)(3) and (1) of the Act.

ORDER

***6** The National Labor Relations Board reaffirms its Order set forth at 366 NLRB No. 131, as modified below, and orders that the Respondent, Constellium Rolled Products Ravenswood LLC, Ravenswood, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified. [14]

1. Insert the following after par. 2(c) and re-letter the subsequent paragraphs:

> (d) File with the Regional Director for Region 9 a copy of Williams' corresponding W-2 form reflecting the backpay award.

2. Substitute the following for re-lettered par. 2(g):

> (g) Post at its Ravenswood, West Virginia facility copies of the attached notice marked "Appendix." [15] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 10, 2013.

3. Substitute the attached notice for the notice attached to the Board's original Decision and Order.

Dated, Washington, D.C. August 25, 2021

Marvin E. Kaplan
Member
William J. Emanuel
Member

***7** CHAIRMAN MCFERRAN, concurring in the result.

I did not participate in *General Motors LLC,* 369 NLRB No. 127 (2020), and I take no position on whether that decision was correctly decided, whether it "harmonize[d] the potential conflict between an employer's duties under the [National Labor Relations] Act and under antidiscrimination laws" (as the majority asserts), or whether it is appropriate to apply that decision

here. Nonetheless, I agree with the majority's conclusion that the Board's underlying decision in this case [1] --where it held that the Respondent violated Section 8(a)(3) and (1) by suspending and discharging employee Andrew "Jack" Williams--did not interfere with the Respondent's obligations under equal employment opportunity laws and should therefore be affirmed.

The United States Court of Appeals for the District of Columbia Circuit directed the Board, on remand, "to address the potential conflict between its interpretation of the NLRA and Constellium's obligations under state and federal equal employment opportunity laws." [2] In so doing, the court found that substantial evidence supported the Board's finding that the Respondent disciplined Williams because of the protected content of his message: the words "whore board," which he wrote on the Respondent's overtime signup sheet as part of an ongoing concerted protest against the Respondent's new overtime procedure. [3] But the court found that the Board failed to address the argument that it had "ignored the Company's obligations under federal and state anti-discrimination laws to maintain a harassment-free workplace." [4]

Focusing only on the narrow question that the court posed, I would find that that the Board's Decision and Order did not create any conflict--actual or potential--with the Respondent's obligations under equal employment opportunity laws. Longstanding Supreme Court precedent holds that, pursuant to Title VII, a hostile work environment exists where "the workplace is permeated with discriminatory intimidation, ridicule, and insult[ ] that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." [5] "[I]n order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." [6] The Court has directed reviewing courts to "look[ ] at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." [7] "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." [8]

***8** Viewed in the context of the facts and circumstances in this case, Williams' conduct here--a single instance of writing "whore board" on an overtime signup sheet--could not plausibly constitute a basis for establishing a hostile work environment claim under federal discrimination precedent. Most significantly, the record makes clear that the phrase "whore board" was widely and reasonably understood by the Respondent's employees and managers as a reference to the ongoing labor dispute involving the new overtime procedure. Williams's use of the term was not directed at any coworker or protected characteristic, including gender. Moreover, the Board explained that Williams' protest was a single, brief act that appeared to be spontaneous, and "there is no evidence that Williams' act disrupted work or interfered with the legibility or use of the signup sheets," [9] or "interrupted production[.]" [10] Even assuming--contrary to the evidence--that the term would have been objectively and subjectively understood as a gender-based slur, Williams' single written use of the phrase "whore board" would not, on this record, have been sufficiently severe, pervasive, or disruptive to alter an individual's conditions of employment.

Likewise, the Board's Order would not have required the Respondent to tolerate hostile work conditions or forgo its obligations under equal employment opportunity laws. The Order required only that the Respondent cease and desist from "[s]uspending, discharging, or otherwise discriminating against any employee for engaging in union or protected concerted activity," and that it reinstate and make whole Williams. Nothing in the language of the Order would have precluded the Respondent from preventing or acting against potential Title VII misconduct.

In support of its position that Williams' action created potential liability, the Respondent repeatedly cites an unrelated case from December 2012 where a West Virginia jury found that two of its female employees had been subjected to a hostile work environment. But the incident that the Respondent relies on-- which was initiated by management, involved multiple comments, and implicated personal, gender-based slurs that referenced specific employees--is easily distinguishable from the one here. [11] And despite the Respondent's claim that it had adopted a "zero-tolerance policy," the record indicates that it continued to tolerate vulgarity, profanity, and employees' common usage of the term "whore board" in the months preceding Williams' discipline.

For these reasons, in response to the court's directive on remand, I would find that the Board's underlying Decision and Order did not conflict with the Respondent's obligations under equal employment opportunity laws, and would therefore affirm the Board's findings that the Respondent violated Section 8(a)(3) and (1) by suspending and discharging Williams.

***9** Dated, Washington, D.C. August 25, 2021

Lauren McFerran
Chairman

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

***10** The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend, discharge, or otherwise discriminate against you for engaging in union or protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Andrew “”””Jack” Williams full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Andrew “Jack” Williams whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest, and WE WILL also make Andrew “Jack” Williams whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Andrew “Jack” Williams for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL file with the Regional Director for Region 9 a copy of Andrew “Jack” Williams' corresponding W-2 form reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Andrew "Jack" Williams, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

CONSTELLIUM ROLLED PRODUCTS RAVENSWOOD, LLC

The Board's decision can be found at https://www.nlrb.gov/case/09-CA-116410 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Footnotes

1 The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. Member Ring took no part in the consideration of this case.

2 366 NLRB No. 131.

3 Member Ring took no part in the consideration of the Board's underlying decision or the Respondent's motion. Member Kaplan did not participate in the Board's underlying decision, and he expresses no view on whether it was correctly decided.

4 On July 31, 2020, the Respondent filed a Notice of Supplemental Authority.

5 *Constellium Rolled Products Ravenswood LLC*, supra, 366 NLRB No. 131. Member Emanuel dissented.

6 Member Emanuel adheres to his dissent from the Board's decision. As explained in that dissent, Williams defaced company property by writing "whore board" on an overtime signup sheet. Because an employer has a right to maintain discipline and order in its facility, Member Emanuel would have found this defacement unprotected under established Board law. However, he acknowledges that the law of the case on remand by the court is that the defacement did not render the conduct by Williams unprotected.

7 *Desert Springs Hospital Medical Center*, 363 NLRB 1824, 1824 fn. 3 (2016); *Clear Pine Mouldings, Inc*., 268 NLRB 1044, 1046 (1984), enfd. mem. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986).

8 369 NLRB No. 127, slip op at 1.

9 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

10 As the Board found in its underlying decision:

> [T]he record evidence indicates that "whore board" became a common expression, frequently uttered even by supervisors. There is no evidence that the Respondent censored or punished employees for using this expression. Indeed, there appears to have been a general laxity toward profane and vulgar language in the workplace. [366 NLRB No. 131, slip op. at 1.]

11 See *Wendt Corp*, supra, 369 NLRB No. 135, slip op. at 4; *Mondelez Global, LLC*, supra, 369 NLRB No. 46, slip op. at 2-3; accord: *Volvo Group North America, LLC,* 370 NLRB No. 52, slip op. at 3 (2020) (finding insufficient circumstantial

evidence of animus under *Tschiggfrie Properties* where the General Counsel did not show that the discipline was inconsistent with the employer's treatment of similar misconduct).

12 We recognize that *Mondelez* and *Wendt* had multiple bases for finding animus, unlike here; nevertheless, we find that the strength of the disparate treatment evidence established in this case is sufficient to show animus. See *General Motors*, 369 NLRB No. 127, slip op. at 10 fn. 23 (disparate treatment evidence carries particular probative value showing animus in the context of abusive conduct cases); *Tschiggfrie Properties*, 368 NLRB No. 120, slip op. at 8 ("some kinds of circumstantial evidence are more likely than others to satisfy the General Counsel's initial burden").

13 The Respondent asserts it was committed to a zero-tolerance anti-harassment policy at the time it discharged Williams on Oct. 22, 2013, because some 10 months earlier the Respondent had received a $1 million jury verdict against it for creating a hostile work environment for two female employees. See *Constellium Rolled Products Ravenswood, LLC v. Griffith,* 2014 WL 5315409 (W. Va. 2014).

14 We have modified the Order in accordance with *Cascades Containerboard Packaging-Niagara*, 370 NLRB No. 76 (2021), and *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We have substituted a new notice to conform to the Order as modified

15 If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

1 *Constellium Rolled Products Ravenswood, LLC*, 366 NLRB No. 131 (2018).

2 *Constellium Rolled Products Ravenswood, LLC v. NLRB*, 945 F.3d 546, 548-49 (D.C. Cir. 2019).

3 Id. at 551.

4 Id.

5 *Harris v. Forklift Systems*, Inc., 510 U.S. 17, 21 (1993) quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65, 67 (1986) (internal citations and quotations omitted). The Respondent here does not assert a specific theory of potential Title VII liability that concerned it; in my view, the only arguable theory is sex discrimination based on a hostile work environment, given that the facts could not support disparate treatment, impact, or quid pro quo harassment claims.

6 *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998), citing *Harris v. Forklift Systems, Inc.*, 510 U.S. at 21-22.

7 Id. at 787-788, citing *Harris v. Forklift Systems, Inc.*, 510 U.S. at 23 (quotations omitted).

8 Id., citing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998) (quotations omitted). Similarly, under West Virginia State law, "[a]n employee may state a claim for hostile environment sexual harassment if unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature have the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment." *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995). Accordingly, for the reasons discussed, the Board's Decision and Order would not have interfered with the Respondent's obligations under State law either.

9 366 NLRB No. 131, slip op. at 3.

10 Id., slip op. at 4.

11 There, the Respondent's CEO posted on a bulletin board poorly redacted employee comments that referred to two readily identifiable female employees as, among other things, “lazy worthless bitches” with “big lazy asses.” See *Constellium Rolled Products Ravenswood, LLC v. Griffith*, 235 W. Va. 538, 775 S.E.2d 90, 98 (2015).

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