

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

CONSTELLIUM ROLLED PRODUCTS)	
RAVENSWOOD, LLC)	
)	
and)	Case No. 09-CA-116410
)	
UNITED STEEL, PAPER AND FORESTRY,)	
RUBBER, MANUFACTURING, ENERGY,)	
ALLIED INDUSTRIAL AND SERVICE)	
WORKERS INTERNATIONAL UNION,)	
LOCAL 5668, AFL-CIO-CLC)	
)	

CONSTELLIUM’S STATEMENT OF POSITION

Constellium Rolled Products Ravenswood, LLC (“Constellium” or the “Company”) respectfully submits this Statement of Position pursuant to the National Labor Relations Board’s (“NLRB’s” or the “Board’s”) March 10, 2020 invitation.

I. INTRODUCTION

On December 31, 2019, the United States Court of Appeals for the District of Columbia Circuit granted the Company’s petition for review of the Board’s July 24, 2018 Decision and Order (“Decision”) in *Constellium Rolled Products Ravenswood, LLC*, 366 NLRB No. 131 (July 24, 2018). The court ruled that the Board’s Decision failed “to address the potential conflict between [the Board’s] interpretation of the [National Labor Relations Act (“NLRA or the Act”)] and Constellium’s obligations under state and federal equal employment opportunity [(“EEO”)] laws.” Opinion at 1, 8–9 (finding that the Company had, on multiple occasions, “raised the potential conflict” during the litigation of the unfair labor practice charge). Accordingly, the court remanded the case and ordered the Board to address the Company’s arguments regarding this conflict. *Id.* at 1, 9.

On remand, the Board should rescind its July 24, 2018 Decision and dismiss the Complaint against Constellium. In October 2013, Employee Jack Williams abused Company property and engaged in misconduct – writing “Whore Board” on the Company’s overtime sheets posted on a bulletin board in a heavily trafficked work area – in order to disseminate a vulgar, gender-based epithet. Federal and state EEO laws place an affirmative obligation on employers to root out such behavior. Even though the “Whore Board” term started with a dispute between the Company and the United Steel Workers regarding overtime policy, the NLRA does not, and should not, shield employees who display this kind of language at work.

Alternatively, Board decisions since the July 24, 2018 Decision provide means to avoid a conflict between the NLRA and EEO law altogether. Mr. Williams defaced – and effectively seized – Company property (the bulletin board) in order to disseminate his epithet in the workplace. Nothing under the Act gave him the right to use Company equipment, and his conduct never gained threshold protection under the Act as confirmed by these recent decisions.

II. ARGUMENT

A. Mr. Williams’s Use of the Phrase “Whore Board” on the Company’s Bulletin Board Lost the Act’s Protection Based on Federal and State Equal Employment Opportunity Laws.

This case presents the opportunity, as the D.C. Circuit remarked, to reconcile employers’ EEO obligations with those of the NLRA. Despite having the opportunity in the July 24, 2018 Decision, and a second opportunity through the Company’s August 28, 2018 Motion for Reconsideration, the Board sidestepped this serious issue. Employers cannot be caught in this impossible situation – to either violate the NLRA or violate EEO law. Under the facts in this case, the *specific* EEO rights govern over the *general* NLRA rights, and on this basis, the Complaint should be dismissed.

1. The Board's Existing Precedent Fails to Harmonize or Reconcile the Act's Role in the Workplace with EEO Obligations.

In an era where employers and the larger society actively are rooting out historical forms of gender-based and other discrimination in the workplace, the NLRB has to date been criticized for falling behind. The Board repeatedly has issued decisions (such as the one here) for several decades that unnecessarily prevent employers from eradicating threatening and harassing workplace behavior that may harm employees and give rise to future legal liability. This has been derided on multiple occasions at the federal level. *See, e.g., Consol. Commc'ns*, 837 F.3d 1, 20–21 (D.C. Cir. 2016) (Millett, J., concurring) (noting the “too-often cavalier and enabling approach that the Board’s decisions have taken toward the sexually and racially demeaning misconduct” and observing that “[t]he 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”); *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 27 (D.C. Cir. 2001) (“We cannot help but note that the NLRB is remarkably indifferent to the concerns and sensitivity which prompt many employers to adopt the sort of rule at issue here. Under both federal and state law, employers are subject to civil liability should they fail to maintain a workplace free of racial, sexual, and other harassment. . . . Under current law, the only reliable protection is a zero-tolerance policy, one which prohibits any statement that, when aggregated with other statements, may lead to a hostile environment.” (citation and internal quotation marks omitted)).

Constellium understands that the Board, in *General Motors*, has asked for input “to aid the Board in reconsidering the standards for determining whether profane outbursts and offensive statements of a racial or sexual nature, made in the course of otherwise protected activity, lose

the employee who utters them the protection of the Act.” 368 NLRB No. 68, slip op. at 2 (Sept. 5, 2019). The stated rationale for this request is that the Board’s precedent on racially and sexually offensive language “has been criticized as both morally unacceptable and inconsistent with other workplace laws by Federal judges as well as within the Board.” *Id.* This case presents an important opportunity for the Board to move against discrimination and harassment, regardless of its origin, consistent with other workplace laws and important societal values.¹

2. Mr. Williams’s Written Use of the Term “Whore” Implicated EEO Laws and Protections.

Neither the Board nor the General Counsel has ever argued that Mr. Williams’s use of the term “Whore Board” is permissible under federal and state EEO laws, including Title VII of the Civil Rights Act of 1964 (“Title VII”) or analogous state and local laws. That is understandable because the case law is clear that the term “whore” is a gender-based epithet designed to demean and harass based on sex. *See, e.g., Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 813 (11th Cir. 2010) (even where a term like “whore” was used to refer to men, “this usage may not make the epithets any the less offensive to women on account of gender”); *Forrest v. Brinker Int’l Payroll Co.*, 511 F.3d 225, 229 (1st Cir. 2007) (“A raft of case law . . . establishes that the use of sexually degrading, gender-specific epithets, such as . . . ‘whore’ . . . [have] been consistently held to constitute harassment based upon sex.”); *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1000 (10th Cir. 1996) (noting that the term “whore” is a “sexual epithet[.]” that has “been identified as intensely degrading to women” (citations and internal quotation marks omitted)).

¹ While the instant case raises overlapping issues with *General Motors*, for the reasons explained in this position statement, the Board can dismiss the Complaint here based on the unique facts and circumstances without first deciding *General Motors*.

Indeed, as the Equal Employment Opportunity Commission (“EEOC”) recently opined in an amicus curiae brief to the Board, “[a]lthough context matters under Title VII, there is no leeway granted employees who make racist or sexist comments because they may have heated feelings about workplace matters.” *See* Brief of the Equal Employment Opportunity Commission as Amicus Curiae at 13, *General Motors LLC*, 368 NLRB No. 68 (Sept. 5, 2019); *see also id.* at 7, 18 (concluding that “[e]mployers should be able to address offensive statements or conduct that violate, or may violate, Title VII or other federal antidiscrimination laws”). The EEOC also has recognized that the term “whore” can be grounds for valid hostile work environment claims. *See* Press Release, Equal Employment Opportunity Commission, Courtesy Building Services Settles EEOC Sex Harassment Suit (Nov. 17, 2011), <https://www.eeoc.gov/eeoc/newsroom/release/11-17-11.cfm> (company subjected female employees to a sexually hostile work environment where, *inter alia*, a male sales representative frequently used the word “whore” in referencing women); Press Release, Equal Employment Opportunity Commission, Phoenix Car Dealers to Pay \$500,000 to Settle Suit for Race and Sex Harassment, Retaliation (Dec. 8, 2009), <https://www.eeoc.gov/eeoc/newsroom/release/12-8-09.cfm> (hostile work environment included, *inter alia*, employees being referred to as a “whore”).

The prospect of having to respond to offensive workplace postings that violate EEO law is not just a hypothetical issue for Constellium. In December 2012, just months before Mr. Williams’s October 2013 “Whore Board” posting, the Company received an adverse \$1 million jury verdict after a West Virginia state court jury concluded that two employees were “subjected to [an] unwelcome gender based, hostile or abusive employment environment” based on sexually offensive language (including use of the term “bitch”) posted by coworkers on the Company’s

bulletin boards. As a direct result of the verdict, the Company reaffirmed its commitment to maintaining a harassment-free workplace and adopted a zero-tolerance policy for behavior that involved, among other things, vulgar or offensive workplace graffiti and postings. It was under these conditions that the Company decided in 2013 to quickly remove Mr. Williams’s offensive postings and respond with discipline.

The past several years – and the emergence of the “me too” movement – have only heightened the concerns that led Constellium to take the actions it did in 2013. One need look no further than the widely-covered Harvey Weinstein criminal proceedings, where the backdrop of sexual harassment and violence included the terms “bitch” and “whore” to denigrate women.² These gender-based epithets have no redeeming societal value, regardless of the existence of a “labor dispute.” A word like whore is chosen in the context of a labor dispute *based on its demeaning history*, with the goal of smearing employees with an offensive label “whore” if they do not join in the cause. Here, that cause was to pressure employees not to accept voluntary overtime. It cannot be the case that employees need access to such degrading terms during a “labor dispute” in order to promote collective action under the NLRA.³

² James Queally & Laura Newberry, *Harvey Weinstein verdict: Jurors took women’s harrowing testimony to heart*, L.A. Times, Feb. 24, 2020, <https://www.latimes.com/california/story/2020-02-24/harvey-weinstein-verdict-jurors-took-accusers-harrowing-testimony-to-heart> (last visited April 24, 2020) (one victim recalling that during a rape event Weinstein called her a “whore” and a “bitch”).

³ There are plenty of other terms Mr. Williams or others could have used to encourage employees not to accept voluntary overtime, such as “sell out,” “toady,” or even the labor-related epithet “scab.” None of those terms would have triggered the express conflict that led the D.C. Circuit to order the Board to reconcile the NLRA with EEO obligations.

3. Based on the Conflict with EEO Law and Obligations, the Generalized Protections Afforded Under the NLRA for Workplace Protest Must Not Extend to Shield Mr. Williams’s Written Epithet.

Given the above, there should be no dispute that the term “Whore Board” triggers liability under federal and state EEO law. The issue is whether the NLRA should override this EEO concern and place employers, like Constellium, in the position to comply with one legal obligation at the expense of another. For the reasons explained below, placing the NLRA above EEO laws in this case is bad law and policy.

The Board routinely is tasked with harmonizing the Act’s policies and demands with other workplace laws and obligations at issue. As the Board has recognized, “employees have equivalent rights—guaranteed by federal, state, and local laws and regulations—to have protection from unlawful workplace harassment and discrimination based on sex” and employers “have an obligation to maintain work rules and policies to assure these rights.” *The Boeing Co.*, 365 NLRB No. 154, slip op. at 21 (Dec. 14, 2017). Likewise, the United States Supreme Court long ago found that the Board cannot simply “effectuate the policies of the [NLRA] so single-mindedly that it . . . wholly ignore[s] other and equally important Congressional objectives.” *S. S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). Rather, “the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.” *Id.* Federal courts will not defer “to the Board’s remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.” *See Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 142–44 (2002).

Here, EEO laws should prevail as a general rule when employees use those terms in a discriminatory or harassing manner, even during a labor dispute. This is true regardless of

whether the Board applies the “totality of the circumstances” test, the *Atlantic Steel* test, or some new test to analyze whether Mr. Williams’s conduct retained the Act’s protection. *See Pier Sixty, LLC*, 362 NLRB 505, 506 (2015); *Atl. Steel Co.*, 245 NLRB 814, 816–17 (1979). Under any framework, the Board must consider whether the employee conduct at issue implicates federal, state, and local EEO obligations and public policy, including potential employer liability for discrimination or harassment if left unaddressed. If so, the Board should give the specific EEO policy controlling weight over generalized NLRA protections that speak nothing to overriding EEO law.

For example, controlling weight would align with existing factors under the totality of the circumstances or *Atlantic Steel* tests. The Company’s EEO obligations are most relevant to the nature and subject matter of Mr. Williams’s post, whether the Company considered language similar to that used by Mr. Williams to be offensive, and, perhaps most applicably, whether the Company maintained a specific rule (for example, an anti-harassment rule, which Constellium did and the General Counsel never challenged) prohibiting the language at issue. *See Pier Sixty, LLC*, 362 NLRB at 506. Likewise, with the *Atlantic Steel* test, the Company’s EEO obligations are relevant to the nature of Mr. Williams’s conduct. *See Atl. Steel Co.*, 245 NLRB at 816. No matter the test applied, it is clear that Mr. Williams’s written dissemination of the term “Whore Board” violated the Company’s anti-harassment rule, triggered the Company’s EEO law obligations and, as a result, lost the Act’s protection.

The Board must do more than label the language “harsh and arguably vulgar.” *Constellium Rolled Prods. Ravenswood, LLC*, 366 NLRB No. 131, slip op. at 3. The D.C. Circuit has demanded more, and employers like Constellium deserve a rational balance between legal regimes affecting the workplace. *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 153–54

(D.C. Cir. 2003) (“[W]here the policies of the Act conflict with another federal statute, the Board cannot ignore the other statute; instead, it must fully enforce the requirements of its own statute, but must do so, insofar as possible, in a manner that minimizes the impact of its actions on the policies of the other statute.” (citations and internal quotation marks omitted)). Under the facts presented, EEO obligations prevail and the allegation that Constellium violated the Act by disciplining Mr. Williams should be dismissed.

B. New Board Precedent Since July 24, 2018 Reinforces the Alternative Grounds to Dismiss the Complaint on Remand.

Constellium acknowledges that the D.C. Circuit’s basis for remand was the unaddressed conflict with NLRA and EEO obligations. The remand, however, also affords the Board an opportunity to acknowledge that there are relevant, intervening Board decisions that support the Complaint’s dismissal on grounds that avoid a potential NLRA/EEO conflict. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2019) (declining to defer to the Board’s interpretation of the Act where the Board unnecessarily seeks to interpret the Act “in a way that limits the work of a second statute”).

Mr. Williams defaced Company property and used the Company bulletin board in October 2013 to spread his epithet, but he had no legal right to do either. *Constellium Rolled Prods. Ravenswood, LLC*, 366 NLRB No. 131, slip op. at 1. Since deciding this case, the Board has made clear that employees have “no Section 7 right to use employer-owned . . . bulletin boards[.]” *Rio All-Suites Hotel & Casino*, 368 NLRB No. 143, slip op. at 6 (Dec. 16, 2019) (citing *Eaton Technologies*, 322 NLRB 848 (1997) and *Nugent Service*, 207 NLRB 158 (1973)). Likewise, even more recently, in *Argos USA LLC*, the Board reaffirmed that employees lack any Section 7 right to use employer equipment, in that case email systems, “absent proof that employees would otherwise be deprived of any reasonable means of communicating with each

other *or proof of discrimination.*” 369 NLRB No. 26, slip op. at 5 (Feb. 5, 2020) (emphasis added).

These new rulings leave no doubt, contrary to the Board’s July 24, 2018 Decision, that Mr. Williams had no threshold Section 7 right here, absent evidence of discrimination, to co-opt the Company bulletin board to spread his “Whore Board” message in the workplace. On the discrimination exception, the General Counsel did not allege discriminatory treatment regarding bulletin board access or defacement. Nor did the Board find evidence of discriminatory treatment toward Mr. Williams for his opposition to the overtime changes. 366 NLRB No. 131, slip op. at 4 (explaining that the Company for months “tolerated its employees engaging in ‘a wide range of protected activity’ to protest the overtime policy”). The General Counsel instead maintained a case theory premised on Mr. Williams’s conduct *inherently being protected* based on the dispute over the Company’s overtime policy changes. The General Counsel then argued, which the Board accepted in the July 24, 2018 Decision, that under a balancing test the Act’s protection still applied despite the defacement, unauthorized use of employer equipment, and the gender-based epithet “Whore” being displayed at work.

Because Mr. Williams never had the Act’s protection to begin with when he wrote “Whore Board” on the bulletin board in the middle of the Company’s plant, under the holdings in *Rio All-Suites Hotel & Casino* and *Argos USA LLC*, the Complaint can be dismissed without having to resolve the NLRA/EEO conflict issue.

III. CONCLUSION

For the foregoing reasons, Constellium respectfully requests that the Board, on remand, rescind its July 24, 2018 Decision and issue a new Decision and Order that dismisses the Complaint against the Company.

Dated: April 28, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of Constellium's Statement of Position was filed with the Office of the Executive Secretary today, April 28, 2020, using the NLRB's e-Filing system and was served by email upon the following:

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