

In the
United States Court of Appeals
for the Seventh Circuit

Nos. 19-1321 and 19-1549

CONSTELLATION BRANDS U.S. OPERATIONS, INCORPORATED,
doing business as Woodbridge Winery,

Petitioner / Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent / Cross-Petitioner.

On Appeal from the National Labor Relations Board
Case Nos. 32-CA-186238 and 32-CA-186265

**PETITIONER'S REPLY BRIEF IN FURTHER SUPPORT OF REVIEW AND
OPPOSITION OF CROSS-APPLICATION FOR ENFORCEMENT OF A
DECISION OF THE NATIONAL LABOR RELATIONS BOARD**

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PRELIMINARY STATEMENT

Constellation Brands U.S. Operations, Inc. (“Constellation”) did not violate the National Labor Relations Act (“NLRA”) when it requested that an employee remove a defaced vest with offensive language to protect the workforce and its public image. The NLRA does not protect racially insensitive speech. Despite the National Labor Relations Board’s (“NLRB” or the “Board”) arguments in its Brief in Opposition (“Opposition”)¹, the broadcasting of “Cellar Lives Matter,” a derivative of “Black Lives Matter,” (“BLM”) is racially insensitive and has no place in the workplace.

During the past five years, America’s social consciousness has evolved as a direct result of the BLM movement. Whether or not the NLRB agrees with the social justice aims of the BLM movement, it cannot simply ignore the associated social tension nor condemn employer responses driven by concern for the workplace instability that parody of the BLM movement could reasonably portend. The Board’s position seems to outrightly reject the notion that systemic racism continues to exist in modern America, and it similarly dismisses the politically charged environment in which the social debate over that issue exists.

¹ Respondent’s Opposition is hereinafter cited to as “Opp.” Additionally, “Supp. A” refers to the Short Appendix submitted with Constellation’s Opening Brief and “Supp. B” refers to the amended supplemental appendix Constellation filed.

The NLRB's decision ignores the watershed moment of American history and the importance of the BLM movement. The phrase "Cellar Lives Matter" does not warrant Section 7 protection. The law does not require that employers protect union-organizing speech at all costs. The Board has consistently agreed that speech with racial undertones is not protected. The Board now changes its position, by arguing that racial and inappropriate speech receive protection at work. To understand the Board's position is to dismiss the Black Lives Matter movement as, in the Board's words, nothing more than a "catchy and popular" phrase. *See Opp.*, at 40. Malicious, inappropriate and offensive speech does not deserve Section 7 protection if it "jeopardize[s] employee safety, . . . exacerbate[s] employee dissention, or unreasonably interfere[s] with a public image that the employer has established or when necessary to maintain decorum and discipline amongst employees." *See Komatsu America Corp.*, 342 NLRB 649, 650 (2004).

Constellation's position in this case demonstrates its respect for the Black Lives Matters movement and its dedication to ensuring a respectful and safe environment for its employees. Constellation reasonably perceived that co-opted use of the "Cellar Lives Matters" slogan in 2016 was and continues to be racially insensitive and, if left unchecked in the workplace, it could create a danger to its employees and its brand. Constellation respectfully asks that existing law be upheld, allowing employers to stand up against racially insensitive speech in the

workplace. Constellation should not be prohibited from ordering employees to remove racially insensitive slogans in the workplace and be ordered to post a notice that they were in error for removing racially insensitive speech from their workplace, particularly when those slogans overtly co-opt racially charged social movements for unrelated reasons.

ARGUMENT

I. “CELLAR LIVES MATTER” IS OFFENSIVE SPEECH AND IS THUS NOT PROTECTED ACTIVITY IN THE WORKPLACE

Based on the political and social history of the BLM movement, any spin off of the BLM phrase is innately racially offensive. Such offensive language is not “protected” in an employment context. As detailed in Constellation’s moving papers, the BLM movement stems from the centuries’ long and well-documented legacy of racism towards African Americans in the United States. The BLM movement advocates on matters of fundamental civil rights, including racial discrimination and state-sanctioned violence towards Black Americans. As a result, the BLM movement has driven a well-publicized wedge between Americans in the political and social arenas; the term “Black Lives Matter” has become inarguably polarizing and political. Businesses cannot ignore this polarization, given the possible disruption in the workplace and potential consumer resentment.

The NLRB dismisses the “Cellar Lives Matter” phrase as just a “catchy and popular” phrase. This perspective trivializes a movement and ignores its polarizing and political nature. Indeed, the “Cellar Lives Matter” phrase specifically plays off the “catchiness” of the “Black Lives Matter” movement, as evidenced by other derivatives such as: “All Lives Matter,” “Blue Lives Matter,” “Drunk Lives Matter,” and “Unborn Lives Matter.” All of these have been found to be offensive co-options of “Black Lives Matter.” That context cannot be ignored. “Cellar Lives Matter” cannot be divorced from the divisive social movement upon which it is derived. Because it is racially charged and has the potential to create discord among employees and impact consumer sentiment, the display of “Cellar Lives Matter” on a work vest is not protected Section 7 speech.

II. THE LANGUAGE IS INAPPROPRIATE AND MEETS THE SPECIAL CIRCUMSTANCES TEST

The NLRB’s position that the term “Cellar Lives Matter” does not fall into the special circumstances exemption demonstrates its inability to comprehend that co-option of the BLM phrase is inappropriate and offensive in any context, regardless of intent.² In fact, the NLRB’s minimization of “Cellar Lives Matter” to

² The Board states that, “a reasonable observer’s interpretation of the meaning of the ‘Cellar Lives Matter’ vest is, at the very most, open to debate.” *See Opp.*, at 32-33. While the Board seemingly maintains that the phrase is “open to debate,” the Board is incorrect in its assertion that it is *at most* open to debate, which is contrary to the relevant case law.

a mere “catchy and popular” phrase is precisely the problem.

The NLRB argues that “Cellar Lives Matters” is simply not as offensive as the language at issue in *Komatsu America Corp.*, 342 N.L.R.B. 649 (2004) or that in *Noah’s New York Bagels, Inc.*, 324 N.L.R.B. 266 (1997). The NLRB argues that the language at issue in *Komatsu* satisfied the special circumstances test because it was “unambiguously inflammatory and that on its face constitutes sufficient evidence of likely disruption of harmonious employee-management relations.” *See Opp.*, at 32. The NLRB differentiates *Noah’s New York Bagels, Inc.* because the language was “ethnically charged” and “potential harm to the employer’s business was ‘self-evident’.” *See Id.* In distinguishing those cases, the NLRB interjects a subjective standard to what is offensive, then dismisses the polarizing nature of the “BLM” movement and its history.

“Cellar Lives Matter” is a derivative of “Black Lives Matter.” It is inflammatory and racially charged on its face, with the potential to cause disruption in the workplace and harm to Constellation’s business, as would be any derivative of “Black Lives Matter.” Thus, “Cellar Lives Matter” meets the special circumstances test.

A. The Complainant's Lack of Intent is Irrelevant When Applying the Special Circumstances Test

The NLRB argues that because Chavez's intent was union-related and there were no complaints about the defaced vest, the phrase "Cellar Lives Matter" is not offensive. The NLRB is wrong on both issues.

i. Intent Does Not Preclude a Finding that Special Circumstances Exist

At the outset, we note the confusion throughout the Administrative Law Judge's ("ALJ") and the NLRB's arguments about whether it was Chavez's intent to cause harm or whether his intent to harm is relevant. Chavez's intent does not matter because intent is not an element the law requires.

The NLRB argues that there is no relationship between "Cellar Lives Matter" and "Black Lives Matter" and that Chavez's display of a union-related message could not be reasonably interpreted as expressing a substantive opinion regarding the BLM movement. *See Opp.*, at 21, Fn. 5. The NLRB further asserts that Chavez's vest was "*innocuous under any standard particularly given the context within which it was created and worn.*" *See Opp.*, at 22 (emphasis added). This argument is tautological: Chavez's vest was not offensive only because the NLRB determined it was not offensive enough. Ignorance and willful blindness do not create workplace protection of racially charged speech.

The NLRB cites to Manuel Chavez's testimony that he wanted "*something catchy and something that was popular*" in support of its contention that the "Cellar Lives Matter" slogan was not meant to be interpreted as "either endorsing or disparaging the movement." *See Opp.*, at 26. The NLRB improperly places importance on Chavez's intent. The intent of the message (expression of union support) is trumped by the offensive and racially insensitive nature of the message, and thus such language is not protected speech under the NLRA. *See Komatsu*, 342 N.L.R.B. 649 (finding special circumstances exist even though the employees' intentions were to protest the employer's decision to outsource portions of its production facilities); and *Noah's New York Bagels, Inc.*, 324 N.L.R.B. 266 (1997) (finding special circumstances exist even though the employees wore pro-union t-shirts). The NLRB also asserts that use of the phrase was not racially motivated. *See Opp.*, at 33, Fn. 7. However, it does not matter what message Chavez thought he was portraying; what matters is whether the conduct could potentially jeopardize employee safety, exacerbate employee dissension or interfere with the employer's public image. Any intent-based standard becomes completely subjective.

The NLRB further contends that Constellation "*fails to acknowledge that there can be innocent phraseological interchange*" and that Constellation had a subjective interpretation of the phrase. *See Opp.*, at 19-21 (emphasis added).

Intentional or not, words have meanings and connotations. Dismissing “Cellar Lives Matters” as “innocent phraseological interchange” ignores the inherently political nature of the BLM phrase. The “innocence” is difficult to find in phraseology specifically invoked from a socially polarizing matter that is deeply rooted in racial injustice. Such a spin-off of “Black Lives Matter” is intrinsically racial and political, as well as polarizing.

The NLRB compares the “Cellar Lives Matter” phrase on Chavez’s vest to images of striking Memphis sanitization workers “demanding improved working conditions and recognitions of their union while bearing placards stating, ‘I am a man,’” *see* Opp., at 21, which is offensive in and of itself. That comparison ignores the historical significance of the “I am a man,” phrase. The 1968 Black Memphis sanitation workers strike became an integral part of the Civil Rights Movement in America. Within days of the pivotal March 28, 1968 march, Dr. Martin Luther King, Jr. delivered his famous “I’ve Been to the Mountaintop Speech,” where he spoke about his own mortality. On April 4, 1968, Dr. King was assassinated at the Lorraine Motel in Memphis. The “I am a man” phrase is synonymous with the Civil Rights Movement, and a spin-off of this phrase would be equally offensive today. That phrase is associated with the struggle of Black Americans to obtain equal treatment, not just as sanitation workers, but as citizens of the United States of America. The BLM movement stems from a centuries’ long history of racism in America that

includes the watershed events that occurred in Memphis in March and April of 1968. “I am a man,” is a Civil Rights statement, not a Section 7 statement, and thus should not be used in a labor context. Therefore, the “Cellar Lives Matter,” vest would indeed be “reasonably understood as mocking [and undermining] the Black Lives Matter movement.” *Id.*

The NLRB cannot properly protect “Cellar Lives Matter” as “union-related” speech. Any spin-off of the Black Lives Matter movement is polarizing and political because of the inseparable connection between the phrase and racial injustice. As Constellation noted in its opening brief, “All Lives Matter,” and “Blue Lives Matter” were coined in direct response to the BLM movement – both are highly polarizing.

As an alternative argument, the NLRB contends that even if “Cellar Lives Matter” was a political statement, the defaced vest would still be considered protected activity. *See Opp.*, at 26. The NLRB relies on *Pac. Bell Tel. Co.*, in which the NLRB found no special circumstances existed to justify a ban on Section-7 related insignia expressing an opposition to a ballot proposition despite the employer’s claim that it was “a highly controversial political issue.” *See Opp.*, at 6 (citing *Pac. Bell Tel. Co.*, 362 N.L.R.B. 885, 889 (2015)). The NLRB failed to mention, however, that the “highly controversial political issue” involved payroll deductions. It goes without saying that payroll deductions are not controversial or polarizing like the co-option of the BLM movement.

ii. **A Perceived Lack of Complaints from Employees Does Not Determine Whether Language is Offensive or Inflammatory**

The NLRB also argues that since Chavez “did not receive any complaints [about the vest] from coworkers,” *see* Opp., at 7; 25, Fn. 7, the language is not offensive and is acceptable. However, three Constellation employees testified that it was offensive. Specifically, Josh Schulze testified that Constellation decided to advise Chavez “of the sensitivity of what’s going on,” and how a few individuals “said [‘Cellar Lives Matter’] is offensive as well as how others in the winery could perceive it as offensive.” *See* Supp. B, 178 and 179. Schulze further testified that he told Chavez “that the term can be and is becoming offensive,” and that he personally found “Cellar Lives Matter” to be “a poor timed, insensitive, offensive statement.” *Id.* at 179 and 180. Angela Schultz similarly testified that she personally found the phrase “Cellar Lives Matter” to be offensive given what is happening “around the Black Lives Matter movement and in comparison to Black people being killed by police and police being killed by other individuals.” *See* Supp. B, at 302 and 303.³ Jeff Moeckly also testified that he was “disgusted” by the Cellar Lives Matter slogan. *See* Supp. A, at 7, Fn. 22; *see also* Supp. B, at 256. Thus, the NLRB’s reliance on the “fact” that employees did not complain, is misplaced.

³ Moreover, Angela Schultz testified that Constellation’s employees, Normalinda Cantu and Jerry Ramos, were offended by the “Cellar Lives Matter” phrase. *See* Supp. B, at 275.

Even assuming no complaints were made, the NLRB's argument would require Constellation to wait until someone complains about offensive language. In any other legal context, Constellation's failure to take action upon learning of racially insensitive language would be actionable. The NLRB also infers that Constellation should have polled employees before taking any action. This argument also makes no sense. Race cannot be separated from any derivative of the Black Lives Matter phrase, regardless of whether some employees find it racially offensive and some do not. Constellation has the right to prevent polarizing, racially insensitive speech even if some percentage of employees find it "catchy". In short, the NLRB is attempting to create a requirement that is not recognized or mandated by law, which Constellation asks this Court to ignore.

B. The Evidence Establishes that the Potential for Violence in the Workplace was Sufficient to Meet the Special Circumstances Test

The Board argues that Constellation failed to point to evidence to conclude that "Cellar Lives Matter" is reasonably likely to jeopardize employee safety. *See* Opp., 23. This argument ignores the evidence testimony Constellation provided during the ALJ hearing.

Specifically, Angela Schultz testified that the BLM movement was a "racially charged situation," and further mentioned that the movement was "creating violent undertones throughout this country." *See* Supp. B, 180. Shultz further testified that

BLM is a “sensitive topic,” and there were “pretty violent protests over it.” *See* Supp. B, 288. As a result, Shultz stated that Constellation did not want to invite violence into the workplace. *Id.* Josh Schulze also testified that wearing the defaced vest could lead to violence. *See* Supp. B, 178 and 278.

The NLRB’s contentions that Constellation’s position is “not even supported by ‘general and speculative testimony’,” *see* Opp., at 23, is false. Angela Schultz’s and Josh Schulze’s respective testimony sufficiently establishes that both individuals were concerned that the “Cellar Lives Matter” statement could reasonably result in violence in the workplace.⁴ As the evidence wholly supports Constellation’s contentions that “Cellar Lives Matter” could reasonably invite violence into the workplace, special circumstances exist.

III. THE NLRB CONTINUES TO MISPLACE RELIANCE ON *MEDCO*

The NLRB relies heavily on *Medco Health Solutions of Las Vegas*, 364 N.L.R.B. 115 (2016) to support its claim that the “Cellar Lives Matter” slogan was

⁴ Constellation’s sensitivity concerning the defaced vest has been enhanced over time as demonstrated by the response to the death of George Floyd on May 25, 2020, a Black man who died while in custody of a White police officer who knelt on Floyd’s neck for eight minutes and 46 seconds; the death of Breonna Taylor, an African American woman who police officers fatally shot when she was asleep in her apartment while they were executing a no-knock warrant on March 13, 2020; the death of Elijah McClain, a Black man who police detained by using a carotid hold and injected with ketamine, went into cardiac arrest on August 24, 2019 and subsequently died; and countless other deaths of Black Americans. Protests and rallies erupted across the nation calling for police reform and protection for Black Americans and in some situations, the circumstances became violent, wherein cities imposed curfews and even called for the assistance of the National Guard.

not “insensitive” or “disrespectful.” However, the NLRB clearly ignores the history and significance of the BLM movement and fails to grasp how the slogan is offensive and thus could exacerbate employee dissent or unreasonably interfere with Constellation’s public image. In *Medco*, the phrase at issue was, “I don’t need a WOW to do my job,” referring to a wall of employee recognition. The phrase in *Medco* is not synonymous with the “Cellar Lives Matter” phrase, as it was not a racially sensitive comment that could be published and potentially impact marginalized individuals. The phrase in *Medco* and the “Cellar Lives Matter” phrase are dissimilar and thus *Medco* is inapplicable from the outset.

The NLRB insinuates that employee dissent or harm to Constellation’s reputation would have had to occur for there to be a “basis” for Constellation’s claims. However, proof of actual harm is not required under the special circumstance standards. Indeed, based on *Noah’s New York Bagels*, a potential for harm is sufficient.

The NLRB argues that Constellation failed to provide evidence of how the “Cellar Lives Matter” slogan could damage its public image. Constellation detailed the possible customer-based media revolt or a boycott that the published image could have caused. The NLRB also insinuates that Constellation’s concern that an image of the vest would circulate the internet causing damage to its reputation is unfounded. The mere fact that Chavez took a picture with his cell phone of the

defaced vest, which was subsequently entered into evidence during the hearing, shows a potential intention to publish the image. As Constellation's Petition and the instant Reply point out, the "Cellar Lives Matter" slogan could have been disseminated much more broadly through social media, as it was in traditional media.

Constellation has every right to protect its public image by prohibiting racially insensitive speech that reflects on the organization as a whole. Condoning such offensive language would harm Constellation's business.⁵

CONCLUSION

For the foregoing reasons, as well as those set forth in its Petition, Constellation respectfully requests that the Court set aside the Board's Decision and Order dated January 31, 2019, and find that Constellation did not violate Section 8(a)(1) of the Acts as: (1) special circumstances existed when Constellation directed an employee to remove a safety vest with the slogan "Cellar Lives Matter," sufficient to outweigh Section 7 rights; and (2) the Short-Term Incentive Plan language was not unlawfully coercive.⁶

⁵ Judicial notice should be taken that Constellation has made \$100 million investment in Black and minority -owned businesses as the country has grappled with a racial reckoning.

⁶ As stated in Constellation's opening brief, there is simply no basis for the Board's conclusion that Constellation's Short-Term Incentive Plan includes coercive language and thus violates the NLRA.

Date: Woodbury, New York
December 22, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a) and Circuit Rule 32(b) and (c), Petitioner Employer certifies that its brief contains 3,259 words of proportionately spaced, 14-point typeface, using Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22 day of December 2020, the foregoing was electronically filed with the United States Court of Appeals for the Seventh Circuit Court using the ECF system, which will automatically notice all parties of same. In addition, an original and fifteen (15) copies will be transited to the Court via U.S. First Class Mail.

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