UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

GENERAL MOTORS LLC	)	
	)	Case Nos. 14-CA-197985 and
and	)	14-CA-208242
	)	
CHARLES ROBINSON	)	
	)	

BRIEF *AMICUS CURIAE* OF THE
CENTER FOR WORKPLACE COMPLIANCE

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November 8, 2019

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The Center for Workplace Compliance respectfully submits this brief *amicus curiae* in response to the National Labor Relations Board's (NLRB or the Board) Notice and Invitation to File Briefs, dated September 5, 2019.

INTEREST OF THE *AMICUS CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes more than 200 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of employment-related regulations. CWC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The vast majority of CWC's members are employers subject to the National Labor Relations Act (NLRA or the Act), 29 U.S.C. §§ 151 *et seq.*, as amended, as well as Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C §§ 2000e *et seq.*, as amended, and other federal employment nondiscrimination laws. A large majority also are federal government contractors subject to the nondiscrimination and affirmative action requirements of Executive Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), as amended, the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA), 38 U.S.C. §§ 4212 *et seq.*, as amended, and Section

503 of the Rehabilitation Act of 1973 (Section 503), 29 U.S.C. § 793, as amended. As such, CWC's interest in how employers must balance their nondiscrimination obligations with their duties under the Act includes, but is much broader than, the potential NLRA issues raised in this case. Because of its interest in both the application of the nation's fair employment laws, as well as the effective mitigation of enterprise-wide Title VII risk, the issues presented in this case are extremely important to the nationwide constituency that CWC represents.

Thus, CWC has an interest in, and a familiarity with, the practical issues and policy concerns raised in this case. Indeed, because of its significant experience in workplace EEO compliance, CWC is well-situated to brief the Board on the importance of the issues beyond the immediate concerns of the parties to the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

On September 5, 2019, the Board published a Notice and Invitation to File Briefs soliciting views on the following questions:

1. Under what circumstances should profane language or sexually or racially offensive speech lose the protection of the Act? In *Plaza Auto*, although the nature of Aguirre's outburst weighed against protection, the Board found that the other three *Atlantic Steel* factors favored protection, and it concluded that Aguirre retained the Act's protection. And although the *Plaza Auto* majority did not say that the nature of the outburst could never result in loss of protection where the other three factors tilt the other way, it also did not say that it ever could. Are there circumstances under which the "nature of the employee's outburst" factor should be dispositive as to loss of protection, regardless of the remaining *Atlantic Steel* factors? Why or why not?

2. The Board has held that employees must be granted some leeway when engaged in Section 7 activity because "[t]he protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumers Power Co.*, 282 NLRB 130, 132 (1986). To what extent should this principle remain applicable with respect to profanity or language that is offensive to others on the basis of race or sex?

3. In determining whether an employee's outburst is unprotected, the Board has considered the norms of the workplace, particularly whether profanity is commonplace and tolerated. See, e.g., *Traverse City Osteopathic Hospital*, 260 NLRB 1061 (1982). Should the Board continue to do so? If the norms of the workplace are relevant, should the Board consider employer work rules, such as those that prohibit profanity, bullying, or uncivil behavior?

4. Should the Board adhere to, modify, or abandon the standard the Board applied in, e.g., *Cooper Tire*, supra, *Airo Die Casting*, 347 NLRB 810 (2006), *Nickell Moulding*, 317 NLRB 826 (1995), enf. denied sub nom. *NMC Finishing v. NLRB*, 101 F.3d 528 (8th Cir. 1996), and *Calliope Designs*, 297 NLRB 510 (1989), to the extent it permitted a finding in those cases that racially or sexually offensive language on a picket line did not lose the protection of the Act? To what extent, if any, should the Board continue to consider context—e.g., picket-line setting—when determining whether racially or sexually offensive language loses the Act's protection? What other factors, if any, should the Board deem relevant to that determination? Should the use of such language compel a finding of loss of protection? Why or why not?

5. What relevance should the Board accord to antidiscrimination laws such as Title VII in determining whether an employee's statements lose the protection of the Act? How should the Board accommodate both employers' duty to comply with such laws and its own duty to protect employees in exercising their Section 7 rights?

NLRB, Notice and Invitation to File Briefs, *General Motors LLC*, Nos. 14-CA-197985, 14-CA-208242, at 2-3 (Sept. 5, 2019).

The National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, as amended, governs employee collective bargaining and other labor-management issues, such as the right of employees to engage in protected "concerted activities" for their "mutual aid and protection." 29 U.S.C. § 157. To be considered "concerted," the activity must involve other employees advocating for a mutual benefit, rather than be directed by a single person for his or her own personal reasons.

Under the Board's *Atlantic Steel* test first established in 1979, otherwise protected employee workplace conduct can be sufficiently "opprobrious" or abusive as to lose the NLRA's protection. 245 NLRB 814, at *4 (1979). Such conduct may include repeated use of vulgarities

and profanity towards other employees. The Board has established a different, more lenient test for offensive conduct occurring on the picket line, however, under which such behavior – even the use of racial epithets – will not lose the protection of the Act unless it advocates or threatens physical violence. *Airo Die Casting, Inc.*, 347 NLRB 810 (2006); *Cooper Tire & Rubber Co.*, 363 NLRB No. 194 (2016), *enforced*, 866 F.3d 885 (8th Cir. 2017).

Both of these tests are in tension with Title VII of the Civil Rights Act of 1964, 42 U.S. C. §§ 2000e *et seq.*, which has been widely interpreted by the courts to require an employer to take prompt action when employees engage in unlawful harassment, or face liability for failing to do so. These actions can include maintaining an equal employment opportunity policy, investigating potential violations of the policy and, where warranted, disciplining employees who violate the policy. Accordingly, *amicus* CWC urges the Board to overturn its current standard, which protects even overtly racist or sexist speech depending on *where* in the workplace it is uttered.

ARGUMENT

I. RACIST AND MISOGYNISTIC SPEECH DOES NOT ADVANCE ANY NLRA OBJECTIVES OR REFLECT CURRENT SOCIAL NORMS REGARDING ACCEPTABLE WORKPLACE BEHAVIOR, AND THEREFORE IS CATEGORICALLY UNPROTECTED

In its September 5, 2019 Notice and Invitation to File Briefs, the Board posed several questions, including whether and under what circumstances should "profane language or sexually or racially offensive speech lose the protection of the [National Labor Relations] Act," (NLRA), 29 U.S.C. §§ 151 *et seq.*, as amended, and whether the "'nature of the employee's outburst,'" one of several factors articulated by the Board in *Atlantic Steel Co.,* 245 NLRB 814 (1979), "should be dispositive as to loss of protection, regardless of the remaining *Atlantic Steel*

factors?" Notice and Invitation to File Briefs, at 2. *Amicus curiae* CWC respectfully submits that while "profane" language in the general sense may be more tolerable in the context of disputes that may arise under the NLRA, racist and misogynistic speech has no place in the workplace, does not advance any legitimate aims of the Act, and thus under no circumstances should be considered "protected" speech.

A. An Individual's Racist Or Sexist Rants Cannot Be Treated As "Concerted" Activity Within The Meaning Of The Act

"Section 7 of the NLRA provides that [e]mployees shall have the right to join … or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *NLRB v. City Disposal Sys., Inc*., 465 U.S. 822, 829 (1984) (citation and internal quotation omitted). As the Supreme Court observed in *City Disposal Systems,* among the principal objectives of Congress in enacting the NLRA was to encourage "collective bargaining and other 'practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions.'" *Id.* at 833-34 (citation omitted).

An employee's action "may be concerted 'although it involves only a speaker and a listener' if the individual engages in it 'with the object of initiating or inducing or preparing for group action or [] it ha[s] some relation to group action in the interest of the employees.'" *MCPc, Inc. v. NLRB*, 813 F.3d 475, 483 (3d Cir. 2016) (citation omitted). Not all concerted activity is protected, however, such as "calculated, devastating attacks upon an employer's reputation and products." *MikLin Enters., Inc. v. NLRB*, 861 F.3d 812, 826 (8th Cir. 2017).

B. Sexually Or Racially Offensive Speech, Even If Considered "Concerted" Activity, Is Not "Protected" Conduct Under The NLRA

Even if racially or sexually offensive speech somehow can be construed as advancing legitimate interests for the purpose of collective bargaining or "mutual aid and protection," the language can never be considered protected, because targeting individuals based on immutable characteristics like race is motivated only by personal animus, not any unfair labor practice or collective employee interests. If "devastating attacks" on an employer's business are considered unprotected, then surely similarly damaging personal attacks on employees – solely because of their protected characteristics – must also fall outside the bounds of the NLRA. Indeed, "[w]here an employee's conduct significantly disrupts work processes, creates a hostile work environment, or constitutes racial or sexual discrimination or harassment, the Board has found it unprotected even if it involves concerted activities regarding working conditions." NLRB Office of Gen. Counsel, Advice Memorandum re: *Google, Inc.,* Case 32-CA-205351 (Jan. 16, 2018), at 4.

In a January 16, 2018 Advice Memorandum, the Board's Office of General Counsel addressed whether circulating a memo "in opposition to the Employer's diversity initiatives" that perpetuates several offensive stereotypes – including that "innate differences between men and women may explain the lack of equal representation of the sexes in tech and leadership" – constitutes protected activity. *Google* Advice Mem. at 1. Assuming for sake of argument that the complainant's actions were concerted, the Memorandum concludes that his memo contained both protected and unprotected language and that he was fired solely for the latter, not the former. It references several cases in which the Board found concerted conduct that caused

significant disruptions at work, or that were discriminatory or harassing, to be unprotected, including for instance:

- Unfounded assertions by a union activist that her foreman was a member of the Ku Klux Klan (*Avondale Industries, Inc.*, 333 NLRB 622 (2001));
- "[D]ebasing and sexually abusive" comments to a female employee who had crossed a picket line months earlier (*Advertiser Mfg. Co.*, 275 NLRB 100 (1985)); and
- Distributing a newsletter encouraging a particular employee to "come out of the closet" and other sexually offensive language (*Honda of America Mfg., Inc.*, 334 NLRB 746, 747 (2001)).

Google Advice Mem., at 4. The Advice Memorandum concluded that the complainant's offensive speech "should not be treated differently than the types of conduct the Board found unprotected" in those cases, *id.*, noting further that his statements were likely to, and did, cause significant disruption in the workplace, generating numerous complaints from men and women alike.

Societal norms around what behavior is and is not acceptable in the workplace have evolved considerably in the decades since *Atlantic Steel* was decided. One need look no further than the #Me Too movement and its impact on bringing to light even the most outrageous conduct, which in the past often was permitted to go unchecked at work likely because it was less socially unacceptable in 1979 than it is in 2019. Sexually or racially offensive comments serve only to insult and demean those to whom they are directed and are not generally intended to express disagreement with a management decision or solidarity with an employee's exercise of NLRA rights. When the Board sanctions an individual's hateful racist or misogynistic speech, by implication it sanctions that behavior on behalf of others as well, allowing wrongdoers to invoke the NLRA as a shield against legitimate disciplinary action.

For those reasons, and as discussed below, the Board should overturn *Airo Die Casting* and *Cooper Tire* and rule that racist and misogynistic speech does not serve any role in promoting positive labor relations, and thus should always fall outside the scope of NLRA-protected activity – whether accompanied by threats of violence or not.

II. BECAUSE RACIST AND MISOGYNISTIC SPEECH DOES NOT PROMOTE ANY LEGITIMATE LABOR RELATIONS GOALS, AND IS UNACCEPTABLE IN ANY WORKPLACE CONTEXT, THE BOARD'S CURRENT STANDARD PERMITTING SUCH SPEECH ON THE PICKET LINE IS INDEFENSIBLE AND SHOULD BE REVERSED

In *Airo Die Casting*, the Board ruled that an employer could not terminate an employee who shouted racial epithets while on the picket line unless the conduct was shown to rise to the level of threatening or violent conduct, 347 NLRB 810 (2006), and the Board reaffirmed that principle in *Cooper Tire*. 363 NLRB No. 194 (2016), *enforced*, 866 F.3d 885 (8th Cir. 2017). There, the Board found that racist statements directed at African American replacement workers by a picketing employee constituted protected speech under the NLRA. *Id.* Accordingly, the Board ruled that the employer was precluded from disciplining the employee, even though his conduct represented a blatant violation of the employer's well-established anti-harassment policy. *Id.*

The Board has solicited comment regarding whether it should:

> [A]dhere to, modify, or abandon the standard the Board applied in, e.g., *Cooper Tire*, supra, *Airo Die Casting*, 347 NLRB 810 (2006), *Nickell Moulding*, 317 NLRB 826 (1995), enf. denied sub nom. *NMC Finishing v. NLRB*, 101 F.3d 528 (8th Cir. 1996), and *Calliope Designs*, 297 NLRB 510 (1989), to the extent it permitted a finding in those cases that racially or sexually offensive language on a picket line did not lose the protection of the Act? To what extent, if any, should the Board continue to consider context—e.g., picket-line setting—when determining whether racially or sexually offensive language loses the Act's protection? What other factors, if any, should the Board deem relevant to that

> determination? Should the use of such language compel a finding of loss of protection? Why or why not?

Notice and Invitation to File Briefs, at 2. *Amicus curiae* CWC respectfully submits that the Board's rationale in those cases is woefully misguided and does not comport with any reasonable interpretation of the NLRA as it applies to the modern American workplace. Moreover, the picketing-versus-non-picketing *context* of racist and misogynistic speech should be irrelevant to judging its *content* – which can never have any legitimate bearing on productive workplace labor-management relations. Accordingly, the standard derived from and reaffirmed in those cases, which protects such speech both on and off the picket line, albeit to different degrees, should be abandoned entirely.

A. Picket Line Racist And Sexist Speech

The picket line obviously differs from the ordinary workplace. Passions run high and tempers flare as picketers exercise their Section 7 rights, in direct opposition (and close proximity) to management and other employees who exercise their Section 7 rights to not engage in concerted activity. Impolitic behavior that might not be tolerated in the office can be expected to occur. Once picket line conduct escalates to the point of implicating other employees' statutory nondiscrimination rights, however, employers must be free to take reasonable steps to correct the misconduct and prevent its recurrence.

The facts and procedural history of the *Cooper Tire* case are instructive. Following a lockout of its members after collective bargaining efforts reached an impasse, a union representing Cooper Tire employees staged a picket of the company's Findlay, Ohio plant. 363 NLRB No. 194, at *2. The company continued to operate the facility by bringing in nonunion

and replacement employees, including many African Americans, who were forced to cross the picket line each day. *Id.*

On January 7, 2012, union employee Anthony Runion attended a cookout for striking employees and their families at the Union Hall located near the main gate of the Findlay plant. *Id.* After leaving the event and returning to the picket line, Runion hurled several racist taunts at the replacement workers. *Id.* Among other things, he said, "Hey, did you bring enough KFC for everyone?", which prompted an unidentified worker to exclaim, "Go back to Africa, you bunch of fucking losers." *Id.* Runion leveled a second racist taunt a few minutes later, saying, "Hey, anybody smell that? I smell fried chicken and watermelon." *Id.* After investigating the incident and confirming that Runion made the "KFC" and the "fried chicken and watermelon" statements, Cooper fired Runion for gross misconduct in violation of its anti-harassment policy. *Id.*

Following Runion's termination, the union filed a grievance, and both parties submitted to arbitration. *Id.* The arbitrator found that Runion's use of racially demeaning comments directed specifically at African American replacement workers constituted a "clear violation" of Cooper's anti-harassment policies, which was "so intolerable" as to constitute gross misconduct justifying his termination. *Id.*

The NLRB Regional Director refused to defer to the arbitrator's award, and issued a complaint alleging that Cooper discharged Runion for engaging in union and/or concerted activities, in violation of the NLRA. *Id.* The company filed exceptions with the Board, which in a one-page decision affirmed. *Id.* at *1. A divided three-judge Eighth Circuit panel affirmed. *Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d 885 (8th Cir. 2017). It began by drawing a qualitative distinction between conduct taking place on the picket line and that which may occur

in other contexts, noting, "One of the necessary conditions of picketing is a confrontation in some form between union members and employees." 866 F.3d at 889 (citation omitted). Because some level of discord is expected, courts have carved out different conduct rules for actions taken in the picketing context and those occurring on the job itself, the panel majority observed. *Id.* at 889-92.

For instance, in cases involving picket-line conduct, the Board has found it unlawful for an employer to discharge an employee for related misconduct unless the behavior "may reasonably tend to coerce or intimidate employees" in their exercise of NLRA rights. *Consolidated Communs., Inc.*, 360 NLRB 1284, 1294 (2014), *enforcement denied in part*, *Consolidated Communs., Inc. v. NLRB*, 837 F.3d 1 (D.C. Cir. 2016). The *Cooper Tire* majority cited favorably to the Board's decision in *Airo Die Casting*, which also involved the termination of an employee for violating the company's anti-harassment policy while on the picket line. 866 F.3d at 891.

There, the employee in question approached a group of replacement workers "with both middle fingers extended and screamed 'f*** you ni***r.'" *Id.* The Board found the employer's actions in discharging the employee to violate the NLRA, because the employee's behavior was not coercive or accompanied by any threats of violence. *Id.* Applying that rationale, the panel majority found that Runion's comments similarly were non-coercive, were not directed at any one particular person, and were not physically threatening in nature. *Id.* at 891-92.

At the same time, the panel majority clearly took issue with the Board's aggressive protection of offensive picket-line conduct, expressing agreement with the D.C. Circuit's recent admonition in *Consolidated Communications, Inc. v. NLRB* "against assuming that the use of

abusive language, vulgar expletives, and racial epithets between employees is part and parcel of the vigorous exchange that often accompanies labor relations …." *Id.* at 891 n.1 (citation omitted). Circuit Judge C. Arlen Beam went further, penning a lengthy dissent that began with the statement, "No employer in America is or can be required to employ a racial bigot." *Id.* at 894 (Beam, J., dissenting). He characterized the case as involving two straightforward questions: (1) did Runion engage in racist behavior, and (2) was his conduct legally protected under the NLRA? *Id.* at 894-95. In Judge Beam's view, the "answer to question one is clearly yes and the answer to query two is undoubtedly no!" *Id.* at 895.

Judge Beam was especially critical of the majority's failure to make any meaningful effort to harmonize the NLRB with the employer's Title VII obligations. In particular, he complained that the majority completely ignored the ongoing impact that conduct like Runion's could and likely would have on the workplace once the labor dispute is resolved and "work resumes with a day-to-day labor force consisting of members of various races including at least some Runion-maligned African American citizens." *Id.*

B. Non-Picket Line Racist And Sexist Speech

An employer's obligation to prevent discrimination and harassment extends beyond the physical workplace and also includes other places where work is being conducted and where employees and non-employees alike may be gathered. *See*, *e.g.*, *Dowd v. United Steelworkers of Am.,* 253 F.3d 1093 (8th Cir. 2001); *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307 (5th Cir. 1987). For that reason, the Board should not distinguish between racist or sexist picket-line conduct occurring on an employer's premises – where workers, clients, and customers are likely and expected to be present – and racist or sexist conduct occurring elsewhere in the workplace –

where workers, clients, and customers also are likely and expected to be present – because such speech never advances legitimate workplace issues and thus never is justified at work, regardless of where it is uttered or whether it is accompanied by violence or threats of violence. Federal employment nondiscrimination laws make no such distinction, and for good reason.

For instance, when employees participate in employer-sponsored (or mandated) off-premises events, Title VII does not absolve the employer of potential liability stemming from a discriminatory incident occurring during or in connection with the event simply because of *where* the discriminatory or harassing occurred, nor are employees left without any reasonable expectation of being protected from such misconduct. *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Franchina v. City of Providence*, 881 F.2d 82 (1st Cir. 2018); *Fuller v. Idaho Dep't of Corrs.*, 865 F.3d 1154 (9th Cir. 2017).

Were one to apply the Board's picket line rationale to the "company-sponsored event" context, then it could be said that employees traveling with their coworkers to, say, a sales convention should expect raunchier and impolitic behavior and, as such, racist or sexist remarks made at such events should be tolerated more than if the same comments were uttered in the office environment. Such a distinction would make little practical sense, especially given the growing regularity in which employees work and engage with one another remotely.

III. INASMUCH AS CURRENT BOARD PRECEDENT PERTAINING TO RACIST AND MISOGYNISTIC SPEECH INTERFERES WITH EMPLOYERS' LEGAL OBLIGATIONS UNDER TITLE VII TO PREVENT AND CORRECT WORKPLACE HARASSMENT, IT SHOULD BE ABANDONED

The Board's final question in its Notice and Invitation to File Briefs asks:

> What relevance should the Board accord to antidiscrimination laws such as Title VII in determining whether an employee's statements lose the protection of the Act? How should the Board accommodate both employers' duty to comply with

> such laws and its own duty to protect employees in exercising their Section 7 rights?

Notice and Invitation to File Briefs, at 2-3 (footnote omitted). The Board is wise to seriously consider the implications, as elucidated by Judge Beam, of maintaining the standard applied in *Airo Die Casting, Cooper Tire,* and similar cases. The Board's position strongly implies that employers must subordinate their EEO responsibilities to the NLRA whenever the subject of a misconduct investigation may implicate, however remotely, employee rights under the NLRA.

That rationale regrettably places companies in an untenable position of either enforcing their workplace anti-harassment policies or treating the misconduct as NLRA-protected – and risking potential challenge and legal liability under federal nondiscrimination laws prohibiting protected-status harassment and discrimination. Accordingly, *amicus curiae* CWC respectfully urges the Board to overturn those rulings in favor of a standard that defers to the legal requirements imposed on employers by federal law.

A. While Failing To Advance Any Articulable NLRA Objective, Racist And Misogynistic Speech In The Workplace Directly Implicates Title VII's Nondiscrimination Proscriptions

Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, makes it unlawful for an employer to discriminate "against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin ...." 42 U.S.C. § 2000e-2(a)(1). In *Meritor Savings Bank, FSB v. Vinson,* the Supreme Court ruled that a "plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." 477 U.S. 57, 66 (1986). *See also Harris v. Forklift Sys., Inc*., 510 U.S. 17 (1993) (establishing standards for determining when an environment is sufficiently hostile or abusive to be

actionable). Accordingly, "many employers today aggressively react to sexual harassment allegations ...." *Brady v. Office of the Sergeant at Arms,* 520 F.3d 490, 496 (D.C. Cir. 2008).

"It is the existence of past harassment, every bit as much as the risk of future harassment, that the statute condemns. Employers have a duty to express[] strong disapproval of sexual harassment, and to develop[] appropriate sanctions." *Fuller v. City of Oakland, Cal.*, 47 F.3d 1522, 1529 (9th Cir. 1995) (citation and internal quotations omitted). Importantly, Title VII's prohibition against workplace harassment extends beyond the sexual harassment context, and also encompasses harassing conduct based on race, color, religion, and/or national origin. *See Meritor*, 477 U.S. at 66.

As the General Counsel's January 16, 2018 Advice Memorandum points out, an employer's "good-faith efforts to enforce its lawful anti-discrimination or anti-harassment policies must be afforded particular deference in light of the employer's duty to comply with state and federal EEO laws." *Google* Advice Mem. at 3-4 (footnote omitted). Indeed, employers have legitimate interests in promoting workplace diversity and inclusion, and in furtherance of those interests, "must be permitted to 'nip in the bud' the kinds of employee conduct that could lead to a 'hostile workplace,' rather than waiting until an actionable hostile workplace has been created before taking action." *Id.* at 4.

> [Moreover, i]naction cannot be fairly said to qualify as a remedy reasonably calculated to end harassment, even where the individual harasser has voluntarily ceased harassment. Title VII does not permit employers to stand idly by once they learn that sexual harassment has occurred. To do so amounts to a ratification of prior harassment.

Brands v. Lakeside Fire Dist., CV08-8143-PHX-NVW, 2010 WL 2079712, at *11 (D. Ariz. May 24, 2010) (citing *Fuller v. City of Oakland*, 47 F.3d at 1528-29).

B. Failure To Exercise Reasonable Care To Address Harassing Conduct Can Lead To Significant Liability Under Title VII

Prior to 1991, the only statutory remedy available to Title VII litigants was back pay and injunctive and declaratory relief. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975). With the passage of the Civil Rights Act of 1991 (CRA), 42 U.S.C. § 1981a, however, Congress greatly expanded the remedies available under Title VII by permitting the award of compensatory and punitive damages in cases of intentional discrimination, in addition to statutory attorney's fees and costs. 42 U.S.C. § 1981a(a)(1). In particular, a Title VII plaintiff may be awarded punitive damages where he or she proves that the defendant intentionally discriminated against them "with malice or with reckless indifference" to the individual's federally protected rights. 42 U.S.C. § 1981a(b)(1); *see also Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999).

In its dual holdings in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Supreme Court established an affirmative defense to liability for hostile work environment claims. The first of two necessary elements of the defense is that "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior...." *Ellerth*, 524 U.S. at 765, *Faragher*, 524 U.S. at 807. The Court later described the defense as "a strong inducement [for employers] to ferret out and put a stop to any discriminatory activity in their operations as a way to break the circuit of imputed liability." *Crawford v. Metro. Gov't of Nashville*, 555 U.S. 271, 278 (2009) (citation omitted). In other words, an employer must make a meaningful effort to prevent workplace harassment. Where it has not been successful at prevention, it needs to act quickly to remedy the situation.

Because employers are subject to potential Title VII liability for failing to affirmatively act when faced with allegations of harassment, employers understandably take this duty seriously. In *Cooper Tire*, for instance, the employer maintained and enforced an anti-harassment policy, receipt of which employees were required to acknowledge in writing. 363 NLRB No. 194, at *2 (2016), *enforced*, 866 F.3d 885 (8th Cir. 2017). When a striking employee violated the policy by hurling racially offensive remarks at replacement employees, the company responded swiftly – as the law requires – to address and correct the conduct. Had it not done so, it could have faced potential claims from the targets of the racist language, a group that included current employees. Its inaction also would have sent a strong message to other employees that such behavior is acceptable, encouraging the use of such speech and creating a chilling effect on those who are targeted or offended by it.

C. As A Policy Matter, Employers Have A Strong Interest In Maintaining A Work Environment Free From Harassment

Indeed, apart from a desire to avoid liability under Title VII, most of *amicus curiae*'s members have a deep commitment to maintain a working environment that is free from all forms of harassment. "[Title VII]'s 'primary objective' [with respect to employment discrimination] is 'a prophylactic one,' . . . aim[ing], chiefly, 'not to provide redress but to avoid harm.'" *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999) (citations omitted). That aim is frustrated, if not defeated entirely, when an employer is prevented from responding proactively to racially offensive misconduct by an employee that is directed at other employees, regardless of where the offense occurred. Under those circumstances, the employer cannot fulfill its "affirmative obligation to prevent violations." *Faragher*, 524 U.S. at 806.

Even absent the prescription under Title VII to prevent workplace harassment, employers have substantial business and policy reasons to do so. Harassment can lower employee morale, affect job satisfaction, interfere with productivity and work quality, and ultimately lead to higher rates of employee turnover. *See, e.g.,* EEOC, Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic (June 2016).[1] Responsible employers realize that harassment, if left unchecked, can fester and rot a company from within. A swift and effective response to harassing conduct serves to demonstrate to an employer's workforce that it does not tolerate violations of its EEO policy under any circumstances.

Because employee harassment based on a protected characteristic is a form of unlawful discrimination for which employers can be held legally responsible, and because harassment can have a significant negative effect on an employer's business, investigating and promptly remedying such conduct is an integral part of operating a business. *See EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1176 (11th Cir. 2000) (noting that during an internal investigation, "the employer is not acting pursuant to the statute or under color of law, but is conducting the company's own business"). Employers thus have substantial interests in determining when and how to enforce their EEO policies.

Board precedent privileges picketing employees' NLRA rights over both employees' and employers' Title VII rights. The Board must overturn that precedent by recognizing that Title VII discrimination cannot be permitted, even in the context of the picket line. If employers are

[1] *Available at* https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

to give full effect to Title VII, and reap the benefits of increased workplace harmony that flow from doing so, they must be afforded the latitude to enforce their policies.

Employers have invested considerable time and effort in designing effective policies against workplace harassment and complementary complaint procedures to address employee concerns. Notably, the Supreme Court in *Meritor* rejected the view that "the mere existence of a grievance procedure and a policy against discrimination, coupled with [a victim's] failure to invoke that procedure, must insulate [an employer] from liability." 477 U.S. at 72. The Court criticized the employer's policy in *Meritor* on several grounds, and observed that the employer's position "might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward." *Id.* at 73. For this reason, employers have designed their harassment policies and complaint practices with the specific intent of encouraging employees to do just that.

Those policies identify the types of conduct intended to be covered, and explicitly forbid such conduct. Indeed, companies frequently set the threshold for taking action based on their own anti-harassment policies at a lower point than would trigger liability under Title VII, largely in order to proactively catch and address problems well before they escalate to a point that would trigger legal liability or harm the company. Under *Airo Die Casting* and its progeny, however, employers must walk an impossible line between redressing harassing conduct pursuant to company policy and Title VII requirements, and potentially infringing on someone's Section 7 rights. As noted above, employer anti-harassment policies typically call for disciplinary action for a level of conduct far less egregious than that which would meet the minimum standards for liability under Title VII. For example, while spewing two racially offensive remarks on one day

might not satisfy the "severe or pervasive" legal standard, it likely would violate most employers' policies, many of which are "zero-tolerance" or close to it.

By casting a broad cloak of protection over any employee who can claim to have been engaging in protected concerted activity, current Board policy prevents employers from taking proactive measures to prevent and correct plainly inappropriate and potentially illegal conduct under Title VII.

The Board is obligated to consider other statutory regimes when fashioning remedies and, in this instance, Title VII's goal of rooting out workplace discrimination must prevail over the Board's general, picket line policy preferences. Like the Supreme Court, this Board no longer should defer to "remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002).

CONCLUSION

For the foregoing reasons, *amicus curiae* Center for Workplace Compliance respectfully submits that the Board should overturn the holding of its *Airo Die Casting* and *Cooper Tire* decisions.

Respectfully submitted,

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November 8, 2019

CERTIFICATE OF SERVICE

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