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Subject: Center for Economic and Policy Research/Case 05-CA-352812 (case-closing email)
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The Region submitted this case for advice as to whether a workplace-harassment provision in a collective-bargaining agreement is unlawful under *Stericycle Inc.*, 372 NLRB No. 113 (2023). We conclude that the charge allegation should be dismissed, absent withdrawal, because the workplace-harassment provision does not restrict Section 7 activity, particularly such activity that implicates employees' exercise of the right to oppose or support the union under *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974).

The Center for Economic and Policy Research ("Employer") is a think tank in Washington, DC, whose employees have been represented by the International Federation of Professional and Technical Engineers, Nonprofit Professional Employees Union (Local 70), AFL-CIO ("Union"), for over twenty years. The Union and the Employer have been parties to multiple successive collective-bargaining agreements, including the January 1, 2021–December 31, 2023 CBA, which was extended while the parties negotiated a new contract.^[1] The 2021–2023 CBA contained a Workplace Harassment provision, which stated:

Article V. CONTRACT ADMINISTRATION

Section 5. Workplace Harassment

This workplace harassment policy applies to all employees, interns, fellows and anyone else whom employees come into contact with related to the workplace.

Harassment includes bullying, intimidation, direct insults, malicious gossip, and victimization. This Agreement cannot create an exhaustive list, but the following instances are considered harassment:

- Sabotaging someone else's work on purpose;
- Minimizing someone else's contributions; degrading someone for making suggestions; preventing a co-author from sharing in outreach tasks after a release;
- Engaging in frequent or unwanted advances of any nature;
- Commenting derogatorily on a person's origin or religious beliefs;
- Angrily confronting someone in the workplace, either in-person or online;
- Gaslighting or similar behaviors; habitual lying, especially about the conduct of others;

- Calling meetings for the purposes of publicly humiliating someone or for the presentation of allegations publicly, or putting someone "on the spot" with malicious intent;
- Ridiculing someone in front of others or singling them out to perform tasks unrelated to their job (e.g., bringing coffee) against their will.

Management and Union leadership shall seriously investigate any reports of harassment. If an employee is found guilty of sexual harassment, they will be terminated (See Section 4). The process for investigating other harassment follows the steps in Section 2 for just cause. Punishment for other harassment depends on the severity of the offense and may include counseling, reprimands, suspensions, or termination. Repeated instances of other harassment will progressively lead to more severe punishments.^[2]

There is no allegation that this policy has been unlawfully applied to protected activity.

As to the appropriate legal standard for assessing collectively bargained rules, we are unaware of Board decisions applying *Stericycle* or the Board's prior handbook-rule standards to determine whether a provision in a collective-bargaining agreement violates Section 8(a)(1). See *DTM Corp.*, 358 NLRB 974, 975 & n.3 (2012) (*Noel Canning* decision) (finding it was "unnecessary to pass on whether it was correct for the judge to apply the *Lutheran Heritage Livonia* standard to a collectively-bargained rule"). Rather, the Board has applied *Magnavox*, where the Supreme Court held that a union cannot waive employees' individual Section 7 right to distribute literature on employer property in nonwork areas because that activity implicates employees' exercise of their right to choose a bargaining representative. 415 U.S. at 325–26. By contrast, the Court found a union's waiver of the right to strike, which is primarily economic in nature, presupposes that the selection of the bargaining representative remains free and is thus permissible. *Id.* at 325. Additionally, the Court highlighted that allowing an incumbent union to waive the rights of represented employees to engage in activities that directly express support for or opposition to itself would leave employees open to employer discipline for activities protected under Section 7. See *id.* ("The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees.").

Although *Magnavox* and its progeny specifically involved the distribution of literature, the Board has applied that principle in other contexts to find employees' individual Section 7 rights to express their views regarding unionization to be nonwaivable by their bargaining representative. For example, in *Universal Fuels*, 298 NLRB 254 (1990), the Board applied *Magnavox* to hold that a contract provision that employees would reasonably interpret to restrict communications about contractual pay or benefits was unlawful because, even though the restrictions were "not expressly related to the status of an incumbent union," they were "equally destructive of employees' rights to oppose or support an incumbent union." *Id.*

at 256. Therefore, the union’s waiver was invalid. *Id.* at 256–57.

Here, employees would not reasonably construe the Workplace Harassment provision to restrain Section 7 activities, much less such activities that implicate employees’ exercise of the right to oppose or support the Union. The provision prohibits “bullying, intimidation, direct insults, malicious gossip, and victimization,” and gives multiple examples of such misconduct, including sexual harassment (e.g., the reference to “frequent and unwanted advances”), intentionally sabotaging someone else’s work, calling meetings to publicly humiliate someone, and similar abuses. Viewed in context, the provision’s restrictions clearly address misconduct unconnected to the exercise of Section 7 rights. *Cf. DTM Corp.*, 358 NLRB at 974 (finding CBA provision lawful because, under the “most reasonable construction,” it only restricted Section 7 activity connected to strikes, which the union “was permitted to waive”).^[3] Cases involving overly broad contract provisions that the Board has found to be destructive of employees’ nonwaivable Section 7 rights to oppose or support an incumbent union are distinguishable. *See, e.g., Universal Fuels*, 298 NLRB at 256–57 (provision prohibiting employees from making misrepresentations regarding their contractual pay and benefits restricted employees’ right to voice their views concerning those terms, e.g., comparing them unfavorably with benefits provided under a rival union’s contract); *Teachers AFT New Mexico*, 360 NLRB 438, 438 n.2, 443–44 (2014) (provision prohibiting participation in employer’s “internal politics,” including “lobbying of [employer] [e]xecutive [c]ouncil members . . . on personnel matters,” interfered with employees’ Section 7 rights to raise, e.g., “questions of union representation and collective bargaining”).

Accordingly, the Region should dismiss this allegation, absent withdrawal.
Please contact us with any questions.

[1] The instant charge was filed when the extension of the 2021–2023 CBA was in effect.

[2] The parties’ current CBA, which was recently executed, contains the identical Workplace Harassment provision.

[3] Although *DTM Corp.* was issued by a panel that, under *NLRB v. Noel Canning*, 573 U.S. 513 (2014), was not properly constituted, it is instructive. *See DHL Express, Inc. v. NLRB*, 813 F.3d 365, 377 n.2 (D.C. Cir. 2016) (noting that the rationale in a voided, two-member Board decision was “instructive”).

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