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

COOPER TIRE & RUBBER COMPANY	)	
	)	Case No. 08-CA-087155
and	)	
	)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC	)	

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* in support of Respondent Cooper Tire & Rubber Co. The brief urges the Board to overturn the holding of its decision in *Airo Die Casting, Inc.*, 347 N.L.R.B. 810 (2006). Alternatively, if the Board declines the opportunity to overturn its decision in *Airo Die Casting*, we urge the Board to deny reinstatement of the terminated employee.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 of the nation's largest private sector companies, collectively providing employment to millions of people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and other HR compliance requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The vast majority of EEAC's member companies 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, EEAC'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 EEAC represents.

EEAC 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 compliance generally, and EEO and nondiscrimination in particular, EEAC is well-situated to brief the Board on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Cooper Tire & Rubber Co. (Cooper) manufactures tires at three plants, one of which is located in Findlay, Ohio (Findlay plant). *Cooper Tire & Rubber Co.,* Case No. 08-CA-087155 (N.L.R.B. June 5, 2015), at 2. Prior to the expiration of its collective bargaining agreement on October 31, 2011, the Findlay plant had been continuously unionized for at least 70 years. *Id.* After Cooper presented its last, best, and final offer on November 22, 2011, and the union failed to ratify it, the company locked out its employees and arranged for replacement employees, many of whom are African-American and some of whom were employees at Cooper's Tupelo, Mississippi plant. *Id.* at 2-3. Locked-out employees picketed in front of the plant for the duration of the lockout, which ended on February 28, 2012, when the parties came to an agreement. *Id.* at 3.

On the evening of January 7, 2012, the union held a hog roast. *Id.* After the roast, locked-out employee Anthony Runion appeared on the picket line. *Id.* As replacement employees crossed the picket line in a van, Runion leveled two racists taunts, saying, "Hey, did you bring enough KFC for everyone?" and "Hey, anybody smell that? I smell fried chicken and watermelon" (the "KFC statement" and the "fried chicken statement"). *Id.* at 4-5. Between these two statements, an unidentified individual also made a racist taunt, saying, "Go back to Africa, you bunch of fucking losers." *Id.* at 4.

Cooper maintains an equal employment opportunity policy to which its employees must adhere. *Id.* at 6. Among other actions, the policy prohibits racial harassment, and informs employees that violation of the policy may result in termination. *Id.* Runion received this policy as part of his new-employee orientation, and signed a form indicating receipt. *Id.* After reviewing video footage of the January 7 incident and determining that Runion made the KFC statement and the fried chicken statement, Cooper terminated Runion on March 1, 2012. *Id.* Both parties agree that Cooper terminated Runion for conduct that occurred while he was engaged in picketing activity. *Id.* at 10.

Following Runion's termination, the union filed a grievance, and both parties submitted to arbitration. *Id.* at 6-7. The arbitrator concluded that Runion in fact made both the KFC statement and the fried chicken statement and that, in doing so, increased the likelihood that violence would erupt. *Id.* at 7. He concluded that Runion was terminated for just cause, and therefore denied the grievance. *Id.* At the union's request, the NLRB Regional Director refused to defer to the arbitrator's award, and issued a complaint that Cooper discharged Runion for

engaging in union and/or concerted activities, in violation of Section 8(a)(3) and (1) of the Act. *Id.*

Administrative Law Judge (ALJ) Randazzo held that Runion indeed made the KFC statement and the fried chicken statement, *id.* at 5, but that the statements were "not violent in character, not accompanied by violent or threatening behavior … did not raise a reasonable likelihood of an imminent physical confrontation and … did not reasonably tend to coerce or intimidate employees in the exercise of their Section 7 rights." *Id.* at 16. Therefore, Runion remained protected by the Act when he made the KFC statement and the fried chicken statement, and his discharge accordingly violated Section 8(a)(3) and (1) of the Act. *Id.* ALJ Randazzo also refused to defer to the arbitrator's award, deeming it "palpably wrong" and "'clearly repugnant' to the Act." *Id.* at 20. Lastly, the ALJ ordered Cooper to reinstate Runion with full backpay. *Id.* at 21.

Cooper has appealed the ALJ's decision to the full Board, which will address the following questions:

1. Whether racist speech and conduct should be accorded protection by Section 7?
2. Whether reinstating Runion with backpay violates Section 10(c) of the Act?
3. Whether the ALJ erred in concluding that the General Counsel carried her burden of proving that Cooper discriminated against Runion by discharging him for his racist comments?
4. Whether the arbitrator's award upholding the discharge of Runion for his racist remarks is entitled to deference under *Olin Corp.*, 268 N.L.R.B. 573 (1984)?

SUMMARY OF ARGUMENT

The Board should overturn *Airo Die Casting, Inc.*, 347 N.L.R.B. 810 (2006), which holds that employees who use racial slurs on a picket line are protected by the Act so long as their slurs do not constitute a threat. Employers such as Cooper have legal obligations under not only the Act, but also under other federal statutes as well, such as Title VII of the Civil Rights Act of 1964 (Title VII), which requires employers either to take corrective action in the face of racial harassment perpetrated by any employee, or potentially face significant monetary and non-monetary liability. According to *Airo Die Casting*, however, the Act prohibits such employers from disciplining any employee who engaged in racially harassing conduct directed towards others while on a picket line, absent any threats or violence. The decision therefore prevents employers from acting swiftly to address and remediate potential Title VII violations that occur in the midst of protected activity. Such a rule requires employers effectively to disregard their Title VII obligations so as to avoid potential liability under the Act, which is contrary to the aims and purposes underlying both statutes.

Even if the Board declines to overturn *Airo Die Casting*, it should reject the ALJ's award of reinstatement. When fashioning remedies, the Board is obligated to consider the policy objectives of other statutes. Here, the Board must consider Congress' intent in passing Title VII, which includes removing barriers to equal employment opportunity, *see, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971), and ensuring "that the workplace be an environment free of discrimination." *Ricci v. DeStefano*, 557 U.S. 557, 580 (2009). Reinstatement would force Cooper to put back into its workforce an employee whose deeply offensive, racist conduct and actions violate its EEO policy, thereby undermining the company's efforts to maintain a

workplace free from all forms of harassment and discrimination. Because it would fail to give effect to Congress' desire to prevent and eliminate workplace discrimination, the Board should decline to order reinstatement.

ARGUMENT

I. EMPLOYERS ARE EXPECTED UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 TO PREVENT AND CORRECT ALL FORMS OF UNLAWFUL WORKPLACE HARASSMENT

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). 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.

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).

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

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 this instance, Cooper had a policy that prohibited harassment (which employees,

including Runion, received and signed); the company also monitored employees' behavior for compliance with the policy, and disciplined Runion when he violated the policy by hurling racially offensive remarks at replacement employees, many of whom also work for Cooper. Had Cooper not acted swiftly to address Runion's conduct, the replacement employees very well could have had a cognizable Title VII claim against the company.

At the very least, failure to act could and likely would have been construed by other employees as tacit approval of Runion's behavior. That, in turn, likely would deter other employees from complaining about such conduct in the future and/or signal to would-be racists that such language is tolerated. Although Runion's statements alone may not have been sufficient to state such a claim, they could have served as evidence of a pattern of the company's refusal to protect employees from harassment, had Cooper not taken decisive action by terminating him.

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

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. Responsible employers realize that harassment, if left unchecked, can fester and rot a company from within. Given that some of the replacement workers in this case came from another Cooper facility and could therefore be expected to remain Cooper employees after the end of the lockout, Cooper had legitimate interests in responding promptly to Runion's misconduct, which violated the company's anti-harassment policy. A swift response would demonstrate to the Tupelo replacement workers – and indeed, would broadcast to the entire company – that Cooper does not tolerate violations of its EEO policy under any circumstances.

In short, Cooper had both legal compliance as well as policy interests in enforcing its EEO policy by terminating Runion.[1] 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"). Cooper has substantial interests in determining when and how to enforce its EEO policy.

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[1] Employers also have a legal duty to not interfere with concerted, protected activities under Section 7 of the NLRA. However, to the extent that Runion's comments were not made to advance the "purpose of collective bargaining," *amicus* contends that they are not protected. In any event, employees engaging in such misconduct should not be permitted to use Section 7 as a shield against responsibility for violations of EEO laws or policy.

II. TO THE EXTENT THAT CURRENT NLRB PRECEDENT REQUIRES EMPLOYERS TO CHOOSE WHETHER TO COMPLY WITH LEGAL DUTIES UNDER TITLE VII OR THE ACT, THE PRECEDENT SHOULD BE OVERTURNED

When faced with evidence that an employee violated its EEO policy while on a picket line, Cooper was forced to choose which set of risks it preferred: taking no action, and thereby opening itself to a Title VII claim for violating its African-American replacement employees' rights to be free from racial harassment (and signaling to its employees a lack of commitment to its EEO policy), or terminating the harassing employee and thereby being accused of interfering with the employee's Section 7 rights, in violation of Section 8(a)(3) and (1). Cooper chose the latter option and finds itself with unfair labor practice charges. Although this outcome perhaps was predictable, it need not be inevitable. The Board must recognize an employer's interest in enforcing its anti-harassment policies promulgated to advance Title VII compliance, even when the harassment occurs during activities that might be protected by the Act.

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.

In this instance, Runion's racist statements violated other Cooper employees' rights to be free from racial harassment – and according to *Airo Die Casting*, Cooper is powerless to remedy that violation. In short, 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 to give full effect to Title VII, and to 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. 57, 72 (1986). 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 create legal liability or harm the company. Under *Airo Die Casting,* 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 trigger disciplinary action at 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, *Airo Die Casting* prevents employers from taking proactive measures to prevent and correct plainly inappropriate and potentially illegal conduct under Title VII.

III. REGARDLESS OF WHETHER THE RACIST SPEECH IN THIS CASE WAS PROTECTED, THE BOARD SHOULD NOT ORDER THE PERPETRATOR'S REINSTATEMENT

If the Board overturns *Airo Die Casting* and determines that racial harassment by a picketing employee causes that employee to lose the protection of the Act, as would be appropriate, then it must also overturn the Administrative Law Judge's order of reinstatement and backpay.

However, even if the Board refuses to overturn *Airo Die Casting*, and holds that racial harassment by a picketing employee is indeed protected, it nonetheless must deny Runion's reinstatement. 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.

In fact, the Supreme Court has "never deferred to the Board's 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). *Hoffman Plastics* considered the rights of an undocumented employee, who was unlawfully terminated for engaging in protected activity under the Act. In reversing the NLRB's award of back pay to the terminated employee, the Court observed that "awarding backpay to illegal aliens runs counter to policies underlying [the Immigration Reform and Control Act], policies the Board has no authority to enforce or administer." *Id.* at 149.

It follows that under *Hoffman Plastics*, the Board should decline to reinstate Runion for conduct that violated Cooper's anti-harassment policy, and ran afoul of other employees' Title VII rights. In enacting Title VII, Congress intended to curtail employment discrimination on the basis of protected characteristics, including race, color, religion, sex, or national origin. *See Ricci v. DeStefano*, 557 U.S. 557, 580 (2009). Ordering reinstatement of an employee who harassed other employees on one of these bases, simply because he happened to be on a picket line, directly contravenes Congress's purpose in enacting Title VII. The Board should therefore make clear that harassing others on the basis of a characteristic protected by Title VII will not be rewarded with reinstatement, even if the harassment occurs during the course of activity that might otherwise be protected by the Act.

Reinstating Runion would indeed work against the aims of Title VII. Cooper would be forced to reinstate an employee who publicly harassed fellow employees on the basis of their race. This action would dilute the perceived sincerity of the company's commitment to combatting Title VII-prohibited harassment, as embodied in its EEO policy, and would cause all employees (not just those who might be victims of such harassment) to question the policy's efficacy. Cooper depends on the cooperation of all employees in order to give effect to Title

VII's laudable policy goals. These employees would now receive a mixed message: on paper, the company prohibits harassment on the basis of race, color, religion, sex, and national origin, but in practice, such harassment can occur without consequence. Robbed of practical effect, the company's EEO policy would be nothing more than mere words, preventing Cooper from effectuating Title VII's clear goal of putting an end to workplace discrimination on the basis of race, color, religion, sex, and national origin.

CONCLUSION

For the foregoing reasons, *amicus curiae* Equal Employment Advisory Council respectfully submits that the Board should overturn the holding of its *Airo Die Casting* decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of August, 2015, an electronic copy of the foregoing was filed on the NLRB e-filing website and served by electronic mail on:

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