



April 1, 2022

Senator Patty Murray
Chair
U.S. Senate HELP Committee
Washington, DC 20510

Representative Robert Scott
Chair
U.S. House Education & Labor Committee
Washington, DC 20515

Senator Richard Burr
Ranking Member
U.S. Senate HELP Committee
Washington, DC 20510

Representative Virginia Foxx
Ranking Member
U.S. House Education & Labor Committee
Washington, DC 20515

Dear Senators Murray and Burr and Representatives Scott and Foxx:

I write to ask that your committees investigate the National Labor Relations Board (NLRB) General Counsel's suit against Amazon.com, Inc., both with respect to policy behind the suit, which is at odds with federal civil rights laws, and the timing of the suit, which gives the appearance of an attempt to influence the outcome of a pending union representation election.

NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and internet retailers from the United States and more than 45 countries. Retail is the nation's largest private-sector employer, supporting one in four U.S. jobs — 52 million working Americans. Contributing \$3.9 trillion to annual GDP, retail is a daily barometer for the nation's economy.

On March 17, 2022, the NLRB General Counsel filed suit in the U.S. District Court for the Eastern District of New York seeking reinstatement of a former employee at Amazon's Staten Island facility who was fired nearly two years ago for shouting sexually charged and profane obscenities at a female coworker over a bullhorn at their shared workplace. As seen in video evidence, this individual called his female coworker a "gutter bitch," "ignorant and stupid," "crack-head ass," "crack ho," and "queen of the swamp" and accused her of being "high" and on "fentanyl."

Degrading obscenities like the ones at issue in this matter are entirely inappropriate and unacceptable in any modern workplace. By forcing employers, coworkers and the public to accept such abusive behavior, the NLRB invites an unsafe and hostile workplace environment that is contrary to federal civil rights laws.

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Unfortunately, the NLRB has a history of defending unacceptable behavior by employees engaged in protests or strikes. The Board's actions in this regard drew criticism in 2016 from Judge Millett of the U.S. Court of Appeals for the DC Circuit. Millett, an Obama appointee, drafted a [concurring opinion](#) in *Consolidated Communications v NLRB*¹ to specifically address the Board's defense of unacceptable behavior, stating the following:

I write separately, though, to convey my substantial concern with the too-often cavalier and enabling approach that the Board's decisions have taken toward the sexually and racially demeaning misconduct of some employees during strikes. Those decisions have repeatedly given refuge to conduct that is not only intolerable by any standard of decency, but also illegal in every other corner of the workplace. The sexually and racially disparaging conduct that Board decisions have winked away encapsulates the very types of demeaning and degrading messages that for too much of our history have trapped women and minorities in a second-class workplace status...Conduct that is designed to humiliate and intimidate another individual *because of and in terms of that person's gender or race* should be unacceptable in the work environment. Full stop...Such language and behavior have nothing to do with attempted persuasion about the striker's cause... Indeed, such behavior is flatly forbidden in every other corner of the workplace because it is dangerously wrong and breathes new life into economically suffocating and dehumanizing discrimination that we have labored for generations to eliminate. Brushing that same behavior off when it occurs during a strike simply legitimates the entirely illegitimate, and it signals that, when push comes to shove, discriminatory and degrading stereotypes can still be a legitimate weapon in economic disputes.

In 2019, the Equal Employment Opportunity Commission (EEOC) also weighed in on this issue, filing an [amicus brief](#) to the NLRB in *General Motors*², in which the EEOC said, "Under [the] negligence standard [under Title VII of the Civil Rights Act,] employers bear the obligation of preventing and correcting harassment in the workplace... [I]f the employer fails to take corrective action, and the harassment continues and rises to the level of an actionable hostile work environment, then the employer may face liability... [E]mployers should be able to address and take corrective action vis-à-vis workers who use this kind of racist and sexist language while otherwise lawfully exercising their rights under the NLRA." The EEOC called on the Board to "consider a standard that permits employers to take action to correct conduct that violates Title VII or other antidiscrimination statutes."

¹ *Consolidated Communications, Inc. v. NLRB*, 837 F.3d 1 (D.C. Cir. 2016).

² *General Motors LLC*, 369 NLRB No. 127 (2020).

On July 21, 2020, it appeared that the Board had abandoned defending unacceptable conduct by workers with an announcement by then NLRB Chairman John Ring in a *Wall Street Journal* [op-ed](#)³ that:

The NLRB ruled that it will no longer give special protection to offensive language or conduct in the workplace. This change is long overdue. It eliminates the conflict with federal, state and local antidiscrimination laws and stops penalizing employers for complying with those laws.

As Ring also noted, “[e]mployers are required to take prompt and appropriate action to stop harassing conduct, and the failure to do so has significant consequences, including the risk of legal liability.... Other employees aren’t less offended by obscene language and harassment when it is connected to labor-related activity.”

The General Counsel’s recent action reflects a concerning pivot back to the Board’s prior policy and inconsistent with Judge Millett’s warnings, the EEOC’s brief and former Chairman Ring’s welcome announcement the Board had changed policy.

Also, concerning is the timing of the suit. The General Counsel unearthed this 23-month-old incident just a week before a union representation election was scheduled to take place at the Staten Island facility. The General Counsel took no action regarding this incident over the course of her 15 months in office, yet as the General Counsel has noted, the entire point of a 10(j) injunction, which is the mechanism used in this suit, is to “ensure that employees’ rights will be adequately protected from remedial failure due to the passage of time.”⁴ The suit gives the appearance of an overt attempt to influence the outcome of the pending election. The NLRB, of course, is required by federal law to conduct union representation elections “‘under conditions as nearly ideal as possible’—so-called laboratory conditions—in order to provide employees the opportunity to express their uninhibited desires regarding representation.”⁵ By suddenly pursuing this lawsuit against Amazon on a charge the Board let linger for almost two years and seeking reinstatement of this employee a week before voting begins, the General Counsel jeopardizes those laboratory conditions and is inappropriately interfering with the election.

The General Counsel’s decision to move forward in this case shows a disregard for the growing chorus of voices declaring that this type of behavior has no place in the workplace or the picket line. Her decision to pursue this case risks forcing employers to violate federal antidiscrimination laws and interfering with workers’ right to a free and fair representation election. We urge Congress to investigate the General Counsel’s choices with respect to this matter. If the General Counsel truly believes protecting such unacceptable language is the role of the Board, Congress should consider remedial steps. The General Counsel should also explain

³ John Ring, “NLRB Stops Excusing Workplace Harassment,” *Wall Street Journal* (July 21, 2020).

⁴ *Memorandum GC 21-05*, Office of the NLRB General Counsel, August 19, 2021.

⁵ *Professional Transp., Inc.*, 370 NLRB No. 132, at *2 (2021) (citing *General Shoe Corp.*, 77 NLRB 124, 127 (1948)).

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why she filed this suit on a matter that had lingered for nearly two years, weeks before the NLRB will conduct a representation election at the facility.

Sincerely,

A handwritten signature in black ink, appearing to read "David French". The signature is stylized with a large, sweeping initial "D" and a cursive "F".

David French
Senior Vice President
Government Relations