United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1107 **September Term, 2018**

FILED ON: MAY 24, 2019

TITO CONTRACTORS, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, DISTRICT COUNCIL 51,
INTERVENOR

Consolidated with 18-1119

On Petition for Review and Cross-Application
for Enforcement of an Order of the
National Labor Relations Board

Before: GARLAND, *Chief Judge*, KATSAS, *Circuit Judge*, and SILBERMAN, *Senior Circuit Judge*.

J U D G M E N T

The petition for review and the cross-application for enforcement were considered on the record from the National Labor Relations Board and on the briefs of the parties. The Court has given the issues full consideration and determined that they do not warrant a published opinion. *See* Fed. R. App. P. 36; D.C. Cir. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the petition for review be denied and the cross-application for enforcement be granted.

Tito Contractors challenges the Board's finding that it engaged in unfair labor practices by firing five employees and by creating and enforcing a stricter overtime policy in response to union and other protected activities. Tito also argues that the Board improperly delayed consideration of backpay issues until compliance proceedings.

Section 8(a) of the National Labor Relations Act (NLRA) prohibits employers from engaging in unfair labor practices, which include interfering with protected union activities and discriminating against employees based on those activities. 29 U.S.C. § 158(a)(1), (3). In mixed-

motive cases, the Board's General Counsel may prove that the employer took an action motivated in part by improper animus, in which case the employer may avoid liability only by proving that it would have taken the same action regardless. *See Wright Line*, 251 N.L.R.B. 1083, 1089 (1980). The Supreme Court has approved this administrative interpretation of the NLRA, *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983), and Tito does not challenge it here.

Substantial evidence supports the Board's finding that the terminations in this case were motivated by improper animus. For example, Tomas Berganza, a Tito supervisor, "explicitly referenced [the first two employees'] union activities when terminating them," and he "made comments about the Union to [the third employee] at her termination meeting." *Tito Contractors, Inc.*, 366 N.L.R.B. No. 47, 2018 WL 1559885, at *5 n.18, *6 (Mar. 29, 2018). Further, Tito does not dispute that it knew of the final two employees' union activities.

Tito argues that it would have fired the employees in any event because of misconduct or low productivity. The Board reasonably rejected these justifications as pretextual, because Tito treated the fired employees worse than others similarly situated. *Tito Contractors*, 2018 WL 1559885, at *5. Tito challenges the credibility determinations of the administrative law judge on this point, but it fails to show that they were patently unsupportable.

The Board also had substantial evidence to find that Tito's creation of a policy requiring advance approval for overtime was an unfair labor practice. The Board noted statements by Tito's owner and several of its supervisors that the new overtime policy would apply only to employees who joined a lawsuit under the Fair Labor Standards Act (FLSA). *Tito Contractors*, 2018 WL 1559885, at *3. These statements provided adequate grounds both to find an impermissible motive and to reject Tito's argument that it would have created the new policy even absent that motive.

In addition, substantial evidence supports the Board's finding that Tito impermissibly discriminated against the FLSA plaintiffs in implementing the overtime policy. First, the Board cited payroll data showing that, "[d]uring the first full pay period after the filing of the overtime lawsuit, [Tito] assigned overtime to various employees, but none to the original seven, named plaintiffs." *Tito Contractors*, 2018 WL 1559885, at *4. This allocation of work "was in stark contrast" to the allocation in past pay periods "when the seven discriminatees were assigned an average of at least 10 hours of overtime pay per pay period, with a few working substantially more." *Id.* Second, the Board reasonably rejected Tito's arguments that it would have made the same overtime assignments for legitimate reasons; as the Board explained, Tito "did not lack overtime work." *Id.*

Tito further argues that the Board erred by "leav[ing] to compliance the determination of the extent to which [Tito] discriminated against the plaintiffs" beyond the first pay period after the lawsuit was filed. *Tito Contractors*, 2018 WL 1559885, at *4 n.15. The Board did not improperly delay this determination, for "compliance proceedings provide the appropriate forum where the [parties] will be able to offer concrete evidence as to the amounts of backpay, if any." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984).

The Board seeks summary enforcement of the rest of its order. Because Tito's opening brief does not challenge these parts of the order, we grant the Board's request.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk