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‘BIG Little Lies’: Court Upholds Employee Discharge For Dishonesty

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A little white lie never hurt anyone, right? That was the philosophy the National Labor Relations Board (NLRB) appeared to subscribe to last year when it ruled an employer unlawfully discharged an employee for dishonesty because, in the agency’s view, the company had handled terminations for lying inconsistently. That board decision was rendered in *Cellco Partnership*, 365 NLRB No. 93 (2017).

Fast forward to now. A federal court of appeals reviewed that NLRB order and has overturned it. In other words, the court ruled that the employer was justified in terminating the employee. At issue in the case was employee Bianca Cunningham, a known union activist. Cunningham was asked by another employee, Victory Esharetur, for advice about a workplace issue. Specifically, Esharetur had concerns about staying late with a manager in light of a disagreement she’d had with the manager earlier in the day, saying she felt threatened. Cunningham told Esharetur that if she were to feel threatened and find herself in the same situation, she would “go home.” So that is exactly what Esharetur did; she clocked out and left work without authorization.

During its investigation into Esharetur’s unauthorized departure from work, the company interviewed Cunningham multiple times. While Cunningham initially denied ever telling Esharetur to leave work, she subsequently admitted to investigators that she had told Esharetur she would leave if she

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ever found herself in that type of situation. Cunningham also had some inconsistencies in statements she made regarding the nature of her text message exchanges with Esharetur about the incident. The employer considered Cunningham's inconsistent statements to constitute lying during an investigation and terminated her on that basis.

The NLRB held the company's termination of Cunningham was unlawful because, among other things, the company purportedly had not consistently terminated other employees who had lied during investigations. The court of appeals rejected that finding, however, as the employer demonstrated via unrebutted evidence at the initial hearing that it did in fact discharge other employees for similar acts of dishonesty in the past. Accordingly, the court overruled the board's order because the agency's decision was not supported by "substantial evidence."

This case serves as yet another reminder that consistency in employee discipline is critical on many levels – including for use in potential defenses in legal proceedings regarding disputed discipline.