

'BIG Little Lies': Employer's Inconsistent Practice Invalidates Employee Termination For Dishonesty, Says NLRB

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A little white lie never hurt anyone, right? That age-old saying appears to be false, at least when it comes to a recent ruling by the National Labor Relations Board (NLRB). On June 9, the NLRB issued its decision in *Cellco Partnership*, 365 NLRB No. 93 (2017), which found that an employer unlawfully discharged an employee for dishonesty because the employer had handled terminations for lying inconsistently. In the case, employee Bianca Cunningham, a known union activist, 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 ever found herself in that type of situation. Cunningham also had some inconsistencies in statements she made regarding the nature of 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 company, however, had not consistently terminated other employees who had lied during investigations. An NLRB administrative law judge (ALJ) determined the company unlawfully discharged Cunningham based on her union activity. The ALJ largely cited how the company had been inconsistent in its treatment of other employees who had lied during past investigations. That is, the ALJ inferred union *animus* by the employer in light of the fact that other employees engaging in dishonesty who were not known union supporters retained their employment, whereas Cunningham – a vocal union supporter – was discharged. The NLRB affirmed the ALJ's decision in its [June 9 opinion](#). In addition to ordering backpay, the NLRB also required the company to pay subsequent job-search costs/expenses to Cunningham, which aligns with [the agency's new approach](#) on this front. This case illustrates the importance of being consistent when it comes to employee discipline. While union activity does not give an employee carte blanche to engage in misconduct, terminating an employee who has engaged in protected activity could be invalidated if a company's treatment of that type of misconduct has been inconsistent.

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