



July 27, 2020

## NLRB Decision Gives Employers More Freedom to Address Offensive and Abusive Conduct

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On July 21, 2020, the National Labor Relations Board (NLRB or the Board) issued a long-awaited decision giving employers more freedom to discipline employees who engage in abusive, obscene or profane conduct in connection with their work. In *General Motors, LLC*, 369 NLRB No. 127 (2020), the NLRB rejected three context-specific rules formerly used to assess whether an employee's inappropriate conduct is protected by Section 7 of the National Labor Relations Act (NLRA or the Act). Instead, the NLRB will now assess that conduct under the *Wright Line* standard, which is used to evaluate all other claims of discriminatory conduct under the Act.

Previously, when assessing whether an employer lawfully disciplined an employee who engaged in abusive, obscene or profane conduct in connection with activity protected by Section 7 of the NLRA, the NLRB applied one of three different circumstance-specific tests that focused on the context of the employee's misconduct. One (the *Atlantic Steel* test) applied when the misconduct occurred during otherwise-protected workplace interactions with management. Another (the "totality of the circumstances" test) applied when the misconduct occurred on social media or during interactions with fellow employees. And a third (the *Clear Pine Mouldings* test) applied when the misconduct occurred on a picket line.

In *General Motors*, the NLRB disapproved of this context-specific analysis because it treated abusive and offensive conduct as "analytically inseparable" from activity protected by the Act. In contrast, the NLRB held that "[a]busive speech and conduct (e.g., profane ad hominem attack or racial slur) is not protected by the Act and is differentiable from speech or conduct that is protected by Section 7 (e.g., articulating a concerted grievance or patrolling a picket line)."

Now, when an employee engages in abusive or profane conduct, the *Wright Line* standard simplifies the analysis by utilizing the same two-step, burden-shifting framework that applies to all other claims of

discriminatory conduct under the Act. The NLRB's General Counsel must first present sufficient evidence to establish a causal connection between the discipline and the employer's alleged anti-union animus. Then, even if the General Counsel makes this showing, if the employer demonstrates that it would have taken the same action to address the employee's misconduct in the absence of the employee's protected activity, the employer's action will not be overturned.

In an [op-ed for the Wall Street Journal](#), NLRB Chairman John Ring emphasized the Board's former context-specific standards' could not coexist with antidiscrimination laws, which "impose a legal duty on employers to protect all employees from discrimination and harassment. Employers 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." Accordingly, the NLRB "will no longer give special protection to offensive language or conduct in the workplace" and its *General Motors* decision "eliminates the conflict with federal, state and local antidiscrimination laws and stops penalizing employers for complying with those laws." According to Chairman Ring, "[t]his is a long-overdue change in the NLRB's approach to profanity-laced tirades and other abusive conduct in the workplace. For too long, the Board has protected employees who engage in obscene, racist, and sexually harassing speech not tolerated in almost any workplace today."

This decision, indeed, is a welcome change for employers, as they will be given significantly more leeway when disciplining both union-represented and non-union employees who engage in abusive conduct or offensive tirades. Previously, employers often had to tolerate egregiously inappropriate misconduct simply because it occurred on the picket line or was intertwined with the employee's protected activity. Now, employers will have more predictability when disciplining employees for their abusive, profane or offensive conduct, and will be able to respond more effectively when employees engage in what the NLRB called "obscene, racist, and sexually harassing speech not tolerated in almost any workplace today." For more questions on the *Wright Line* standard or any other labor-management issues, please contact any attorney on the Faegre Drinker Labor Management Relations team.

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