NLRB Ruling Corrects Overbroad Abusive Conduct Standard

By **Amber Rogers and Gary Enis** (July 30, 2020)

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It might be shocking to non-labor law practitioners, but until last week, federal labor law permitted workers to engage in racist, sexist, and overall harassing and abusive conduct so long as it was done while also engaged in activities protected by the National Labor Relations Act.

Perhaps even more shocking, employers violated federal labor law for disciplining an employee for such conduct.

Lively and even heated debates about wages, benefits, and other terms and conditions of employment between and among employees and their employers are welcomed and protected under Section 7 of the NLRA.

However, over the past 40 years, the National Labor Relations Board's decision making has prioritized these Section 7 rights over — and at the expense of — the rights of employees to work in an environment free from abuse, harassment and discrimination.

Indeed, the NLRB has left many employers scratching their heads as it has repeatedly offered workers essentially a free pass to engage in vile conduct antithetical to all notions of a civil workplace.

Last week, the NLRB finally came to grips with its precedent that all too often deemed an employee's abusive conduct protected under the NLRA. The NLRB's recent decision in General Motors LLC now makes clear that abusive language and conduct are not protected under the NLRA, even when coupled with activity protected under Section 7 of the NLRA.

The Board's Decision in General Motors

On July 21, the board released its highly anticipated decision in General Motors, wherein it overruled three decades-old standards it previously used to determine whether an employee's abusive conduct in the workplace lost the protection of the NLRA. The decision exchanges three setting-specific standards for the well-known Wright Line[1] test, which the board has historically used to determine if an employer's disciplinary actions against an employee were motivated by the employee's involvement in protected activity.[2]

This case came before the board after General Motors disciplined an employee for abusive conduct during an exchange with management regarding overtime coverage while employees were out on cross-training. During the exchange, the employee yelled the F-word and other expletives at a management employee several times.[3]

General Motors suspended the employee for this conduct, and the employee filed a charge of discrimination alleging the suspension violated the act.[4] The general counsel for the board issued a complaint on the charge, and an administrative law judge determined that the employee's outburst was protected under the NLRA pursuant to the board's decision in Atlantic Steel Co.[5] General Motors appealed that decision to the NLRB.[6]

In overruling these three setting-specific standards, the board acknowledged that its application of these standards extended NLRA protections to employee conduct during Section 7 activity far beyond its statutory purposes, i.e., protecting employees from retaliation for engaging in protected concerted activity. Instead, the board routinely applied these standards to find employers violated the NLRA for disciplining employees who engaged in objectively offensive, racist and abusive conduct.

Acknowledging the error in its ways, the board decried its previous use of the NLRA to fashion an impenetrable shield around employees who engage in abusive conduct in the workplace while also engaging in Section 7 activity.

Inadequacy of the Board's Setting-Specific Standards

The board historically relied on three setting-specific standards to determine if an employee's abusive conduct that occurred while engaged in protected concerted activity lost protection under the NLRA.[7] As demonstrated below, the board's application of these standards over the past 40 years yielded incongruous and absurd decisions that allowed employees to engage in racist, sexist and vulgar behavior without consequence.

The first setting-specific approach overturned by the board applied when an employee lashed out at a manager while also engaged in Section 7 activity. Under these circumstances, the board applied the four-prong Atlantic Steel test to determine if the employer unlawfully disciplined an employee.

Under this test, the board considered "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way provoked by an employer's unfair labor practice."[8] This test was utilized by the board in Tampa Tribune in 2007 to find that an employee's use of profanity to describe his employer's vice president was not so offensive as to lose the protection of the act.[9]

Contrarily, the board used the same test to conclude in Trus Joist MacMillan in 2004 to find that an employer did not violate the act by disciplining an employee for using vulgar language and an obscene gesture toward his manager.[10]

The board applied the second standard to social media posts and conversations between employees around the workplace. Under this standard, the board took a totality of the circumstances approach to determine whether an employee's abusive behavior online or directed at a co-worker lost the protection of the act.[11]

Applying this standard, the board found in Pier Sixty in 2015 that an employer violated the act for terminating an employee who wrote a Facebook post attacking a supervisor using profanity and ad hominem attacks about the supervisor's mother, while promoting an upcoming union vote.[12]

Third, where the abusive conduct occurred on a picket line, the board used the controversial Clear Pine Mouldings standard which determined whether, "under all of the circumstances, nonstrikers reasonably would have been coerced or intimidated by the abusive conduct."[13] Under this approach, unless the picketers all but threatened or engaged in physical harm of other employees or the employer, the board found the speech and conduct was protected under the NLRA.[14]

Accordingly, the board offered protection to picketers to make racist and sexist comments and gestures, and abusive conduct on the picket line as long as they did not threaten physical violence. The board, for instance, found in Airo Die Casting Inc. in 2006 that a picketer's use of the N-word was protected under the Clear Pine Mouldings standard.[15] Under this same standard, the board also held in Calliope Designs Inc. in 1989 that an employer violated the act by disciplining strikers who called nonstrikers "whores."[16]

By protecting such abhorrent language and conduct, the board drastically prioritized workers' Section 7 rights over the rights of workers to be free of abuse, harassment and discrimination in the workplace. While the board acknowledges that employees should be extended some flexibility by employers when engaging in protected activity, it recognized that its application of these setting-specific standards created a framework that undermined an employer's ability to "maintain order, respect, and a workplace free from invidious discrimination."[17]

Streamlining the Analysis of Abusive Conduct in the Workplace — Wright Line Standard

Employers have a legal obligation to protect their workers from harassment and discrimination in the workplace, and the board's decision making should parallel those duties.

Continued application of setting-specific standards to determine if the discipline levied by an employer on an employee engaging in abusive conduct hindered an employer's ability to maintain a healthy workplace, free of discrimination and harassment. The Wright Line standard resolves this issue by untangling the employee's abusive conduct from the protected activity.[18]

Under the Wright Line standard, the general counsel must show that "(1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity."[19] If this showing is made, an employer will nevertheless prevail if it can demonstrate it would have taken the same disciplinary action even in the absence of Section 7 activity.[20]

The board's adoption of the Wright Line standard promotes more consistent, predictable jurisprudence where abusive conduct does not run afoul of antidiscrimination laws and policies employers must follow.[21] This approach also narrows the scope of the NLRA protection to the Section 7 activity and not abusive conduct that would otherwise result in disciplinary action.[22]

Indeed, the board concluded that everyday American workers engage in Section 7 activities

> without resorting to abuse, and nothing in the text of Section 7 suggests that abusive conduct is an inherent part of the activities that Section 7 protects or that employees who choose to engage in abusive conduct in the course of such activities must be shielded from nondiscriminatory discipline.[23]

In effect, the board has decided that abusive conduct is abusive conduct no matter the setting. Employees are no longer shielded from nondiscriminatory corrective action for their offensive remarks or behaviors done while simultaneously engaging in protected activity.

In its analysis, the board concluded that abusive conduct is not analytically inseparable from the protected activity.[24] It relied on federal, state and local equal employment opportunity laws to frame its adoption of the Wright Line standard.

The board reasoned that if employers must comport with laws that do not excuse abusive conduct simply because it derives from "heated feelings about working conditions or because crude language is common in the workplace," then the same must hold true in this forum.[25]

The U.S. Supreme Court's approval of the Wright Line standard and its use in past decisions made by the board should result in "more reliable, less arbitrary, and more equitable treatment of abusive conduct in the workplace" when compared to the other setting-specific standards previously used by the board.[26] Thus, the board overruled all relevant cases that were inconsistent with its General Motors decision.[27]

What This Decision Means for Employers

While this decision diminishes once-broadened protections for employee abusive speech and conduct, it does not expand an employer's right to discipline employees or grant employers the right to infringe on employees' protected activity. Indeed, notwithstanding the board's decision in General Motors, it still remains unlawful to discipline an employee for engaging in Section 7 activity.

This decision also provides employers with greater assurance that they are entitled to take corrective action consistent with their practices and policies to prevent the emergence of a hostile work environment. Under the Wright Line standard, an employer does not violate the NLRA if it can show that it would have taken the same action in the absence of Section 7 activity.

Accordingly, an employer will not run afoul of the NLRA by disciplining employees who engage in abusive conduct while exercising their Section 7 rights, if it consistently disciplines all employees for similar abusive conduct.

Overall, this decision by the NLRB should be welcome news to employers. For far too long, employers were faced with the difficult choice of either violating the NLRA by disciplining an employee who engaged in abusive conduct or allowing abusive behavior in their workplaces to go unremedied. With the board's decision in General Motors, employers no longer must make this difficult choice.

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[1] Wright Line, 251 NLRB 1083 (1980).

[2] General Motors LLC, 369 NLRB No. 127 (July 21, 2020).

[3] Id. at 2.

[4] Id. at 1-2.

[5] Id. at 2.

[6] Id.

[7] Id. at 1.

[8] Id. (quoting Atlantic Steel Co., 245 NLRB 814, 816 (1979).

[9] Id. at 4-5 (citing Tampa Tribune, 351 NLRB 1324 (2007)).

[10] Trus Joist Macmillan, 341 NLRB 369 (2004).

[11] General Motors, 369 NLRB No. 127, slip op. at 6.

[12] Id. (citing Pier Sixty, 362 NLRB 505 (2015)).

[13] Id.

[14] Id.

[15] Id. (citing Airo Die Casting, Inc., 347 NLRB 810, 812 (2006)).

[16] Id. (citing Calliope Designs, Inc., 297 NLRB 510, 521 (1989)).

[17] Id.

[18] Id. at 6-7.

[19] Id. at 2.

[20] Id.

[21] Id. at 6-7.

[22] Id. at 8.

[23] Id.

[24] Id. at 9.

[25] Id. at 7.

[26] NLRB v. Transportation Management Corp., 462 U.S. 393, 403 (1983).

[27] General Motors, 369 NLRB No. 127, slip op. at 2, 9 n. 22.