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The Board Brings the NLRA Into the Modern Era of Discipline for Abusive Conduct, and Union Leaders Lament "Guys Like Us, We Had It Made. Those Were the Days."

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On Tuesday, the three-member, all Republican, National Labor Relations Board (the "Board") issued a 3-0 decision in General Motors LLC and Charles Robinson, 369 NLRB No. 127 (July 21, 2020), reversing its longstanding standard for determining when employers violate the National Labor Relations Act (the "Act") by disciplining employees who, while engaged in activity protected under Section 7 of the Act, use profanity-laced speech, as well as racial, ethnic or sexist slurs, or other abusive conduct toward or about management or other employees. Going forward, including to any unfair labor practice case currently pending, the Board will apply its familiar burden-shifting standard under Wright Line, pursuant to which a charging party must show through evidence that the employer would not have disciplined the employee but for his or her engaging in the protected activity, and the employer will not violate the Act where it shows the employee would have been disciplined because of the abusive speech or conduct regardless of any involvement in protected activity. The Board will no longer treat the engagement in the protected activity and the abusive conduct as being analytically inseparable. Nor will the Board any longer presume in such circumstances the issue of causation between the employee's discipline and his or her involvement in protected activity. In so doing, the Board has brought the Act into the modern era so as to be consistent with current workplace standards of decorum and employers' legal obligations under antidiscrimination laws. To those union leaders and employees who engage in abusive and offensive language or other conduct, similar to that old television dinosaur Archie Bunker, they may well reminisce about the old days when guys like them had it made and they were protected from discipline.

In framing its *General Motors* decision, the Board noted at the outset that it has been "repeatedly asked to determine whether employers have unlawfully discharged or otherwise disciplined employees who had engaged in abusive conduct in connection with activity protected by Section 7 of [the Act]." 369 NLRB No. 127, slip op at 1. As three such recent examples, the Board pointed to cases where employers discharged employees who had 1) "unleashed a barrage of profane ad hominem attacks against the owner … during a meeting in which the employee also raised concerted complaints about compensation;" 2) "posted on social media a profane ad hominem attack against a manager, where the posting also promoted voting for union representation;" and 3) "shouted racial slurs while picketing." The General Motors Board noted that in deciding each of these prior cases under the old standard it had "assumed that the abusive conduct and the Section 7 activity are analytically inseparable." Id. By so doing, the Board had "presumed a causal connection between

the Section 7 activity and the discipline at issue, rendering the Wright Linestandard – typically used to determine whether discipline was an unlawful response to protected conduct or lawfully based on reasons unrelated to protected conduct – inapplicable." Id. In General Motors, the flaw the Board described in this approach is that it "has not taken into account employers' arguments that the discipline at issue was motivated solely by the abusive form or manner of the Section 7 activity or that the employer would have issued the same discipline for the abusive conduct even in the absence of the Section 7 activity." Id. at 1, 10. This has caused employers at times to be faced with standards under the Act that "conflicted alarmingly with employers' obligations under federal, state and local antidiscrimination laws," which may require employers to take prompt corrective action to prevent hostile work environments. *Id.* at 1, 6-7.

Under the Board's prior precedent, an employer violated the Act "by disciplining an employee based on abusive conduct 'that is part of the res gestae' of Section 7 activity, unless evidence shows that the abusive conduct was severe enough to lose the employee the Act's protection." Id. at 4 (quoting Stanford Hotel, 344, NLRB 558, 558 (2005). As the Board explained, "[t]his precedent was based on the view that 'employees are permitted some leeway for impulsive behavior when engaged in concerted activity,' and the accommodation of such behavior is 'balanced against an employer's right to maintain order and respect.' " Id. (quoting Daimler Chrysler Corp., 344 NLRB 1324, 1329 (2005)). To determine whether conduct "is severe enough to lose protection" the Board had applied differing setting-specific standards, each depending on the context of the Section 7 activity. Id. In ascending order of employee leeway permitted by the Board in these settings were workplace discussions with management, social media posts and other conversations among employees, and picket line conduct. *Id.*

For workplace discussions with management, the Board had applied the four-factor standard under its decision in Atlantic Steel, 245 NLRB 814 (1979), which considers "(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." Id. (quoting Atlantic Steel, 245 NRLB at 816). The General Motors Board noted that application of the Atlantic Steel factors over the years has "produced inconsistent outcomes," and so has failed to provide employers with clear guidance. Id. at 4-5. Similarly, for social media posts and coworker discussions the Board has previously applied a totality of the circumstances approach, which the General Motors Board found "promises to create the same, if not more, inconsistency and unpredictability." Id. at 6. Finally, in cases involving picket line conduct the Board has previously applied its standard under *Clear Pine Mouldings, Inc.*, 268 NLRB 1044, 1046 (1984), which the cases applying the same "have found picket-line misconduct to lose the protection of the Act only where it involves an overt or implied threat or where there is a reasonable likelihood of an imminent physical confrontation." *Id.*

Rejecting the prior setting-specific standards approach described above, the Board in General Motors announced a move to its longstanding Wright Linestandard "for deciding cases where employees engage in abusive conduct in connection with Section 7 activity, and the employer asserts it issued discipline because of the abusive conduct." *Id. at 7*. In announcing this move, the Board observed that "[a]bsent evidence of discrimination against Section 7 activity, we fail to see the merit of finding violations of federal labor law against employers that act in good faith to maintain civil, inclusive, and healthy workplaces for their employees." Id. at 8. The Board went on to note that "[w]e read nothing in the Act as intending any protection for abusive conduct from nondiscriminatory discipline, and, accordingly, we will not continue the misconception that abusive conduct must necessarily be tolerated for Section 7 rights to be meaningful." *Id.* Continuing, the Board stated "American workers engage in these activities every day 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." *Id.* Rather, the Board held that:

Abusive speech and conduct (e.g., profane ad hominem attack or racial slur) is not protected by the Act and is differentiable from speech and conduct that is protected by Section 7 (e.g., articulating a concerted grievance or patrolling a picket line). Accordingly, if the General Counsel fails to show that protected speech or conduct was a motivating factor in an employer's decision to impose discipline, or if the General Counsel makes that showing but the employer shows that it would have issued the same discipline for the unprotected, abusive speech or conduct even in the absence of Section 7 activity, the employer appears to us to be well within its rights reserved by Congress.

Id. at 8-9.

Applying this rationale, the General Motors Board found that its longstanding Wright Line burden-shifting framework is the right one, regardless of the setting involved, as it "allows the Board to protect Section 7 activity without erroneously extending the Act's protection to abusive conduct." *Id. at 9.* Under Wright Line, the General Counsel must initially show (in any setting) 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." *Id. at 10.* Such evidence of a causal relationship is "probative of unlawful motivation only if it adds support to a reasonable inference that the employee's Section 7 activity was a motivating factor in the employer's decision to impose discipline." Id. If the General Counsel meets this initial burden, the employer must "meet its defense burden to prove that it would have taken the action even in the absence of the Section 7 activity," which defense will fail if the evidence in total "establishes that the reasons given for the employer's action are pretextual – that is, either false or not in fact relied upon." *Id.* (internal quotation omitted).

This "realignment" of standards "honors the employer's right to maintain order and respect," while avoiding potential conflicts with antidiscrimination laws, such that "the Board will no longer stand in the way of employer's legal obligation to take prompt and appropriate corrective action to avoid a hostile work environment on the basis of protected characteristics." Id. Employers should be cognizant that it remains unlawful to target employees who engage in Section 7 activity for discipline that would not have occurred "but for that protected activity." However, under the Board's General Motors decision "employees who engage in abusive conduct in the course of Section 7 activity will not receive greater protection from discipline than other employees who engage in abusive conduct." *Id.*

Moreover, the Board determined that application of its Wright Line standard shall apply retroactively to cases where employees engaged in abusive conduct in the course of protected Section 7 activity. In so holding the Board concluded that any "ill effects" of applying its General Motors decision retroactively "to all pending cases in whatever stage" are "outweighed by the potential harm of producing results contrary to the Act's principles and potentially at odds with antidiscrimination law." Id. at 11. Specifically, the Board found that continuing to find employers violated the Act in pending cases through the application of the now overruled standards, "where employers were simply exercising their right to maintain a civil, safe, nondiscriminatory workplace for their employees would the greater injustice." *Id.*

Applying the Wright Line standard to the underlying facts and allegations in the General Motors case,

the Board remanded the case to the to the Administrative Law Judge to reopen the record and take evidence relevant to the Wright Line standard. The underlying facts involved suspensions of a union committeeman for profanity-laced rants in the course of protected Section 7 discussions with management. However, under the old Atlantic Steel standard, the General Counsel had not introduced evidence that the employer had any animus against the Section 7 activity (as opposed to only the abusive conduct), and the employer had not been allowed to introduce evidence "now relevant [as] to whether the [it] would have suspended [the employee] for his abusive conduct even in the absence of Section 7 activity." *Id.*

The key takeaway for employers is the availability of a new defense in cases involving profane or offensive language or other abusive conduct by employees in the course of engaging in otherwise protected concerted /union activity (whether made in the course of grievance or investigative meetings, bargaining meetings, social media posts, or on a picket line, etc.). This new defense in these circumstances allows an employer to discipline an employee for abusive conduct without violating the Act only to the same extent the employer would have disciplined any other employee for the same or comparable abusive conduct, such that the employer can demonstrate the discipline was not discriminatorily motivated by the employee's involvement in the protected Section 7 activity. The availability of this Wright Line defense in these circumstances is significant, however, employers should still be careful to assess whether they can make the required evidentiary showing and be mindful that sloppy or inconsistent discipline practices with respect to profane speech in the workplace, for example, may still result in a finding that discipline was unlawfully motivated by an employee's involvement in protected activity. Also, depending on what happens in the November election, the current make-up of the GOP controlled Board could begin to change in 2021, and while it is not clear whether a Democratically controlled Board would look to roll the standard all the way back to that existing before the General Motors decision, one could certainly expect at least some moderation of the standard. For example, there could be some moderation where the issues involve the use of profanity but do not involve conduct potentially creating a hostile work environment along the lines of a protected characteristic so as to potentially conflict with the employer's obligations under antidiscrimination laws. In light of the nuances and complexities that can come up in determining whether underlying activity is protected under the Act, and whether the employer can likely make the required showing of nondiscriminatory discipline motivated by unprotected abusive conduct, employers should continue to consult with labor counsel and labor relations professionals regarding disciplinary decisions in this area.

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