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A Clear Standard Emerges for Employers Dealing with Offensive Conduct in the Workplace

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In an important shift, the National Labor Relations Board has revised the standard applicable to the discipline or discharge of employees who use offensive or profane language, or engage in abusive conduct, while also participating in activity protected by Section 7. The Board's decision in [General Motor LLC, 369 NLRB No. 127 \(2020\)](#) does away with the various tests that presumed a causal connection between the Section 7 activity and the discipline at issue. Instead, the Board will now use its familiar *Wright Line* standard, under which an employer can defend a discipline by showing it would have issued the same discipline for the abusive conduct, even in the absence of Section 7 activity. This decision provides greater certainty for employers as to what standard will apply when they seek to discipline or discharge employees in this context.

Background and Prior Standards

Section 7 of the National Labor Relations Act (the "NLRA"), which applies equally to unionized and non-unionized workforces, protects employees who engage in concerted activity for their mutual aid or protection. Over the last several decades, the Board has applied different tests in analyzing the discipline or discharge of an employee while engaging in Section 7 activity, depending on the context. For example, for offensive conduct when speaking with management, the Board used a four-factor test, as set forth in *Atlantic Steel*; for abusive conduct on social media or in workplace discussions among coworkers, the Board used a "totality of the circumstances" approach; and for abusive conduct occurring on a picket line, the Board used a third test that considered whether the misconduct may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the NLRA. Having different tests for different contexts has yielded unpredictable results and was a source of confusion for many employers who have tried to understand when they may lawfully impose discipline.

Prior Board law had another negative impact on employers: it failed to account for the tension that can exist between employees' Section 7 rights, on the one hand, and the employer's obligations under federal, state, and local antidiscrimination laws, on the other. For example, the Board had previously upheld protection for egregious racist and sexually offensive language when it occurred on a picket line, despite employer protestations that they needed to fire those workers or risk running afoul of tolerating a hostile work environment. Indeed, the EEOC submitted an amicus brief when the Board was considering the applicable test to apply in *General Motors*, arguing that it is "critical that employers are

able to take corrective action as soon as they have notice of harassing conduct," because failure to do so may subject the employer to liability.

Adoption of the long-standing *Wright Line* Standard

In *General Motors*, the Board adopted the familiar *Wright Line* standard and did away with the other various tests. Under *Wright Line*, the General Counsel must first make a showing that the employee engaged in a Section 7 protected activity, the employer knew of that activity, and that the activity was a factor in the discipline of a worker. Once the General Counsel has made the initial case, the burden of persuasion shifts to the employer to prove that the same disciplinary action would have been taken in the absence of the Section 7 activity. The Board noted that application of the *Wright Line* standard "promises more reliable, less arbitrary, and more equitable treatment of abusive conduct" than the Board's prior multitude of tests. The Board also dismissed concerns that this would impinge on Section 7 rights, suggesting that it is "reasonable for employers to expect employees to engage" in such activity "with a modicum of civility."

Impact of *General Motors*

General Motors creates a roadmap for employers and employees in understanding the respective obligations and rights when profane, offensive, or abusive language is used in the workplace. A statement released by Chairman John F. Ring sums up the intended impact of this case best: "[t]his is a long-overdue change in the NLRB's approach to profanity-laced tirades and other abusive conduct in the workplace." He added that, "[f]or too long, the Board has protected employees who engage in obscene, racist, and sexually harassing speech not tolerated in almost any workplace today. Our decision in *General Motors* ends this unwarranted protection, eliminates the conflict between the NLRA and antidiscrimination laws, and acknowledges that the expectations for employee conduct in the workplace have changed."

Employers should analyze their policies and practices to determine whether any changes should be made in light of this ruling, and whether employees have adequate notice of the employer's expectations.

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