

Insights: Alerts

Offensive Employee Outbursts May (Again) Be Shielded From Disciplinary Action Under The NLRA

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On Monday, the National Labor Relations Board (the “Board” or “NLRB”) issued a decision overturning precedent set just three years ago in *General Motors, LLC*. The decision in *Lion Elastomers, LLC*, marks a return to earlier precedent, under which the Board's analysis varied by the context surrounding the underlying misconduct (e.g., picket line, social media post, discussion with management). The ruling, which applies retroactively, makes it much more difficult for employers to lawfully discipline employees making racist, sexist, and other offensive remarks, where they do so under the auspices of Section 7 conduct.

Pier Sixty, LLC, Clear Pine Mouldings & Atlantic Steel: Setting-Specific Standards

Prior to *General Motors*, the NLRB utilized a series of setting-specific standards in determining whether employees were lawfully disciplined after making offensive or abusive statements that occurred while the employee was engaged in activity protected under Section 7 of the National Labor Relations Act (the “Act” or “NLRA”). In cases involving conversations amongst employees in the workplace or for social media activity, the Board looked to the totality of the circumstances test set forth in *Pier Sixty LLC*. Offensive conduct by employees on a picket line was analyzed under the Board's *Clear Pine Mouldings* test, which looked at whether non-strikers, under all of the circumstances, reasonably would have been coerced or intimidated by the abusive conduct. Outbursts by employees during interactions with management were analyzed under *Atlantic Steel*, which considered where the discussion occurred, the subject matter of the discussion, the nature of the outburst, and, whether the outburst was, in any way, provoked by the employer's unfair labor practice.

General Motors: The Wright Line Standard

Under the setting-specific standards, the Board effectively presumed that where an employer disciplined an employee for offensive conduct in the context of protected activity, the disciplinary action was unlawful unless the conduct was so outrageous it lost protection under the Act. This presented a Catch-22 for employers who were forced to choose between violating the NLRA by disciplining offenders or foregoing discipline and risk violating federal, state, and local laws requiring them to promptly address workplace discrimination and harassment. Employers disciplining employees for engaging in even the most egregious conduct frequently saw their discipline overturned.

In *General Motors*, the Board highlighted these concerns and explained 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.” Given these concerns, the Board determined that moving forward cases involving employees disciplined for engaging in offensive or abusive conduct during an otherwise-protected activity would be evaluated under its *Wright Line* standard. Under *Wright Line*, discipline is legal if an employer proves it would have disciplined the employee without the union activity. The decision made it easier for employers to maintain workplaces free of profane, racially or sexually inappropriate, and other offensive comments. The relief experienced by employers, however, was short-lived.

***Lion Elastomers*: Setting-Specific Standards Restored**

In *Lion Elastomers*, the Board restored the setting-specific standards, opining it was necessary to “fully protect employee rights....” It explained that “conduct occurring during the course of a protected activity must be evaluated as part of that activity” because “[t]here is a fundamental difference...between employee misconduct committed during Section 7 activity and misconduct during ordinary work.” The Board further reasoned that because labor disputes often remain heated affairs, workers must be given more leeway to engage in “impulsive” conduct while engaging in Section 7 activity to ensure those rights are exercised without fear of punishment.

The Board's lone Republican member, Member Kaplan, dissented, expressing his concern that the “decision will, once again, require employers to continue to employ individuals who have engaged in such abusive conduct any reasonable employer would have terminated them for that conduct.” Member Kaplan explained that each of the setting-specific standards “presented fundamental problems.” For example, he criticized the Board's use of the multifactor tests under *Atlantic Steel* and *Pier Sixty LLC* as “a cloak for agency whim.” He further criticized the *Clear Pine Mouldings* test as giving workers engaged in picketing or striking free reign to do any and everything short of engaging in express threats of violence. According to the dissent, the setting-specific standards “paid little more than lip service” to the employer's right to maintain order and respect in the workplace.

Key Takeaways

Both unionized and non-unionized employers should ensure managers and supervisors are appropriately trained to identify protected concerted activity under the Act. Employers should proceed with caution when disciplining employees for conduct committed while engaging in protected concerted activity.

Before disciplining employees under such circumstances, employers must carefully consider the context and circumstances surrounding the offensive conduct, including the severity of the conduct and where it occurred. Employers must also weigh the risks associated with disciplining the employee (e.g., an unfair labor practice charge) against the risks associated with not disciplining the employee (e.g., potential Title VII liability).

Further, the *Lion Elastomers* decision is yet another reminder that employers must stay abreast of Board decisions given the trend of decisions expanding worker protections under the Act. The trend is expected to continue through the foreseeable future.

If you have any questions about this Alert or the effect of the NLRB's recent decision, please contact one of the authors or the attorney(s) in our firm with whom you are regularly in contact.

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