

NLRB Updates Framework for Analyzing Discipline Based on Offensive Conduct or Behavior

Alert

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In its recent *General Motors LLC* decision, the National Labor Relations Board fundamentally changed its framework for deciding whether employees engaging in offensive conduct or behavior are protected by Section 7 of the National Labor Relations Act (NLRA). In doing so, it provided a common-sense roadmap for employers looking to maintain order within their businesses without running afoul of the NLRA. In its sweeping decision, the *General Motors* Board adopted the *Wright Line* burden-shifting framework as the universal test for deciding such cases and did away with its previous, setting-specific standards for analyzing such offensive behavior.

Analyzing Offensive Behavior/Conduct Cases: Pre-*General Motors*

Under Section 7 of the NLRA, employees have a right to engage in certain protected activity, which includes the right, generally, to complain (as a group) to their employers about working conditions. The Board had long given employees a fair amount of leeway to engage in such activity, and in many instances employees have engaged in offensive conduct at the same time. Over many decades, the Board had addressed perhaps hundreds of cases under the following general fact-pattern: employees engage in arguably protected, concerted activity—but do so in a way that is highly offensive, racist, sexist, derogatory or otherwise inappropriate—and the employer disciplines the employees for their inappropriate conduct.

In deciding whether such discipline was lawful or, alternatively, unlawfully restricted Section 7 rights, the Board created a number of setting-specific tests. For offensive outbursts addressed to management in the workplace, the Board applied the four-factor *Atlantic Steel* test; for conduct on a picket-line, the Board applied the *Clear Pine Mouldings* test to decide, under all the circumstances, whether the conduct coerced or intimidated non-strikers; and for social media posts or conversations amongst employees in the

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workplace, the Board looked at the totality of the circumstances. Unsurprisingly, this myriad of multi-factor, setting-specific tests produced unpredictable results.

The Board's New *General Motors* Standard for Analyzing Offensive Behavior/Conduct Cases

In *General Motors*, the Board determined that it should scrap its setting-specific tests and instead apply its traditional *Wright Line* test in most other cases where an employee alleges that his or her discipline was in retaliation for engaging in protected activity. Under the *Wright Line* test, (1) the employee must have engaged in Section 7 activity; (2) the employer must know of the activity; and (3) there must be sufficient evidence to show that the Section 7 activity was a motivating factor for the employer's discipline. If the employee can make this initial showing, the employer must prove it would have taken the same action even in the absence of the Section 7 activity.

The Board reasoned 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." The Board further concluded that its existing setting-specific standards for determining when an employer may lawfully discipline an employee for offensive conduct in connection with Section 7 activity were nonfunctional in part because its prior decisions incorrectly presumed that an employee's abusive conduct in the course of Section 7 activity and the Section 7 activity itself were inherently intertwined.

The Board stated that, in their attempt to provide employees certain leeway in exercising Section 7 rights, these setting-specific standards "failed to yield predictable, equitable results" and were "wholly indifferent to employer's legal obligations to prevent hostile work environments on the basis of protected traits" under various federal, state and local anti-discrimination laws (such as Title VII). In contrast, the Board maintained that the application of the *Wright Line* framework "promises more reliable, less arbitrary, and more equitable treatment of abusive conduct" and does not infringe upon employers' obligations under anti-discrimination laws.

The *General Motors* decision will surely come as welcome news to employers who can now address employees' offensive and abusive behavior under a more consistent standard. Nevertheless, it is important that employers recognize the constraints of the Board's holding; an employer's disciplinary decisions may not be motivated by an employee's Section 7 activity. Therefore, employers must ensure that their disciplinary decisions are implemented in a measured and consistent manner to help avoid allegations that the discipline sought to punish or dissuade employees from engaging in protected activity.

For more information on the updated NLRB framework, please contact [Joel Abrahamson](#), [Anne Marie Buethe](#), [Dominic Cecere](#), Nicole Faulkner, Kyle Malone, [Richard Pins](#), [Joseph Santucci](#), [Matthew Tews](#), Johnny Wang or the Stinson LLP contact with whom you regularly work.

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