

## NLRB Makes It Easier to Discipline Employees for Abusive Conduct

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On July 21, 2020, the National Labor Relations Board simplified its legal standard for determining whether an employer violates the National Labor Relations Act when it disciplines employees for engaging in abusive conduct in connection with the exercise of their rights under Section 7 of Act. With its decision in *General Motors LLC*, the Board overturned over 40 years of case law and returned to the so-called *Wright Line* test, providing employers with a single, easy-to-follow standard that applies in all contexts for determining whether they are permitted to discipline employees for abusive conduct.

*General Motors LLC* concerned a union committeeperson at a GM plant who engaged in profane, racially-charged, and threatening outbursts in the course of interacting with management and at bargaining committee meetings. GM suspended the employee for these outbursts; and the employee charged that this discipline constituted unlawful interference with his right to engage in Section 7 activity.

Under a series of NLRB cases over the past 40 years, the question of whether this discipline was lawful was a complicated analytical exercise. Different tests applied to different facts depending on the precise context of the allegedly abusive conduct. Outbursts to management in the workplace were treated under the *Atlantic Steel* test, under which the NLRB considered and weighed the place of the discussion, the subject matter of the discussion, the nature of the employee's outbursts, and whether the outburst was provoked by an unfair labor practice. Outbursts in conversation with other employees (or, more recently, on social media) were treated under a "totality of circumstances" analysis. Allegedly abusive conduct on the picket line required the NLRB to answer whether a nonstriker "reasonably would have been coerced or intimidated by the abusive conduct." These context-dependent balancing tests led to what many viewed as inequitable outcomes between incidents. Employers also often found themselves caught between avoiding liability under the Act while still fulfilling their obligations under anti-discrimination and anti-harassment laws.

In *General Motors LLC*, the Board overhauled its entire approach to these types of cases and returned to the simpler *Wright Line* test. The *Wright Line* test treats all cases of abusive conduct in the course of engaging in Section 7 activity similarly, regardless of context. If an employee alleges that he or she was unlawfully disciplined for such conduct, the NLRB general counsel must first 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, such that a causal relationship between the activity and the discipline is evident. If the general counsel makes that showing, the employer then must show that it would have taken the same disciplinary action against the employee if the abusive conduct had occurred outside the context of Section 7 activity. The *General Motors LLC* case was remanded back to an administrative law judge for decision under the *Wright Line* test.

The re-adoption of the *Wright Line* test in *General Motors LLC* provides clarity to employers as they navigate important workplaces issues, including enforcement of antidiscrimination, antiharassment and workplace violence policies and workplace codes of conduct. With the Board's ruling, employers now have greater freedom to discipline employees for abusive conduct that occurs in the course of an employee's exercise of his or her Section 7 rights.

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