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NLRB Reinstates Setting-Specific Standards To Evaluate Employee Abusive Conduct



The National Labor Relations Board (NLRB or the Board) recently reinstated setting-specific standards to determine whether employers have violated the National Labor Relations Act (NLRA or the Act) by unlawfully disciplining or discharging employees who allegedly engaged in "abusive conduct" in connection with activities protected by Section 7 of the Act. This decision will likely make it more difficult for employers to discipline employees who engage in abusive conduct in connection with Section 7 activities.

Evaluating an Employee's Abusive Conduct

Section 7 of the NLRA protects an employee's right to unionize and to engage in concerted activities regarding the terms and conditions of their employment. Accordingly, employers are generally prohibited from taking any adverse action against employees for engaging in these activities. An employee cannot, however, use the NLRA's protections as a free pass to engage in wrongdoing. That is, an employee generally cannot engage in abusive, discriminatory, or harassing conduct and then claim that they are exempt from discipline simply because their behavior occurred during activities that would otherwise be protected. Unsurprisingly, when an employee is disciplined or discharged for alleged abusive conduct in connection with a protected activity, the Board is often asked to determine whether the employee was *actually* terminated for this abusive conduct, or whether this was simply an excuse to punish the employee for engaging in protected activities.

Prior to 2020, to make this determination, the Board applied different standards depending upon the setting in which the allegedly abusive conduct occurred. These setting-specific standards were eliminated by the Board in 2020 in *General Motors LLC*, NLRB No. 127 (2020). In *General Motors*, the Board concluded that it would "properly find an unfair labor practice for an employer's discipline following abusive conduct committed in the

course of Section 7 activity when the General Counsel shows that the Section 7 activity was a motivating factor in the discipline, and the employer fails to show that it would have issued the same discipline even in the absence of the related Section 7 activity." Therefore, the setting in which the abusive conduct occurred was irrelevant.

This setting-neutral standard was short-lived.

Returning to the Pre-Trump Era Standards

On May 1, 2023, in *Lion Elastomers LLC*, 372 NLRB No. 83 (2023), the Board, in a 2-1 decision, reversed its *General Motors* decision and returned to its previous setting-specific standards.

In this case, which the Board first considered in 2020, an employee had been disciplined and then terminated after he engaged in "heated speech" and made an "impolite statement" to a coworker while discussing working conditions with his employer. The employer claimed that the employee's offensive conduct justified his discipline and eventual termination. The Board disagreed and held that the employee's speech, although heated, was protected under the Act, and ordered the employee to be reinstated. After the decision was issued, the employer filed a petition for review of the Board's Order with the U.S. Court of Appeals for the Fifth Circuit. While the case was pending before the court, the Board issued *General Motors*. The Board then filed an unopposed motion requesting that the court remand the case to the Board to determine whether the *General Motors* decision would affect the case's outcome.

On remand, the Board overruled *General Motors* and declined to review its original decision in *Lion Elastomers*.

In overruling *General Motors*, the Board repeatedly noted that conduct that occurs in the course of a protected activity—even if unpleasant—must be evaluated in the context of the protected activity, and not as if it occurred separately in the ordinary workplace context. It noted that the NLRA, like Title VII of the Civil Rights Act of 1964, is not a civility code, and nothing in the Act requires an employee to be "civil" while exercising their rights. In fact, the Board reasoned that it should be expected that conversations involving wages or the terms and conditions of an individual's employment will be heated and invoke strong emotions.

Accordingly, whether an employee's "abusive conduct," in the course of a protected activity, strips them of the Act's protections will be evaluated based upon the context in which it occurs:

- **Conduct towards management in the workplace** will be evaluated under the *Atlantic Steel* test, which considers four factors: (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.
- **Social media posts and most conversations among employees in the workplace** will be evaluated under a totality-of-the-circumstances test.
- **Picket-line conduct** will be evaluated under the *Clear Pine Mouldings* test, in which the Board considers whether, under all the circumstances, nonstrikers reasonably would have been coerced or intimidated by the picket line.

Employer Takeaways

Importantly, the Board's decision does not prohibit employers from disciplining employees who engage in abusive conduct, even if this conduct occurs in the course of an otherwise protected activity. However, employers must tread carefully.

As a result of this decision, employers should review and revise any existing codes of conduct or behavior expectations to align with these standards and give clear examples of behavior that will not be tolerated. Before taking action against an employee for their abusive conduct, employers must now consider the context in which this behavior occurred. If this behavior occurred in the course of activity that would otherwise be protected by Section 7, employers should speak to experienced counsel before taking action.

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