



July 22, 2020

## **The National Labor Relations Board Provides Employers with More Leeway to Discipline and Terminate Employees for Offensive Speech and Conduct**

On July 21, 2020, the National Labor Relations Board (“Board”) issued a decision in *General Motors LLC and Charles Robinson, Cases 14-CA-197985 and 14-CA-208242*, that provides private-sector employers greater ability to discipline or terminate workers for racist, sexist and other profane speech or conduct in the workplace. Specifically, the Board eliminated three context-specific tests and reinstated the *Wright Line* standard, which requires proof that the employee’s protected union activity was a motivating factor in his or her discipline and that the employer would have taken the same action in the absence of such activity.

### **Background**

Charles Robinson was employed by General Motors as a union committeeperson at its facility in Kansas City, Kansas. In 2017, General Motors suspended Robinson three times following three separate incidents in which he engaged in profane or racially offensive conduct towards management while partaking in protected union activity. On April 11, 2017, Robinson had a heated exchange with a manager about overtime coverage for employees away on cross-training. Specifically, Robinson yelled several profane statements at his manager, which resulted in a three-day suspension.

On April 25, 2017, Robinson became loud and pointed his finger while speaking in a meeting with several managers. When corrected for speaking too loud, Robinson mockingly acted as a caricature of a

slave and repeatedly referred to one of the managers as his master and that the manager wanted him “to be a good Black man.” As a result, General Motors suspended Robinson for two weeks. Likewise, on October 6, 2017, Robinson threatened a manager during a meeting by stating he would mess the manager up and proceeded to play loud music from his phone containing profane, racially charged, and sexually offensive lyrics. General Motors suspended Robinson for 30 days following this incident.

On September 18, 2018, an administrative law judge determined by applying the *Atlantic Steel* factors that Robinson’s conduct lost protection of the National Labor Relations Act (the “Act”) during the April 25th and October 6th meetings, but the April 11th incident was protected despite his profanity-laced outburst to his manager. See *Atlantic Steel Co.*, 245 NLRB 814 (1979) Accordingly, the administrative law judge held that General Motors violated Section 8(a)(3) and (1) of the Act by suspending Robinson for his April 11 conduct.

General Motors filed exceptions and the Board issued a Notice and Invitation to File Briefs in this matter. Numerous amicus curiae briefs were filed by numerous government agencies, policy organizations and law firms, including the Equal Employment Opportunity Commission and the American Federation of Labor and Congress of Industrial Organizations.

## **The Decision**

In reinstating the Board’s *Wright Line* standard, the Board reviewed its context-specific tests for conduct or speech during encounters with management, on picket lines, and on social media. The Board found that these standards have failed to yield predictable, equitable results. For instance, the Board determined that the *Atlantic Steel* four-factor standard used to determine whether abusive conduct in the course of otherwise-protected workplace conversations with management is severe enough to lose the Act’s protection has produced inconsistent outcomes. The Board noted that the four-factors, (1) the place of the discussion; (2) 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, have not been assigned specific weight and the Board has chosen in specific cases to give certain factors more or less weight without adequately explaining why resulting in inconsistent outcomes and no clear guidance for when an employer will violate federal labor law by disciplining an employee who has engaged in abusive conduct.

The Board also noted that the totality of the circumstances approach for cases involving social media posts and the abusive conduct standard applied in *Clear Pine Mouldings* for situations with picket lines also provide inconsistent results and a lack of guidance. See *Clear Pine Mouldings, Inc.* 268 NLRB 1044 (1984). These standards are, according to the Board, at odds with an employer’s obligations to comply with federal and state anti-discrimination laws, such as the employer’s duty to prevent a hostile work environment.

As a result, the Board adopted the *Wright Line* framework because it allows the Board to recognize protected concerted activity, without erroneously extending the Act’s protection to abusive conduct. Under the *Wright Line* standard, the General Counsel must initially 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, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity. 251 NLRB 1083 (1980). If the General Counsel can meet the initial burden, the employer will be found to have violated the Act unless it can prove that it would have taken the same action even in the absence of the Section 7 activity.

Accordingly, the Board remanded the allegations regarding all three incidents to the administrative law judge to be reviewed under the *Wright Line* standard and for the record to be reopened for any additional facts.

## **Takeaway**

Employers with a unionized work force now have more freedom in disciplining and terminating employees who engage in offensive speech or conduct while engaging in Section 7 protected activity. However, employers can still be liable for disciplining employees if the employer was motivated by the employee's participation in the Section 7 activity and there is a causal connection between the Section 7 activity and employee discipline. Employers should update their policies and procedures for disciplining employees who engage in offensive speech and conduct and the implementation of such policies and procedures should be aligned with the new governing standard. Moreover, employers can use their efforts in maintaining a non-discriminatory work environment as a defense to claims of interference with protected concerted conduct. For instance, proof that an employer has fired other employees – in situations where concerted activity is not an issue – will help demonstrate that the employer's motivation was in complying with anti-discrimination laws rather than attempting to curb an employee's Section 7 rights.

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