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Watch your language!! Profane outbursts, threats to supervisors, and racist and sexist remarks are no longer "protected" by the NLRA

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The National Labor Relations Board ("NLRB") has returned some sanity to federal labor law by once again allowing employers to fire or discipline employees who curse at their supervisors or make racist or sexist remarks — even if they're complaining about the workplace or engaging in union organizing activity at the time.

Resolving a conflict between prior interpretations of the National Labor Relations Act ("NLRA" or "the Act") and Title VII of the Civil Rights Act of 1964 ("Title VII"), the Board has reversed its approach by holding that employers may discipline employees for such conduct the same way as they would any other employee, and that employees don't get a "pass" to engage in harassment or insubordination just because they are picketing, posting on social media, or having an on-the-job dispute related to their terms and conditions of employment.

The legal framework

As we've reported previously,[1] in recent years, the NLRB has found that employers violated the NLRA if they disciplined or fired employees for conduct that otherwise would be completely unacceptable — including egregious racist and sexist remarks, insubordination, and threats directed to managers (and in at least one case, directed to the manager's family).

In a decision issued July 21, 2020,[2] the three sitting members of the Board — all appointed by President Trump — announced a new framework for deciding cases involving employees who are

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[1]See our Alerts: "NLRB to reconsider whether profanity is protected activity," November 12, 2019; "Not so fast: NLRB upholds termination of employee who hurled obscenities at management representative," May 08, 2017; "#$@&%*!: Second Circuit upholds NLRB's finding that an employee's vulgar Facebook rant toward his supervisor was protected under the NLRA," April 28, 2017; and "NLRB protects vulgar workplace Facebook rant, reinstates fired employee," April 06, 2015.

[2]*General Motors LLC and Charles Robinson*, Cases 14–CA–197985 and 14–CA–208242.

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disciplined for "abusive conduct" while engaging in "protected concerted activity."[3] The Board previously had used different legal "tests" for determining whether the discipline was unlawful, depending on whether the case involved conduct in the workplace, on the picket line, or on social media. In *General Motors*, the Board did two very important things: (1) It adopted a single test for all situations; and (2) it recognized that the test must allow employers to comply with the Act without violating their separate obligations to other employees under anti-discrimination laws.

The Board's long-stated rationale for protecting conduct that otherwise would violate workplace conduct rules was "the reality" that disputes over wages, hours, and working conditions "are among the disputes most likely to engender ill feelings and strong responses." The current Board concluded, however, "that this rationale is overstated and has largely swallowed employers' concomitant right to maintain order, respect, and a workplace free from invidious discrimination." Nothing in the Act, said the Board, protects employees who engage in abusive conduct from "nondiscriminatory discipline," and therefore, "we will not continue the misconception that abusive conduct must necessarily be tolerated for Section 7 rights to be meaningful."

Instead, the Board found that employees are fully capable of engaging in protected activity under Section 7, even in a heated situation, without resorting to harassing or discriminatory conduct — and in fact, they do so all the time. Section 7 rights, said the Board, "can thrive in the same space afforded other challenging topics, and it is reasonable for employers to expect employees to engage all such topics with a modicum of civility."

The Board's previous decisions

The Board's decision in *General Motors* takes aim at three recent Obama-Era decisions which found that employers violated Section 8(a)(1) of the Act after discharging employees who engaged in profane or abusive conduct while *also* engaging in concerted activity. Of particular concern to the Board in *General Motors* was the fact that Board precedent resulted in entirely different legal standards for determining whether the conduct at issue was "protected," depending on where the conduct occurred, and that the precedent hindered the ability of employers to discipline employees for conduct that otherwise violated anti-discrimination standards.

First, in *Pier Sixty, LLC*,[4] the employer terminated an employee who posted a profanity-laden tirade about his supervisor on Facebook:

> Bob is such a NASTY MOTHER F***ER don't know how to talk to people!!!!!! F*** his mother and his entire f***ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!

In *Pier Sixty*, the Board considered whether the employee lost the protection of the Act because of this conduct (which occurred during a break period). In reviewing abusive conduct occurring on social media, the Board applied a "totality of the circumstances" test to determine whether the conduct was protected under the Act. The factors the Board considered included: "(1) any evidence

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[3]Section 7 of the Act provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*, and shall also have the right to refrain from any or all of such activities."

[4]*Pier Sixty, LLC*, 362 NLRB 505 (2015), *enf'd*, 855 F.3d 115 (2d Cir. 2017).

of antiunion hostility; (2) whether the conduct was provoked; (3) whether the conduct was impulsive or deliberate; (4) the location of the conduct; (5) the subject matter of the conduct; (6) the nature of the content; (7) whether the employer considered similar content to be offensive; (8) whether the employer maintained a specific rule prohibiting the conduct at issue; and (9) whether the discipline imposed was typical for similar violations or proportionate to the offense." Ultimately, the Board in *Pier Sixty* held that the employer violated Section 8(a)(1) for terminating the employee for the Facebook post.

Second, in *Plaza Auto Center, Inc.*,[5] during a meeting with management, an employee called the owner of the company a "f***ing mother f***ing," a "f***ing crook," an "a**hole," "stupid," and stated that nobody liked him and everyone talked about him behind his back. Because the *Plaza Auto* case dealt with a discussion with management during a sales meeting, the Board applied the four-factor test first set forth in *Atlantic Steel Co.*,[6] which considers "(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." In the end, the *Plaza Auto* Board found that the employee's tirade was not sufficiently "belligerent" or "menacing" for him to lose the protections of the Act.

Third, in *Cooper Tire & Rubber Co.*,[7] the employee, while on a picket line, made various racially hostile statements, such as shouting to black replacement employees, "Hey, did you bring enough KFC for everyone?" and "Hey, anybody smell that? I smell fried chicken and watermelon." The Board in *Cooper Tire* found that the employer's decision to terminate the employee who made these statements violated Section 8(a)(1). In so holding, the Board applied a test first set forth in *Clear Pine Mouldings, Inc.*,[8] which applies to conduct that occurs on picket lines, and provides that abusive conduct loses the protection of the Act when "the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."

In addressing these recent cases and the legal standards they espouse, the *General Motors* decision notes that the above-referenced "setting-specific" standards created unnecessary complication in addressing abusive conduct and, particularly, were "wholly indifferent to employers' legal obligations to prevent hostile work environments on the basis of protected traits."

The new standard

The new standard adopted in *General Motors* is really an old standard,[9] and will sound familiar to anyone familiar with the *McDonnell-Douglas* "burden-shifting" approach to Title VII discrimination cases. At the first stage, the Board's General Counsel has the burden to show that: (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, (3) the employee was disciplined, and (4) a causal relationship between the discipline and the Section 7 activity.

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[5] *Plaza Auto Center, Inc.*, 360 NLRB 972, 977–980 (2014).

[6] *Atlantic Steel Co.*, 245 NLRB 814 (1979).

[7] *Cooper Tire & Rubber Co.*, 363 NLRB No. 194, slip op. at 7–10 (2016), *enf'd*, 866 F.3d 885 (8th Cir. 2017).

[8] Clear Pine Mouldings, Inc., 268 NLRB 1044 (1984).

[9] *Wright Line*, 251 NLRB 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

For the last factor, the General Counsel must offer evidence sufficient to raise a reasonable inference that the employer had hostility toward the protected activity and therefore that the activity was a motivating factor in the decision to discipline the employee. If the General Counsel meets this burden, then the employer will be found to have violated the Act unless the employer can prove it would have taken the same action against the employee even in the absence of Section 7 activity. Noting that Section 8(a)(3) of the Act requires a showing of discriminatory treatment, the Board held that there is no "discrimination" against employees engaged in protected activity if they are treated the same as other employees.

Importantly, the Board indicated it is not interested in second-guessing an employer's disciplinary choices. An employer can enforce its standards of conduct and comply with Title VII's goal of preventing harassment in the manner it sees fit. As long as the employer acts consistently, and does not treat employees less favorably because the conduct occurred in the context of "protected concerted activity," there is no role for the Board.

Implications and recommendation for employers

As a federal agency, the Board focused on federal equal employment opportunity law — particularly Title VII — but the Board also recognized more generally the need for employers to prevent "hostile work environments on the basis of protected traits." The Board's broad language and reasoning likely empowers employers to take into account state laws that cover other "protected traits" beyond those covered by Title VII, as well as other federal employment discrimination laws protecting against harassment based on age and disability.

As discussed in our previous Alert,[10] the United States Supreme Court's recent decision in *Bostock* determined that Title VII's ban on "sex" discrimination forbids discrimination on the basis of sexual orientation and gender identity. This decision aligns federal law with the law in numerous states that already prohibit such discrimination, and protects against such discrimination where the state law does not do so. As a result, the Board's more favorable *Wright Line* approach will apply to employers who discipline employees for offensive behavior toward gay, lesbian, bisexual, or transgender workers while engaged in Section 7 activities, regardless of the state in which the conduct occurs.

Now is the time to revisit policies governing workplace civility, employee social media conduct, and harassment prevention. The Board's decision in *General Motors*, coupled with its previous decision in *Boeing*,[11] strengthens employers' rights to maintain and enforce such policies. Employers who rescinded or watered down portions of their policies in response to previous Board decisions may want to reinstate or reinvigorate them, with the advice of a labor lawyer. Employers still must use caution to avoid discrimination (i.e., enforcing policies more strictly against unionizing employees or employees engaging in other concerted, protected conduct), and the need to prove similar treatment highlights once again the need for good documentation. Generally speaking, though, employers can be less sheepish about requiring employees exercising Section 7 rights to behave in a civil, respectful, and non-discriminatory manner.

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[10] See "Supreme Court's landmark Pride month ruling: Title VII prohibits sexual orientation and gender identity discrimination in the workplace," June 16, 2020.

[11] See "Getting straight to work: NLRB overhauls three significant Obama-era priorities in one day," December 15, 2017.

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