

NLRB Empowers Employers to Discipline Employees for Abusive or Offensive Conduct

by Aaron Goldstein

On July 21, 2020, the National Labor Relations Board (NLRB) (once again) modified its standard for determining whether employees have been lawfully disciplined or discharged after making abusive or offensive statements, including those that are profane, racist, or sexually unacceptable, in the course of otherwise protected activity under the National Labor Relations Act (the Act). The Act protects concerted activities for the mutual aid or protection of employees. Concerted activities are not limited to union activities, but also include complaints about working conditions, pay, and benefits by non-union employees.

The *General Motors*¹ analysis restores the standard used before the Obama-era Board. In this new decision, the NLRB signals that offensive or abusive conduct in the course of otherwise protected activity will be analyzed under the *Wright Line* standard, which has long been used in mixed-motive cases. Under *Wright Line*, the General Counsel must first prove that the employee's protected activity was a motivating factor in the discipline. If that burden is met, the employer, must then prove that it would have taken the same action even in the absence of protected activity. For example, the employer could provide evidence that it issued similar discipline to other employees who engaged in similar abusive or offensive conduct.

The *General Motors* standard replaces the NLRB's prior rule, which held that concerted activities can be legally protected even when employees make abusive or offensive statements. Find more information about the Obama-era rule [here](#), [here](#) and [here](#). The prior rule assumed that the abusive conduct and the protected activity were inseparable. Under this analysis, an employer who disciplined or discharged an employee for abusive or offensive conduct in the course of protected concerted activity engaged in an unfair labor practice in violation of the Act.

By way of example, the NLRB has overturned discipline for employees who had:

1. Told business owner he was a "f***ing mother f***ing," a "f***ing crook," and "an a**hole" during a meeting in which an employee also raised protected complaints

Related People

- Aaron Goldstein

Related Capabilities

- Labor & Employment
- Labor & Employment Guides

- about compensation. (*Plaza Auto Center*, 360 NLRB 972 (2014));
2. Posted abusive comments about a supervisor during a union campaign. In relevant part, the post stated: “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” (*Pier Sixty, LLC*, 362 NLRB 505 (2015));
 3. While picketing, shouted to black replacement workers: “Hey, did you bring enough KFC for everyone?” and “Hey, anybody smell that? I smell fried chicken and watermelon” (*Cooper Tire & Rubber Co.*, 363 NLRB No. 194 (2016)).

Under any other circumstances, these statements would give rise to discipline in most, if not all, workplaces. However, the NLRB took the view that employees should be permitted some flexibility for impulsive behavior when engaging in protected concerted activities. These decisions were largely at odds with most workplace norms and were incongruent with anti-discrimination law. Particularly as standards for conduct in the workplace are trending towards the more inclusive and politically correct, this standard interfered with employers’ ability to create an environment free from inappropriate and offensive conduct.

NLRB Chairman John F. Ring issued a statement about the decision explaining “[t]his is a long-overdue change in the NLRB’s approach to profanity-laced tirades and other abusive conduct in the workplace.” “For too long,” he added, “the Board has protected employees who engage in obscene, racist, and sexually harassing speech not tolerated in almost any workplace today. Our decision in *General Motors* ends this unwarranted protection, eliminates the conflict between the [Act] and antidiscrimination laws, and acknowledges that the expectations for employee conduct in the workplace have changed.”

The *General Motors* decision gives employers more freedom to discipline employees for abusive or offensive conduct, even when those employees are engaging in protected concerted activity. Under the new rule, employers are now empowered to discipline employees for abusive or offensive conduct, whether or not it coincides with otherwise protected activity. Employers should review their code of conduct policies to ensure that they adequately address such abusive or offensive conduct. Moving forward, employers should discipline employees who engage in such problematic conduct consistently with their policies, whether or not an employee was engaged in otherwise protected conduct at the time.

¹ *General Motors LLC*, 14-CA-197985 369 NLRB No. 127 (2020).