

The NLRB Reverses Course (again) on Employee Outbursts and Protected Concerted Activity

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What happens when an employee starts yelling at the boss, makes profane social media posts about work, or engages in other “abusive conduct?” In many cases, employers can follow their own policy and impose discipline if appropriate. But, where profanity and heated outbursts come up in the context of complaints about the terms and conditions of the employee’s job, the issue quickly becomes far more complicated.

On May 1, 2023, the National Labor Relations Board (“NLRB” or the “Board”) released a decision addressing employee outbursts in [Lion Elastomers, LLC, 372 NLRB No. 83](#). Overturning a 2020 decision which itself overturned several prior NLRB decisions on employee outbursts, the Board in [Lion Elastomers, LLC](#) reinstated a series of tests to determine when and how an employee’s workplace outbursts can be actionable.

What employee rights were involved in the decision?

Most employees have a right to engage in “concerted activity” under Section 7 of the National Labor Relations Act (“NLRA”). That means employees have the right to, among other things, discuss the terms and conditions of their employment with others, engage in union-related activity, and, where appropriate, go on strike. The rights afforded to employees under Section 7 are not, however, absolute. A long line of cases address when an employee may lose the protection of Section 7 by engaging in “abusive conduct,” such as vulgarity, name-calling, or other outbursts. For more information, see our prior posts on [Concerted Activity in 140 Characters or Less](#), and a [Profanity-Laden Rant Against a Supervisor \(and others\)](#).

How has the NLRB decides whether an employee outburst constitutes Section 7 concerted activity?

Over time, the NLRB adopted a number of tests for determining when an employee steps outside of the protection of Section 7. The prior tests, based on the decisions in [Atlantic Steel](#), [Clear Pine Mouldings](#), and [Pier Sixty](#), sometimes considered the totality of circumstances, the nature of the outbursts, whether the outburst was provoked, or

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whether the outburst was coerced. In 2020, however, the NLRB overruled these various tests and held that rather than examine the circumstances of the *employee's* outbursts, the test should be the *employer's* motive. In that case, *General Motors, LLC, 369 NLRB No. 127*, the NLRB held that test that should be used is whether the employer was motivated by an anti-union animus or whether it merely sought to enforce its anti-profanity policies.

One presidential transition and two NLRB appointments later, the Board shifted course. The Board's May 1, 2023 decision in *Lion Elastomers, LLC* overturned *General Motors, LLC*, in effect reinstating the *Atlantic Steel*, *Clear Pine Mouldings*, and *Pier Sixty* tests. The Board's lengthy explanation for its turn of course rejects *General Motors* as a sharp departure from federal law, and incongruent with the policy underlying the NLRA. Specifically, the Board read heavily into language from the United States Supreme Court acknowledging labor disputes "are ordinarily heated affairs," and that an employee's Section 7 rights are not necessarily dependent on an employer's anti-union bias.

What is the NLRB's current standard?

So where does that leave employers today? The NLRB's *Lion Elastomers, LLC* decision provides a short rule: "[C]onduct occurring during the course of protected activity must be evaluated as part of that activity—not as if it occurred separately from it and in the ordinary workplace context." That means employers can't strictly apply their profanity or obscenity policy as written if the conduct at issue touches on some conduct protected by the NLRA. To provide an easy example: an employee who curses at the boss during a union negotiation meeting is probably engaged in protected activity, and therefore protected by the NLRA.

Employers must examine *what kind* of protected activity is at issue. For different situations—such as picketing, negotiations, or off-work social media usage—the NLRB has adopted different standards. If employee conduct on the picket line is at issue, employers should consider whether, under all the circumstances, non-strikers would have been coerced or intimidated by the picket line conduct under the *Clear Pine Mouldings* standard. If the issue involves outbursts towards management, the *Atlantic Steel* test requires employers to consider: (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 provoked by the employer's unfair labor practices. And, where the "abusive conduct" involves social media, employers need to consider "the totality of the circumstances" under *Pier Sixty*.

What should employers do now?

All this to say that employers should be cautious when dealing with potentially abusive conduct by an employee that could be part of NLRA protected activity. To be proactive, employers should take a few key steps:

- Implement a Clear, Written Policy. As always, employers should have a written policy governing offensive or vulgar language in the workplace. The policy should inform

employees of the rules regarding the use of profanity in their interactions with customers, clients, or other members of the public, colleagues, and superiors, and the policy should make the consequences for violations clear.

- Enforce the Policy Consistently and Uniformly. Having a policy is great, but it's just as important to implement the policy fairly. Failures to enforce anti-profanity policies in the past can tie an employer's hands when faced with conduct that may be clothed in NLRA protection. Importantly, consistent enforcement includes ensuring managers and supervisors comply with the policy.
- Avoid Limiting Protected Activities: The enforcement of a policy against profanity in the workplace must be balanced against an employee's right to engage in NLRA protected activity. For employers, that means carefully considering the context in which the objectionable conduct occurs: is there any angle of the conduct or language which touches on an employee's Section 7 rights, or is the conduct unrelated and distinct from any concerted activity?

NLRB rules generally go back-and-forth during different presidential administrations. For now, the Board's decision in *Lion Elastomers, LLC* restores the pre-2020 status quo for employers with respect to abusive employee conduct. Once again, employers must ensure they balance their own interest in maintaining workplaces free of profanity or abusive conduct against the legitimate rights of an employee to engage in concerted (and sometimes heated) activity, which may involve profanity.