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Employers No Longer Forced to Choose Whether to Comply with the NLRA or Anti-Harassment/Discrimination Law When Addressing Employees' Improper Conduct

Employers have long had to decide how to enforce their harassment, discrimination and workplace conduct policies while, at the same time, complying with the National Labor Relations Act's protection of certain employee speech. A recent National Labor Relations Board ruling, changing the standard by which employees' speech is analyzed, provides some relief to employers.

The National Labor Relations Act (NLRA) protects employee speech relating to the exercise of Section 7 rights to collectively advocate for rights in the workplace. Whether speech is protected under the NLRA is based on different standards, depending on the specific setting of the speech. In-person speech has been analyzed under factors originating from a Board case known as *Atlantic Steel*, social media speech has been analyzed based on a "totality of the circumstances" approach, and picket line speech and related misconduct has been analyzed under a Board case known as *Clear Pine Mouldings*. The Board's use of these standards has generated inconsistent and in some cases shocking outcomes, perplexing employers attempting to comply with the NLRA and other anti-harassment/discrimination laws, especially when employee speech, in the context of Section 7 rights, is outrageous, threatening, vulgar, and/or sexually or racially offensive. In some instances, these standards have resulted in employees having to work in a workplace where they do not feel comfortable or alongside those who have harassed or verbally attacked them.

Since 1979, the Board has consistently used the *Atlantic Steel* test to evaluate whether employee outbursts in the workplace are protected. That test has resulted in decisions that are shocking to most reasonable people and inconsistent as to when employee conduct crosses the line from what is acceptable and protected to unacceptable and unprotected.

Employee comments made on social media have been analyzed using a balancing test, which did not help parties understand what the Board would find protected activity. A perfect example of this is the *Pier Sixty* decision in which the Board found an employee's threats and vulgar language against a manager and his family on Facebook to be protected.

Under the Board's *Clear Pine Mouldings* standard, employee picket line speech only loses the NLRA's protection when it amounts to an overt or implied threat or reasonable likelihood of imminent physical confrontation. This standard has provided employees with carte blanche to use offensive and abusive language, including that which is racially offensive, without repercussion.

This all changed on July 21, when the Board issued its decision in *General Motors LLC*. In this case, an employee union representative continuously engaged in verbally abusive speech that was both sexually and racially offensive, directed against specific managers. Overruling an Administrative Law Judge's decision that the conduct was protected, the Board concluded that the *Atlantic Steel* standard raised "serious concerns that the Board is giving little, if any, consideration to employers' right to maintain order and respect," and that the standard's focus on the Section 7 subject matter of the speech at issue always tilted in favor of the employee. The Board further concluded that the totality of the circumstances standard did not adequately balance an employer's interests, and that the *Clear Pine Mouldings* standard permitted "appallingly abusive picket-line misconduct … including racially and sexually offensive language."

Given these criticisms, the Board concluded that the existing burden-shifting test used in its *Wright Line* decision, similar to the *McDonnell Douglas* test used in employment discrimination cases, is the most appropriate test for analyzing whether

employee speech loses the NLRA's protection. The *Wright Line* test, traditionally used to determine whether an employer's motive for imposing discipline was based on an employee's Section 7 protected activity, requires the General Counsel of the Board to make an initial showing that (1) the employee engaged in protected activity, (2) the employer knew of that activity, and (3) the employer had animus against the activity, which must be proven with sufficient evidence to establish a causal connection between the discipline imposed and the employee's protected activity. If the General Counsel is able to make this showing, the burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the employee's Section 7 activity.

With this decision, which was retroactively applicable to all pending cases, the Board has actively acknowledged the role an employer has in maintaining a collegial and harassment-free work environment, and has alleviated the legal obstacles employers previously faced. Employers, however, must consistently enforce conduct rules, and not discriminatorily enforce them more severely against employees engaging in union activity.

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