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Changing the Landscape: Abusive Conduct Not Protected Under NLRA

On July 21, 2020, the National Labor Relations Board (NLRB) issued its decision in *General Motors, LLC*, 369 N.L.R.B. No. 127, 2020 L.R.R.M. (BNA) 270474, 2020 WL 4193017 (2020), which significantly changes the landscape for employers defending unfair labor practice charges by making clear that abusive or harassing conduct by employees can and should be differentiated from employee conduct that is protected by the National Labor Relations Act (NLRA), ch. 372, 49 Stat. 449 (1935). Namely, if the employee's union activity was not a motivating factor in the employer's decision to impose discipline on the employee for abusive or harassing conduct, and the employer would have taken the same action absent the union activity, the discipline is not unlawful and the employee is not protected by the NLRA.

Background

Robinson was employed at a General Motors (GM) facility in Kansas City and served as a union committeeperson. In 2017, GM suspended him three times for separate incidents in which he engaged in profane or racially offensive conduct towards management or at bargaining meetings in the course of engaging in union activity in his role as committeeperson.

The first incident involved an exchange between Robinson and a manager about overtime coverage for employees away on cross-training. Robinson yelled at the manager, using colorful language and telling him where he could shove the cross-training. He was suspended for three days.

The second incident occurred during a meeting Robinson attended with other committeepersons and managers about subcontracting paint shop work. During the meeting, Robinson was loud and pointed his finger while speaking. He also mockingly acted like he was a slave and that one of the managers was his master. He was suspended for two weeks.

The third incident occurred when Robinson was attending a manpower meeting with another committeeperson and several managers. This time, Robinson kept repeating the same question, told a manager that he would "mess [him] up" and played loud music from his phone that contained profane, racially charged, and sexually offensive lyrics for 10 – 30 minutes. 2020 WL 4193017 at *3. He was suspended for 30 days.

Robinson filed an unfair labor practice charge with the NLRB, claiming that GM violated the NLRA by disciplining him for conduct that occurred in the course of his union activity. Under existing precedent in 2018 (discussed below), the NLRB administrative law judge ruled that GM unlawfully disciplined Robinson for his conduct in the first incident but that he lost the protection of the NLRA for

the second and third incidents. GM filed exceptions to the decision, which ultimately led to the NLRB's July 21, 2020, decision.

NLRB Decision

Prior to the instant case, the NLRB applied several tests to determine under what circumstances abusive or harassing conduct by employees during union activity could still result in unlawful action by an employer. The test applied depended on the type of protected activity the employee was engaged in when the offensive conduct occurred. For example, employee outbursts toward management in the workplace (Robinson's conduct) was analyzed under the four-factor *Atlantic Steel* test, for which the NLRB considers (1) the place of discussion, (2) the subject matter of discussion, (3) the nature of the employee's outburst, and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practice. *Atlantic Steel Co.*, 245 N.L.R.B. 814, 102 L.R.R.M. (BNA) 1247 (1979).

Unlike employee outbursts, the NLRB has used a totality of the circumstances test when the conduct occurred in social media posts or discussions between employees in the workplace. For abusive conduct by employees on a picket line, the NLRB applied the *Clear Pine Mouldings* test, which looked at whether, under all of the circumstances, non-strikers would have been coerced or intimidated by the abusive conduct. If not, the conduct was considered protected activity under the NLRA. *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044, 115 L.R.R.M. (BNA) 1113 (1984). The variety of tests led to unpredictable and unequitable results and proved difficult for employers to enforce reasonable conduct standards in the workplace and protect other employees from abusive conduct simply because it occurred during union activity.

After considering the positions of the parties and several amici briefs on this subject, the NLRB decided to put a stop to the multiple test approach and adopted a single test to be applied in all situations — the existing *Wright Line* burden-shifting framework, which the United States Supreme Court has approved for similar types of discrimination and retaliation cases. Under this framework, if there is an allegation that discipline or other adverse action was motivated by protected activity, the employee must demonstrate that (1) the employee engaged in protected activity, (2) the employer knew of that activity, and (3) the employer had animus against the protected activity, which must be proven with evidence sufficient to establish a causal relationship between the adverse action and the protected activity. *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083, 105 L.R.R.M. (BNA) 1169 (1980).

Once the initial case is made by the employee, the burden shifts to the employer to show it would have taken the same action even in the absence of the employee's protected activity. If the employer satisfies its burden, the employee would then need to establish that the employer's reason was pretextual, meaning that it was false or not actually relied on by the employer. The NLRB stated that using the *Wright Line* framework to decide cases like General Motors "promises more reliable, less arbitrary, and more equitable treatment of abusive conduct" than under the prior precedents. *General Motors, supra*, 2020 WL 4193017 at *16.

The NLRB also decided to apply the *Wright Line* burden-shifting framework retroactively to all pending matters related to discipline or other adverse action in connection with employee outbursts toward management, and when employees engage in abusive or harassing conduct on social media, in discussions with employees in the workplace, or on the picket line. Notably, the NLRB stated that any "ill effects [of retroactive application] are outweighed by the potential harm of producing results contrary to the Act's principles and potentially at odds with antidiscrimination law." 2020 WL 4193017 at *17.

The NLRB remanded the General Motors case for reopening the records and preparing a supplemental decision under the new *Wright Line* standard adopted for these types of cases.

This decision recognizes the important right employers have in maintaining a civil, inclusive, and healthy working environment for all employees.

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