

Labor & Employment Alert
August 3, 2020

**National Labor Relations Board Changes Legal Approach to
Employee's Use of Profane, Racist, and Sexually Harassing
Speech in Protected Activity**

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On July 21, 2020, the National Labor Relations Board (“the Board”) changed its analysis towards an employee’s use of verbally offensive behavior in the context of protected activity under Section 7 of the National Labor Relations Act (“the Act” or “NLRA”) in the following decision: *General Motors, LLC*, No. 14-CA-197985, 369 NLRB No. 127 (2020).

Section 7 of the NLRA provides employees with the right to self-organize, form, join, or assist labor organizations, bargain collectively through representatives, engage in other concerted activities for the purpose of collective bargaining or for other mutual aid or protection, and/or to refrain from being involved in such activities. Under the Act, employers may not discipline an employee simply because of the employee’s involvement in any of these protected activities.

Before this decision, the Board oftentimes excused employees’ use of profane, obscene, and even racially charged or sexually harassing language, while involved in a Section 7 protected activity. In doing so, the Board reasoned that disputes arising in the course of such activities tend to provoke strong reactions. In analyzing these types of claims, the Board also applied different standards depending on the context:

1. ***Atlantic Steel***: When the conduct occurred during a workplace discussion with management, the Board applied the *Atlantic Steel* standard, examining the following four factors: “(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.” *Atlantic Steel Co.*, 245 NLRB 814 (1979).
2. **Totality of the Circumstances**: In the context of social media posts and workplace discussions among coworkers, the Board applied a totality of the circumstances approach without any specified factors. *Pier Sixty, LLC*, 362 NLRB 505, 506 (2015).



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3. *Clear Pine Mouldings*: In analyzing discipline for employee's abusive conduct in picket lines, the Board applied the standard from *Clear Pine Mouldings*, which allowed employers to lawfully discipline or refuse to reinstate employees when the employee's conduct involved an explicit or implicit threat or where an imminent physical confrontation could have occurred. *Clear Pine Mouldings, Inc.*, 268 NLRB 1044, 1046 (1984).

Finding that these three standards yielded inconsistent outcomes and ran counter to the employer's legal duties under anti-discrimination laws, the Board's recent decision in *General Motors* set them aside in favor of the *Wright Line* standard. 251 NLRB 1083 (1980).

The *Wright Line* Standard

Following the Board's decision, the *Wright Line* standard applies in all situations when employers discipline employees who use abusive conduct, including profane, racial or sexually harassing language, in the course of a protected activity. The three different standards described above, are overruled by the Board's decision in *General Motors*.

Under the *Wright Line* standard, the employee must show that s/he engaged in a protected activity, and that the employer both knew of and had animus towards the activity. If the employee successfully demonstrates this, the employer, in rebuttal, must establish that it would have taken the same course of action against the employee even if the employee was not involved in a protected activity. However, if the employer uses the employee's abusive conduct as a *pretext* for discipline, when the real reason was to retaliate against the employee's involvement in a protected activity, the employer would be found to have violated the Act.

The Board's decision emphasized that neither Section 7 nor the entirety of the Act protects racially offensive or sexually harassing language. Moreover, finding the employer's corrective actions against this behavior unlawful under the prior standards conflicted with federal, state, and local antidiscrimination laws that require employers to use corrective actions in order to protect employees and therefore prevent a hostile work environment.

Therefore, employers may discipline or refuse reinstatement of an employee who, in the course of a Section 7 protected activity, uses profane, obscene, racially charged or sexually harassing



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language, so long as the employer can demonstrate that it would have done the same in other contexts.

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