Legal Update Article

Labor Board Returns to Prior Standard, Limiting Employers' Response to Abusive Workplace Conduct

By Jonathan J. Spitz, Richard F. Vitarelli & Laura A. Pierson-Scheinberg

May 3, 2023

Meet the Authors

Jonathan J. Spitz

(He/Him • Jon)
Principal
(404) 586-1835
Jonathan.Spitz@jacksonlewis.com

Richard F. Vitarelli

Principal
860-331-1553
Richard.Vitarelli@jacksonlewis.com

The National Labor Relations Board (NLRB) has returned to its pre-2020 "setting-specific" standards for determining whether an employee's abusive conduct is protected by the National Labor Relations Act. *Lion Elastomers LLC II*, 372 NLRB No. 83 (May 1, 2023). The decision applies retroactively to all pending "abusive conduct" cases.

Overruling *General Motors*, 369 NLRB No. 127 (2020), the NLRB has reverted to standards that provide employees more license to make abusive or offensive comments in the workplace while engaged in putatively protected concerted activity.

Background

In May 2020, the Board found Lion Elastomers violated the Act by (1) threatening to discharge an employee for voicing concerns during a safety meeting, and (2) later discharging the employee for engaging in union activity. *Lion Elastomers LLC*, 369 NLRB No. 88. Using the *Atlantic Steel* (245 NLRB 814 (1979)) four-factor test for determining whether the conduct lost the protections of the Act, the Board assessed:

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.

Two months later, in July 2020, the Board issued *General Motors*, overruling *Atlantic Steel* and other setting-specific standards applicable to employee conduct. The NLRB held *Wright Line* (251 NLRB 1083 (1980)) was the proper standard for deciding cases "where employees engage in abusive conduct in connection with Section 7 activity, and the employer asserts it issued discipline because of the abusive conduct." Under *Wright Line*, the NLRB General Counsel (GC) has an initial burden of establishing a prima facie case to show protected activity was a substantial or motivating factor in the employee's discharge. If the GC meets the burden, the employer must prove it would have taken the same action even in the absence of the Section 7 activity. According to the *General Motors* Board, the decision promoted the consistent discipline of employees across all abusive conduct cases.

Lion Elastomers LLC II

The latest decision (which was on remand from the U.S. Court of Appeals for the

Laura A. Pierson-Scheinberg
(She/Her)
Principal
415-796-5408
Laura.PiersonScheinberg@jacksonlewis.com

Related Services

Labor Relations

Fifth Circuit at the Board's request) returns to three different standards for analyzing the lawfulness of employer discipline when employees engage in abusive conduct in connection with protected Section 7 activity.

These standards include:

- "Outbursts to management in the workplace," as held in *Atlantic Steel*, which analyzes the place, subject-matter, nature of employee's outburst, and whether it was provoked by an unfair labor practice;
- Social media posts "and most cases involving conversations among employees in the workplace," as held in *Pier Sixty, LLC*, 362 NLRB 505 (2015), which uses a "totality of the circumstances" analysis; and
- Abusive picket-line conduct, as held in *Clear Pine Mouldings, Inc.*, 268 NLRB 1044 (1984), which analyzes whether non-strikers reasonably would have been coerced or intimidated.

While *General Motors* applied the *Wright Line* standard consistently in those circumstances, *Lion Elastomers LLC II* returns to the various setting-specific standards to be applied depending on the workplace situation.

Implications

Under the latest NLRB decision, employers must treat employee conduct differently based on whether the employee was engaged in protected concerted activity while committing the misconduct. Additionally, the decision removes uniformity and consistency in the analysis of employer discipline in connection with such activities.

Depending on the circumstances, employers may be forced to continue employing individuals who have committed abusive or threatening conduct that would have resulted in termination absent protected Section 7 activity. Likewise, employers may be limited in other disciplinary action against employees who commit misconduct in connection with such activity. As noted in Board Member Marvin Kaplan's dissent, protected misconduct now may extend to making threats against supervisors, posting social media attacks against managers, or yelling racial slurs at other employees. Member Kaplan highlighted that this creates significant conflict between Board law and equal employment opportunity laws against discrimination and harassment in the workplace.

Employers must consider employee misconduct in the context of whether it occurred during protected concerted activity before implementing disciplinary measures. Conduct previously considered threatening, intimidating, or harassing may be found to be protected by the NLRB.

Please contact a Jackson Lewis attorney with any questions about this and other workplace issues.