Legal Update Article

Manufacturers and Labor Board's Decision Limiting Employers' Response to Abusive Workplace Conduct

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The National Labor Relations Board has narrowed the rights of employers to discipline employees who, while engaged in protected concerted activity under the National Labor Relations Act, engaged in abusive conduct. *Lion Elastomers LLC*, 372 NLRB No. 82 (2023).

Examples of such employee abusive conduct include using profanity or insulting language at a grievance meeting or on a picket line or when speaking on behalf of other employees at a meeting.

The Board's decision has implications for the manufacturing setting, where employees work under one roof and often as part of integrated work teams. Zero tolerance for any abuse, particularly when the abuse is racial in character, is often the norm in the manufacturing industry.

In 2020, the Trump-era Board held that, in determining whether discipline for such conduct was lawful, the focus was on the employer's motivation, *i.e.,* was the employer truly motivated by the abusive conduct or by the protected activity.

The *Lion Elastomers* decision changed the focus to the nature of the conduct and the setting in which it occurred. Under the new approach, whether action taken by an employer is lawful is determined not by the employer's motivation, but by whether the conduct was sufficiently abusive or severe that it is considered not to be protected.

The Board's discussion of how its new rule might apply when the abusive conduct includes racial slurs is eyebrow-raising. Instead of holding that racial abuse would always be unprotected, the Board noted that, under Title VII of the Civil Rights Act, isolated incidents of racially abusive comments do not rise to the level of racial harassment. It reasoned that employers therefore are not required by Title VII to take action against employees when their racial abuse or taunts are isolated. Thus, the Board signaled that employers are required to tolerate isolated racial slurs uttered by employees who are engaged in some form of protected activity.

The Board's view that such conduct must be tolerated in some situations seems directly at odds with how employees expect to be treated and how employers manage their businesses.

Employers must consider employee misconduct in the context of whether it occurred during protected concerted activity before implementing disciplinary measures. Please contact a Jackson Lewis attorney with any questions.

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