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Speak No Evil: The NLRB Drops "Setting-Specific" Standards for Cases Involving Abusive Employee Speech Made in the Course of Protected Concerted Activities

Working Together

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The Trump-era National Labor Relations Board has struck again. On July 21, 2020 in General Motors LLC, 14-CA-197985, 369 NLRB No. 127 (2020), the NLRB overruled longstanding precedent and rejected "setting-specific" standards for evaluating employee speech or conduct made in connection with otherwise protected concerted activities. As a result, employer decisions to discipline or terminate employees for abusive, unprofessional speech or conduct made in connection with protected concerted activity will have a greater chance of withstanding NLRB scrutiny, provided that the employer can prove that such decisions were not motivated by anti-union animus.

Perhaps your workplace is not unionized. Nevertheless, *do not stop reading.* This decision affects non-unionized as well as unionized employers, because employees need not belong to a union to engage in "protected concerted activity" and be protected under the National Labor Relations Act.

General Motors LLC involved union challenges to three suspensions that a GM "committeeperson" (the equivalent of a steward) was issued for confrontations with GM managers. In the first confrontation the committeeperson yelled profanities at a GM manager outside his office during a discussion about employee training and overtime coverage. The committeeperson was suspended for two days.

In the second confrontation, which occurred two weeks later, the same committeeperson – who is African-American – mockingly claimed that a GM manager wanted him to be his slave after the manager told him to lower his voice during a meeting with union and management representatives regarding subcontracting bargaining-unit work. The committeeperson was suspended for two weeks.

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Finally, approximately six months later, the same committeeperson was suspended yet again – this time for thirty days – after he told a manager that he was going to "mess [him] up" and then proceeded to play racially charged, sexually explicit music any time the manager spoke during a meeting with several managers and union officers.

The committeeperson filed an unfair labor practice complaint with the NLRB, alleging that his suspensions were issued in violation of Section 7 of the National Labor Relations Act since he was engaged in protected concerted activities during each of the incidents – i.e. conducting union business on behalf of members. Initially, the administrative law judge who heard the case determined that the second and third suspensions did not violate the Act, but that the first did. Specifically, the ALJ found that, when weighed as a whole, the circumstances relating to the first incident required protection under the NLRB's *Atlantic Steel Co.*, 245 NLRB 814 (1979) standard which looks to: (1) the location of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by the employer's unfair labor practices. Based on these *Atlantic Steel* factors the ALJ reasoned that the committeeperson's profane outburst outside of the manager's office was protected, since the evidence indicated that it was a spontaneous incident directly related to terms and conditions of employment, that did not disrupt operations on the shop floor.

On appeal, the NLRB effectively overturned *Atlantic Steel* and other "setting-specific" speech cases. According to the Board, past setting-specific decisions "have failed to yield predictable, equitable results [and] [i]n some instances, violations found under these standards have conflicted alarmingly with employers' obligations under federal, state, and local antidiscrimination laws." *General Motors LLC*, at *1. With respect to this second point, the Board's decision references the fact that setting-specific Board precedent has been in tension with antidiscrimination laws which hold employers liable for their failure to take prompt, corrective action in response to employee speech concerning race, gender or any other protected class status. According to the NLRB, employers should not have to choose between liability for failure to address actions that may create a hostile work environment on one hand, versus committing an unfair labor practice for punishing abusive speech on the other.

In place of *Atlantic Steel*, the *General Motors LLC* decision expressly adopts the well-established *Wright Line* standard for speech in connection with protected concerted activities. Under *Wright Line*, an employer will be found to have committed an unfair labor practice if: (1) it is initially established that the employee was engaged in protected concerted activity; (2) the employer knew of that activity, and; (3) the employer had animus against that activity, which must be proven by a causal relationship between the discipline and the protected activity. If this initial burden is met, the *Wright Line* test then shifts the burden back to the employer to prove it would have taken the same disciplinary action even in the absence of the protected concerted activity.

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***What Does it All Mean**?*

The *General Motors LLC* decision is certainly a victory for employers who want greater leeway in enforcing workplace speech and civility rules, and who fear potential liability for not aggressively responding to any and all employee speech or conduct that may contribute to the creation of a discriminatory hostile work environment. The case, however, does not give employers a totally free hand to respond however they wish to disruptive or abusive employee speech. The *Wright Line* standard, which the Board endorses, still prohibits employers from using rough talk as a justification to stamp out union activity. As such, if "shop talk" is routinely accepted as a reality in a given workplace, an employer will be hard-pressed to justify a termination decision against a pro-union employee who uses a colorful word or phrase during an employee meeting. Keep in mind as well that protected concerted activity does not necessarily involve union organizing. Talking with coworkers about wages, benefits, or working conditions, or even talking with the media about such matters, is protected activity under the National Labor Relations Act even if no union is involved, and an employer's attempt to punish such speech may run afoul of the *Wright Line* standard. The employer's motive for discipline is still what counts when it comes to NLRB speech cases, and employers are well-advised to carefully assess their justification for employee discipline before imposing a suspension or termination.

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