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Employee Benefit Plan Review

# National Labor Relations Board Kicks Workplace Civility, Consistent Treatment and Equal Employment Opportunity Laws to the Curb

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Are union supporters and others complaining about wages, hours, or working conditions free to use racial and sexist slurs, or profanity, harassing, offensive and disruptive words and behaviors in pursuit of their goals? In *Lion Elastomers LLC II*,[1] the National Labor Relations Board (NLRB or Board) resurrected its former legal standard to answer this question, "yes!"

Employees have the right to engage in "protected concerted activity" to support unions or otherwise present complaints to their employer. But are workers engaged in "protected concerted activity" free to ignore common rules of mutual respect and courtesy that apply to all other workplace interactions?

Before *Lion Elastomers II*, the answer was "no." Now, the answer is "yes." The decision will be applied retroactively.

## Prior Rule: Employers May Not Discriminate Against "Protected Concerted Activity"

The *Lion Elastomers II* decision overruled the NLRB's 2020 decision in *General Motors LLC*. *General Motors* condensed the NLRB's various standards for determining whether employee misconduct was inappropriate in different circumstances: picket lines; outbursts with management; and social media rants – that may encompass Section 7 rights.

*General Motors* adopted the time-honored *Wright Line* standard, which makes employer discipline legal if the employer can prove it would have issued the discipline without the protected concerted activity. In other words, the focus is on the employer's motivation for taking the discipline. Under *General Motors*, employee misconduct is not given special protection simply because it arguably was intertwined with protected concerted activity.

## New Rule: Employers Cannot Discipline Unless Misconduct During "Protected Concerted Activity" Is "So Egregious" As To Lose Legal Protection

In *Lion Elastomers II*, the NLRB returned to *Atlantic Steel's* four-factor test to determine whether an employee's misconduct toward management loses the protection under the

National Labor Relations Act (the Act). Those factors include:

(1) The place of the discussion;
(2) The subject matter of the discussion;
(3) If the nature of the employee's outburst was, in any way, provoked by the employer's unfair labor practice; and
(4) Whether the outburst was, in any way, provoked by an employer's unfair labor practices.[2]

The Board's past application of this legal test demonstrates that even outrageous and abusive words and behaviors are protected under it.

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The NLRB's interpretation of the *Atlantic Steel* test is fueled by its distorted view of the workplace. The NLRB believes "misconduct in the course of Section 7 activity is treated differently than misconduct in the ordinary workplace setting with no Section 7 activity."[3] Why? The NLRB envisions employees (especially union members) "to be the equal of management."[4] Indeed, employee-union representatives "must be treated on a plane of equality" with management "and that, in spite of possible offense to the employer, they be permitted not only to put forth and defend demands, but also to vigorously and robustly debate and challenge the statements of management representatives without fear of discipline or retaliation."[5]

### The NLRB's Track Record Under the *Atlantic Steel* Test

The NLRB also confirmed that, like Title VII, the Act is not a general civility code. "It imposes no obligation on employees to be 'civil' in exercising their statutory rights." The NLRB noted the Act recognizes an employer's legitimate interest in maintaining order and respect in the workplace but emphasized that interest must be balanced against employees' Section 7 rights. Moreover, "[t]he Board – not employers – referees the exercise of protected activity under the Act."[6] While the Board dismissed employer concerns about not running afoul of Title VII (and other federal laws), beyond question, the NLRB has paid little more than lip service to that balancing exercise in the past.

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As NLRB Board Member Marvin Kaplan forewarned in his dissent when discussing the Board's track record under *Atlantic Steel*:

> I am concerned that today's decision will, once again, require employers to continue to employ individuals who have engaged in such abusive conduct any reasonable employer would have terminated them for that misconduct. *If the past is any guide*, the Board will now protect employees who engage in a full range of indefensible misconduct, such as profane ad hominem attacks and threats to supervisors in the workplace, posting social media attacks against a manager and his family, shouting racist epithets at other employees, or carrying signs sexually harassing a particular employee.[7]

**Employers must carefully evaluate employee misconduct and discern whether it arguably is committed in the context of protected concerted activity – before implementing discipline.**

Member Kaplan was not engaging in hyperbole. He cited the following two Board decisions, which serve as chilling reminders of things to come.

- *Plaza Auto Center, Inc.*[8] (finding the following conduct protected: calling the owner a "f*cking mother f*cking," a "f*cking crook," an "a**hole," and "stupid"; telling him no one liked him and everyone talked about the owner behind his back; standing up while pushing a chair aside; and threatening that the owner would regret firing him – if he did).
- *Pier Sixty, LLC*[9] (finding the following social medial post protected: the manager "is such a NASTY MOTHER F*CKER don't know how to talk to people!!!!!! F*ck his mother and his entire f*cking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!").

If you are surprised such misconduct was deemed protected by the NLRB, you are in good company. Such misconduct is not acceptable under any circumstances – whether or not cloaked in alleged "protected concerted activity." While Congress intended a wide range of conduct to

be protected by Section 7, it did not intend the Act to be used as a phantom shield for employees to engage in significant aberrant misconduct (e.g., slurs, profanity, threats) or to prevent employers from taking prompt, effective, and consistent action when necessary to protect their employees from abusive conduct and to preserve workplace civility. Indeed, Member Kaplan "firmly believe[s] Section 7 activity can thrive without racist, sexist, sexually harassing, or profane ad hominem attacks."[10] Most, if not all, employers would agree.

## Hobson's Choice for Employers Going Forward

Unfortunately, given the NLRB's expansive and subjective view of what constitutes protected concerted activity, employers will (once again) find themselves facing the quintessential Hobson's choice: discipline the employee and risk an unfair labor practice before the NLRB or refrain from discipline and risk potential state and federal discrimination agency charges and EEO lawsuits. Accordingly, employers must carefully evaluate employee misconduct and discern whether it arguably is committed in the context of protected concerted activity – before implementing discipline.

## Notes

1. https://www.nlrb.gov/news-outreach/news-story/board-returns-to-traditional-standards-for-evaluating-employee-misconduct.
2. The NLRB also returned to: (1) a "totality-of-the-circumstances" test (Pier Sixty, LLC) for cases involving social media posts and coworker interactions; and (2) a separate standard (Clear Pines Mouldings) to address alleged misconduct on picket lines.
3. Slip Op. at 4.
4. Slip Op. at 10.
5. Slip Op. at 10.
6. Slip Op. at 11.
7. Slip Op. at 18 (emphasis added) (footnotes omitted).
8. Plaza Auto Center, Inc. 360 NLRB 972, 977-980 (2014).
9. Pier Sixty, LLC, 362 NLRB 505, 506-508 (2015) (emphasis in original).
10. Slip Op. at 24.

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